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JEFFERSON--33 GRATTAN.

1730–1880.

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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

BY PEACHY R. GRATTAN.

VOLUME IX.

FROM JULY 1, 1852, TO APRIL 1, 1853.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

JOHN J. ALLEN,

WILLIAM DANIEL, RICHARD C. L. MONCURE,

GEORGE H. LEE, GREEN B. SAMUELS.

Attorney General: WILLIS P. BOCOCK.

Entered according to the Act of Congress, this eighteenth day of May, one thousand eight hundred and fifty-four, for the

COMMONWEALTH OF VIRGINIA,

In the Clerk's Office of the Eastern District of Virginia.

PREFACE.

With the present volume commences the report of the decisions of the Supreme court of appeals organized under the constitution of 1851. In this court is now vested the supreme appellate jurisdiction in both civil and criminal causes.

By the thirteenth section of the sixth article of the constitution it is provided, that "When a judgment or decree is reversed or affirmed by the Supreme court of appeals, the reasons therefor shall be stated in writing, and preserved with the record of the case." This provision has necessarily introduced a considerable change in the mode of expressing the decision of the court. For some years past, with special exceptions, the court has been content simply to express in its judgment or decree the grounds on which its decision was made, without giving the reason for it. Under the present provision of the constitution, the judges have deemed it their duty to set out fully the reasons on which their opinions are founded. A consequence of this change and the number of cases directed to be reported, have rendered it impossible to give the arguments of counsel, and bring the reports for the year within the compass of one volume, which is all that by the statute is authorized to be published in one year. Indeed, this volume does not contain the decisions of one year, but terminates with the 1st of April 1853; that being the regular time for commencing and concluding the volume.

The reporter has deemed it improper to make a second statement of the case, when, as is frequently done, the judge delivering the opinion of the court, or delivering an opinion in which the other judges concur, has made a full statement of the facts in his opinion.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Parrill v. McKinley.

July Term, 1853, Lewisburg.

(Absent DANIEL and LEE,* Js.)

[58 Am. Dec. 212.]

1. **Contracts—Exchange of Land—Statute of Frauds—Memorandum†—Case at Bar.**—Upon a contract for the exchange of land, a deed executed by one of the parties, conveying his land to the other, though not delivered, is a sufficient memorandum in writing to bind the grantor, under the statute of frauds.

2. **Parol Contracts—Exchange of Land—Part Performance‡—Specific Execution.§**—A parol contract for the exchange of lands, partly executed by delivery of possession, and acts of ownership over the lands so received into possession, will be specifically enforced in equity.

3. **Chancery Practice—Specific Performance—Amending Bill.¶**—Bill being filed for the specific execution

*JUDGE LEE had been counsel in the cause.

†**Contracts—Sale of Land—Statute of Frauds—Memorandum.**—A vendor of land prepares a deed and signs it, which describes the land, and states the amount and times of payment of the purchase money. This deed is never delivered, but is retained and preserved by the vendor. Upon a bill by the vendee for a specific performance of the contract, *held*, the deed is a sufficient memorandum in writing of the contract, to satisfy the requirement of the statute of frauds and perjuries. Bowles v. Woodson, 6 Gratt. 78. See also, the principal case cited in Cecil v. Clark, 44 W. Va. 689, 30 S. E. Rep. 228.

‡**Parol Contracts—Sale of Land—Part Performance.**—In Miller v. Lorentz, 39 W. Va. 172, 19 S. E. Rep. 395, it is said: "Our cases on the subject of part performance of verbal contracts for the sale of land have been quite numerous. In Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. Rep. 297, JUDGE SNYDER has clearly and accurately summed up the doctrine, and placed it on its true foundation of estoppel against the commission of a fraud by the vendor, such estoppel to be affirmatively enforced in a court of equity in favor of the vendee. See also, 2 Minor, Inst. 854; Wright v. Pucket, 22 Gratt. 370. I have been at some trouble in gathering up our cases on the subject. Some of them are very instructive. (See the many discussions by JUDGE CARR and JUDGE TUCKER, who had been judges of the old chancery court. I give them here for convenient reference.) Rose v. Nicholas (1794), Wythe R. 59; Rowton v. Rowton (1806), 1 Hen. & M. 92; Argenbright v. Campbell (1808), 3 Hen. & M. 144; Henderson v. Hudson (1810), 1 Munf. 510; Jackson v. Cutright (1817), 5 Munf. 308; Zane v. Zane (1819), 6 Munf. 406; Wilde v. Fox (1822), 1 Rand. (Va.) 165; Anthony v. Leftwich (1825), 3 Rand. (Va.) 238 (a leading case); Vail v. Nelson (1826), 4 Rand. (Va.) 478; Heth v. Wooldridge (1828), 6 Rand. (Va.) 605; Darlington v. McCoole, 1 Leigh 36; Payne v. Graves, 5 Leigh 561; Williams v. Lewis (1834), *Id.* 68. See Pigg v. Corder, 12 Leigh 69; *Parrill v. McKinley, 9 Gratt. 1;* Patrick v. Horton, 3 W. Va. 23; Parrill v. McKinley, 6 W. Va. 67; Vickers v. Sisson, 10 W. Va. 12; Fleming v. Holt, 12 W. Va. 144; Tracy v. Tracy's Heirs, 14 W. Va. 243; Baldenberg v. Warden, *Id.* 397; Oil Co. v. Vinal, *Id.* 639; Lorentz v. Lorentz, *Id.* 761; Snyder v. Martin, 17 W. Va. 276; Pack v. Hansbarger, *Id.* 313; Lydick v. Railroad Co., *Id.* 427; Middleton v. Selby, 19 W. Va. 167; Campbell v. Fetterman's Heirs, 20 W. Va. 398; Renick v. Ludington, *Id.* 513; Ballard v. Ballard, 25 W. Va. 470; Westfall v. Cottrills, 34 W. Va. 763; Steenrod's Adm'r v. Railroad Co., 27 W. Va. 1; Kimmins v. Oldham, *Id.* 258; Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. Rep. 297; Blankenship v. Spencer, 31 W. Va. 510, 7 S. E. Rep. 433; Frame v. Frame, 32 W. Va. 463, 9 S. E. Rep. 901; Boggs v. Bodkin, 32 W. Va. 566, 9 S. E. Rep. 891; Harrison v. Harrison, 36 W. Va. 556, 15 S. E. Rep. 87."

As to what three things must concur in order to justify the court in granting specific performance of a parol contract for the sale of land, see Wright v. Pucket, 22 Gratt. 370, and *foot-note.*

§**Specific Performance—When Denied—Laches.**—In Rison v. Newberry, 90 Va. 519, 18 S. E. Rep. 916, LACY, J., in delivering the opinion of the court, said: "All application to courts to decree a specific performance must depend upon the circumstances, governed by the established principles of the court. If specific performance would work injustice, or be unreasonable, a party will be left to his action for damages. It is generally essential that a party seeking a specific performance should not have been backward; that he should not have held off until circumstances may have changed; or kept himself aloof so as to enforce or abandon the contract as events might prove most advantageous. The case of Chilhowie Iron Co. v. Gardiner, 79 Va. 305, is very much in point. S. V. Railroad Co. v. Lewis, 76 Va. 833; Haskin v. Agricultural Insurance Co., 78 Va. 700; Ferry v. Clarke, 77 Va. 397; 2 Lomax Dig., p. 108; *Parrill v. McKinley, 9 Gratt. 1;* Robertson v. Hogsheads, 3 Leigh 667; 1 Story Eq., sec. 693; Graybill v. Brugh, 89 Va. 895, 17 S. E. Rep. 558; Ford v. Euker, 86 Va. 79, 9 S. E. Rep. 500; Dunsmore v. Lyle, 87 Va. 391, 12 S. E. Rep. 610; Reynolds v. Necessary, 88 Va. 125, 13 S. E. Rep. 348; Grizzle v. Sutherland, 88 Va. 584, 14 S. E. Rep. 332; Nalle v. V. M. Railroad Co., 88 Va. 948, 14 S. E. Rep. 759; Story, Eq. Jur., sec. 716; 3 Pars. Cont. 301; 2 Tuck. Comm. 426."

¶**Chancery Practice—Amending Bill.**—As a general rule, a court of equity will, at any time before the hearing, grant leave to amend where the bill is defective as to the parties, or in the mistake or

of a contract for the exchange of lands, if it appears in the progress of the cause that the defendant cannot comply with his contract, the plaintiff may amend his bill and ask for a rescission of the contract, and for such other relief as under the circumstances he is entitled to.

This was a suit for the specific execution of a contract for the exchange of land, 2 brought in December *1845, in the Circuit court of Harrison county, by William Parrill against William McKinley. The bill charged that in 1843 the plaintiff owned a tract of land then in the county of Marion, but afterwards in the county of Taylor, containing about one hundred and seventy-five acres, on which he resided. That in March 1843 he entered into a parol contract with the defendant who was his brother in law, for the exchange of said land for an undivided interest in a tract of land on Buffalo creek in the county of Harrison, owned by the defendant. By this contract the defendant was to convey to the plaintiff his interest in the land on Buffalo creek, and pay to William Rogers, from whom plaintiff had purchased his land, 300 dollars; and the plaintiff was to convey to the defendant his land in the county of Marion. That in pursuance of this contract, the plaintiff in June 1843 gave up his farm to the defendant, who took it into his care and custody; and he then residing in Lewis county, employed hands to change the fencing upon the farm to suit his fancy. That soon after the contract was made the defendant went to Rogers and obtained from him time for the payment to him of the 300 dollars; and afterwards, desiring to raise money, offered to sell the land.

The bill further stated that in July 1843 the defendant and the other heirs of his father caused a partition of their lands on Buffalo creek to be made; that a plat of the land was made with the name of the owner of each lot written thereon. That the defendant joined with the other heirs in making deeds according to the said partition; and one of the deeds so made and signed by the defendant was a deed executed by himself and the other heirs to the plaintiff, for the lot so laid off for the defendant. This deed bore date the 4th of August 1843, and was signed by the defendant on the 28th of that month, and was acknowledged by him before two justices of the peace, and by them certified according 3 *to the statute. That this deed was left with the defendant's mother for some time, and whilst it was in her possession the plaintiff and defendant went to Taylor county and had the land surveyed, to enable the plaintiff to execute a conveyance of the land to the defendant.

The bill further charged that in December 1843 the plaintiff took possession of the land on Buffalo creek, being ninety-seven and a half acres, and still held possession of it, under his contract with the defendant. That the defendant having failed to pay Rogers the sum of 300 dollars, Rogers filed a bill against him and the plaintiff to subject the land to the payment of it; and thereupon, the defendant, in order to prevent the execution of the contract between himself and the plaintiff, got possession of the deed he had executed, and then had it in his possession, and would not deliver it to the plaintiff. That Rogers had obtained a decree for the sale of the land, and, that one hundred acres of the tract sold by the plaintiff to the defendant, had been sold under that decree for 350 dollars. That the plaintiff had always been ready and willing to convey the land to the defendant, but had delayed doing so at the request of the defendant, who then refused to accept the deed.

The prayer of the bill was for a specific performance of the contract, and for general relief.

The defendant in his answer admitted that there had been some conversation between the plaintiff and himself in relation to the exchange of land; but he denied that any contract was made: That, as he always stated to the plaintiff, depended upon his being able to make certain arrangements. He denied that he was to put the plaintiff into possession of the Buffalo land except upon the contingency of the contract being completed: and if plaintiff took possession of it, it was against the express direction of the defendant. He denied that 4 *the plaintiff had given to the defendant the possession of the land in Taylor county, in June 1843, or that defendant had taken possession of it, or employed hands to change the fencing upon the farm. He denied he had made any promise to pay to Rogers the sum of 300 dollars, except upon the contingency upon which the contract was to be made. He said that he ascertained that complainant had given a deed of trust upon a part of his land, for a considerable amount, and that another part of it was covered by an older title; and that in consequence thereof the land could not be sold except at a great sacrifice; and respondent having failed in obtaining a decree in Wood county which

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omission of any fact or circumstance connected with the substance of the bill, or not repugnant thereto. This amendment may be made by common order, before answer or demurrer, and afterwards by leave of the court. Holland v. Trotter, 22 Gratt. 139, citing the principal case; Mason v. Nelson, 11 Leigh 227; Stephenson v. Taverners, 9 Gratt. 398; Smith v. Smith, 4 Rand. 95; Boykin v. Smith, 3 Munf. 102; Sillings v. Bumgardner, 9 Gratt. 273.

Thus, while the plaintiff will not be permitted to make a new case, he may so alter the frame and structure of his bill as to obtain an entirely different relief from that asked for originally. Belton v. Apperson, 26 Gratt. 217, citing as authority the principal case, and Anthony v. Leftwich, 3 Rand. 238.

See the principal case also cited on the subject of Amended Bills in Ferry v. Clarke, 77 Va. 407; Shen., etc., R. Co. v. Dunlop, 86 Va. 353, 10 S. E. Rep. 239; Tennant v. Dunlop, 97 Va. 239, 33 S. E. Rep. 620; Randall v. Jaques, 20 Fed. Cas. 233. For further information on this subject, see monographic *note* on "Amended Bills" appended to Belton v. Apperson, 26 Gratt. 207.

he expected, he went to the complainant and informed him that his representations about the said lands were not to be relied on; and that respondent would have nothing to do with him upon the subject of the exchange of lands.

The defendant admitted that there had been a partition of the Buffalo land. He said that when apprised that the partition was completed, he went from his residence in Lewis county to the house of his mother on Buffalo, for the purpose of receiving a deed for his portion, and executing deeds to the other heirs. When he arrived there he found the parties with the deeds prepared and justices ready to take their acknowledgments. That being in a hurry to return home he signed in haste the deeds which were presented to him, without enquiring in whose favor they were, and when he was done he enquired for his deed, and A. M. Patton who had written the deeds, replied, that at the instance of the complainant he had written the deed for the respondent's share of the land to the complainant. That he then expressly and openly declared that the complainant was entitled to no such deed, and had he known it was thus written he would not have signed it; and that it must be altered. That Patton said it
5 *would be inconvenient to prepare another at that time; and that respondent could keep the deed, and if he saw fit to deliver it to the complainant at a future time he could do so; and if not the heirs could make him another deed. That he then delivered the deed to his brother Albert, with express instructions not to deliver it to the complainant, but to retain it for the respondent. That said Albert did accordingly retain it for some time, and then gave it to the respondent. This deed was signed some time in August 1843, at which time complainant had full notice that respondent did not consider him entitled to it, or that there was any binding contract between them. No suit had been then instituted by Rogers for the payment of the purchase money due to him; nor had the complainant, by his own showing, any possession of the land claimed by him; but he took possession thereof in the December following. And he relied upon the act to prevent frauds and perjuries.

It appears from the proofs in the cause, that a parol contract was made by the plaintiff and the defendant for the exchange of their lands, and that the terms were such as are stated in the bill. The plaintiff left the land in Taylor county in possession of a tenant who seems to have been recognized by McKinley as in possession for him. He made a contract with this tenant by which the tenant was employed to change some of the fences and shut up a lane on the place. He offered more than once to sell the land; applied to Rogers and obtained from him further time in which to pay the balance of the purchase money due to Rogers from Parrill, and which he had undertaken to pay; and he was present when the land was surveyed, and marked one of the lines himself.

At the time that the contract for the exchange was made the Buffalo lands were not divided. This was done in August 1843, in the absence of Wm. McKin-
6 ley; *and the deeds were prepared by A. Patton, and were executed at the same time by the different parties, of whom there were eight. It appears that McKinley did make some objection to the deed for his portion being made to Parrill; but the ground of the objection seems to have been, that Parrill had not made him a deed for the land in Taylor county; and the suggestion in which he acquiesced was that he could hold up the deed until Parrill had executed his. And the deed was accordingly left with his brother Albert McKinley, but was afterwards mislaid or lost out of his possession. Soon after the division, Parrill went upon the land which had been allotted to Wm. McKinley, built a house, and cleared and cultivated a part of it; and was in possession when this suit was instituted.

In the progress of this cause, the copy of the record of a cause which had been brought in the Circuit court of Lewis county by Hambleton & Denham against Wm. McKinley and Philip Cox jr. was filed. This was a bill to subject the lands of the defendants to satisfy a judgment for 1,449 dollars 64 cents, with interest and costs, which the plaintiffs had recovered against the defendants in September 1841, but which was not docketed in the county of Harrison until February 1844. In this case there had been a decree for the sale of the land of Wm. McKinley; and a sale of the land on Buffalo creek was made, and the sale was confirmed.

The cause came on to be heard in June 1847, when the court dismissed the bill with costs. Whereupon Parrill applied to this court for an appeal, which was allowed.

Fry, for the appellant.
No counsel for the appellee.

ALLEN, J., delivered the opinion of the court.

The court is of opinion, that the
7 contract of exchange *in the bill mentioned is fully proved by the evidence in the record; and having been executed by the delivery of possession and acts of ownership by each party over the parcels of land exchanged, there is proof of sufficient part performance to take the case out of the operation of the statute. And the court is further of opinion, that the making of the deed and the signing and acknowledgment thereof by the appellee Wm. McKinley was a sufficient memorandum in writing according to the authority of Bowles v. Woodson, 6 Gratt. 78. The court is therefore of opinion, that upon the proofs in the record the appellant would have been entitled to a decree for a specific execution of the contract of exchange set forth in the bill. But it furthermore appearing by the records and proceedings in suits of Hambleton and Denham, and of Keith and Camp against the said McKinley and others, filed as exhibits, that all the lands of said Wm. Mc-

Kinley were bound by a judgment lien prior in date to the time of said contract for exchange, and that a decree was rendered for the sale of his lands, and the same or portions thereof, have been sold, the court upon the facts disclosed upon said exhibits, should have directed an enquiry to ascertain whether any title to the Buffalo land in the bill mentioned could be made to the appellant, and if not, to have authorized him to amend his bill and seek for a rescission of the contract, and for such other and further relief as under the circumstances he might show himself entitled to.

Decree reversed with costs; and the cause remanded to be proceeded in according to the principles above declared.

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8 *Martin v. Hall & als.

July Term, 1852, Lewisburg.

(Absent DANIEL and LEE,* Js.)

Deeds of Trust—Usury—Subsequent Bond with Usury Expunged—Case at Bar.—A deed of trust upon land is executed to secure a usurious debt. Afterwards a new bond is executed from which all the usurious premium is excluded, and it is agreed between the parties that the deed of trust shall stand as a security for the new bond. Subsequent to the execution of the new bond and this agreement a third party recovers a judgment against the grantor upon a bond executed before the deed of trust was executed, and files a bill to set aside the deed of trust as usurious: HELD:

1st. **Same—Same—Same—Extent of Relief.**†—If the usury had not been expunged by the parties by their second agreement, the plaintiff coming into equity for relief could only obtain it to the extent of the usurious premium.

2d. **Same—Same—Same—Same.**—The parties having by their second agreement done all that a court of equity would have done, and having agreed that the deed of trust should stand as a security for the second bond, that agreement is valid, and the deed will be held as a security for the bond.

3d. **Chancery Practice—Equity Gives Complete Relief.**‡—The court having possession of the case, will decree the sale of the lands and the application of the proceeds according to the priorities of the parties having liens upon it.

*JUDGE LEE had been counsel in the cause.

†**Usurious Contracts—Extent of Relief.**—In Brockenbrough v. Brockenbrough, 31 Gratt. 595, it is said, the extent of the relief, if usury had been proved, would have been the abatement of the usurious premiums, citing *Martin v. Hall, 9 Gratt. 8.* See monographic *note* on "Usury" appended to Coffman v. Miller, 26 Gratt. 698.

‡**Chancery Practice—Equity Gives Complete Relief.**—In Nale v. Newton, 22 Gratt. 825, it is said: "In such a case the court having obtained possession of the subject, it will do complete justice by disposing of the whole subject at its own bar, without sending the parties to another forum. This practice has been commended and established by numerous decisions of this court. See Payne v. Graves, 5 Leigh 561; Billups v. Sears, 5 Gratt. 31; Lyons v. Miller, 6 Gratt. 427; Bank of Washington v. Arthur, 3 Gratt. 173; *Martin v. Hall, 9 Id. 8.*"

This was a bill filed in the Circuit court of Harrison county, by Sandford B. Hall and Josiah Chamberlin, to set aside a deed of trust executed by John Chamberlin conveying a tract of land to secure a debt alleged to be due to William Martin, on the ground that the debt was usurious. Hall and Josiah Chamberlin held a judgment against John Chamberlin upon which an execution had been issued and returned "no effects;" and they thereupon filed this bill. There was no doubt that the bond executed by John Chamberlin to Martin, and which the deed of trust was intended to se-
9 cure, *was usurious: That bond and deed were executed in December 1839. In December 1841 the parties entered into an agreement in pursuance of which the first bond was surrendered, and Chamberlin executed another bond to Martin, from which all the usurious premium was excluded; and the agreement provided that the deed of trust should stand as a security for this second bond as if it was the original note. The judgment of the plaintiffs was recovered in the fall of 1842, subsequent to this agreement; though it was founded on a bond executed in 1838.

The cause came on to be heard in November 1844, when the court held that the deed of trust was void as a security for the debt due to Martin, and appointed a commissioner to sell the property for the purpose, first, of satisfying other valid liens upon the land; and then of paying the debt of the plaintiffs. From this decree Martin applied to this court for an appeal, which was allowed.

Fry, for the appellant.

There was no counsel for the appellee.

ALLEN, J., delivered the opinion of the court.

It is one of the settled and most cherished principles of a court of equity that he who seeks equity must do equity. It will not relieve against a judgment obtained by the fraud of the creditor but on the terms of paying what is justly due. And so in cases of gross extortion and oppression, where security has been given for the payment of money for goods sold, when the security has been decreed to be surrendered, it has always been upon the terms of paying what was really due. The same course of decision has prevailed in cases arising under the statutes against usury. The Court of chancery in England had invariably held under their statutes, that if it be nec-
10 essary to go into *chancery to displace a judgment, it could be done only upon the equitable terms of paying the principal money really due, with lawful interest. And as this doctrine was familiar to our legislature, we are bound to presume that in adopting the statute they adopted it as it had been construed. This principle, uniformly followed where the debtor himself was the party impeaching the transaction, was in the leading case of Scott v. Nesbitt, 2 Bro. Ch. R. 641, applied to the creditors of the debtor.

In that case there was a judgment on a bond of the testator against his executors, and a bill filed for an account of assets: The other creditors objected to the debt as usurious, an objection which they had no opportunity of making before; but it was held that the judgment should stand for the money actually due, and the interest. The authority of this case was recognized and followed in this court in Rankin's ex'or v. Rankin's adm'r, 1 Gratt. 153. In that case the original bond was tainted with usury; and if that defence had been relied on in the action upon the bond, it would have avoided the obligation entirely. But as a judgment had been obtained upon the bond, the usury could not have been used as a defence to an action at law upon the judgment; and this court determined that the relief in equity, whether sought by a bill for relief against the judgment, or made the ground of defence to a bill by the judgment creditor for an account of assets, must be limited to the rejection from the claim of the usurious excess. The foregoing principles must rule this case. On the 24th of December 1839, John Chamberlin executed his bond to William Martin for the sum of 385 dollars; and on the same day gave a deed of trust to secure the payment. The transaction was confessedly usurious; and at law both the bond and the deed of trust might have been avoided in toto by the defence of usury. Subsequently the
11 parties agreed to cancel *the bond; the debtor executed a new bond for the sum really advanced and justly due; and covenanted and agreed that the deed of trust should remain a good security for the amount of the new bond. After these transactions, the appellees recovered a judgment against the debtor for a debt contracted prior to the execution of the deed of trust; and thereupon filed this bill to remove the deed of trust out of the way of their judgment lien. Without deciding in this case, whether it is competent for a judgment creditor to set up the defence of usury for his debtor, it is sufficient to say that if he is let in, it must be on the terms of a court of equity. Although the deed of trust was void at law; and, being void in its inception, even although the debtor could have defeated a recovery in an action of ejectment by the defence of usury, notwithstanding the subsequent agreement; yet when he seeks relief in equity, he can obtain it only upon the principles of that forum. The judgment creditor had no day in a court of law, he was compelled to resort to equity; and according to the case of Scott v. Nesbit, ubi supra, the measure of relief to which he was entitled, was to purge from the amount of the claim the usurious excess.

In this case the parties themselves have done what a court of equity would have required them to do. As this is not a proceeding under the 3d section of the statute, it must be conceded on all hands that if the parties had made no attempt to purge the claim of the usury, equity would only relieve upon the terms of paying the debt really due with interest; and their doing what they could to remove the taint of usury, should not in a court of equity place the creditor in a worse condition than if he had done nothing. They never canceled the deed of trust. In contemplation of both and by their express agreement, it was to con-
tinue as a security for the money ac-
12 tually loaned. The agreement, *if regarded at all, should be taken altogether. If it be disregarded, the parties are thrown back upon the original transaction, and then the measure of relief in equity is clear from doubt. Or if it is to have any influence on the case, its terms should be adhered to, unless some rule of law or principle of equity be thereby violated.

The fact that the debt of the appellee was contracted before the execution of the deed cannot affect the case. There is no allegation of fraud, and until he obtained his judgment the appellee was a creditor at large.

The court is therefore of opinion, that so much of the decree of the Circuit court is erroneous as held that the deed of trust of the 24th December 1839 should not be treated as a security for the sum actually loaned, with legal interest, as against the appellee's judgment creditors seeking the aid of a court of equity to remove the same out of their way.

Reversed with costs; and cause remanded with instructions to direct a sale of the land, and to apply the proceeds, first, to the payment of the sum of 272 dollars, with interest from the 31st December 1839 until paid, and his costs, to the said William Martin or his representative; and the residue to the several claims in the said interlocutory decree of the 19th November 1844 mentioned, according to their priorities as therein ascertained.

Decree reversed.

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13 *Governor for Davis v. Roach & als.

July Term, 1852, Lewisburg.

(Absent LEE,* J.)

1. **Pleading—Constable's Bond—Assignment of Breach†—Case at Bar.**—In an action on a constable's official bond, the assignment of the breach did not set out specifically the claims put into the constable's hands, but stated that the relator had placed divers claims in his hands for collection which were particularly set out in a receipt given by him as constable and which was thereto annexed, marked A. And then proceeded to aver the collection of the moneys by the constable, and his failure and refusal to pay over to the relator. HELD: On demurrer to the breach, that it was well assigned.

2. **Constable's Bond—Evidence—Case at Bar.**—In such an action the assignment of the breach sets out

*JUDGE LEE had been counsel in the cause.

†See monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

specifically the claims for which the constable had given his receipt; and the receipt is referred to and annexed to the declaration; but an error is committed in stating the amount of one of the claims. This is no ground for excluding the receipt as evidence, as to the other claims correctly described; but the jury should be instructed that it is not evidence as to the claim not correctly set out in the breach.

This was an action in the Circuit court of Harrison county, upon a constable's official bond, in the name of the Governor at the relation of J. and R. Davis against J. D. Roach and his sureties in the bond. The declaration after setting out the bond and its condition, alleged that the relator had placed in the hands of Roach for collection a number of claims which were particularly set out, for which he had given his receipt as constable; and it was referred to and annexed to the declaration; and it was averred that he had failed and refused to pay over the moneys which he had collected. The second breach assigned did not set out the different claims specifically, but alleged that the relators had placed divers other claims in the hands of Roach for col-
14 lection, *which it was averred were particularly set out in said receipt given by Roach as constable and which was thereto annexed, marked A. And then proceeded to aver the collection of the moneys by Roach and his failure and refusal to pay over to the relators.

The suit abated as to Roach, and the sureties appeared and demurred to the declaration, and to each breach thereof; and also pleaded "conditions performed" by Roach. The court below overruled the demurrer to the declaration, and to the first breach, and sustained it to the second.

The cause came on to be tried in November 1848, when the plaintiffs offered in evidence the receipt of the constable for the claims put into his hands, which was objected to on the ground of variance. One of the claims set out in the declaration was "a note on Charles C. Queen for 24 dollars 54 cents, due February 1843, subject to a credit of five dollars." The receipt set out a claim identical with this in all respects except that it stated the debt to be 24 dollars 50 cents. The court sustained the objection, and excluded the receipt from going in evidence to the jury; and the plaintiffs excepted. There was then a verdict and judgment for the defendants: Whereupon the plaintiffs applied to this court for a supersedeas, which was awarded.

Fry, for the appellants.

There was no counsel for the appellees.

DANIEL, J., delivered the opinion of the court.

This court is of opinion that the Circuit court erred in sustaining the demurrer to the second breach in the declaration assigned. It would perhaps have been more regular to have set out in words and figures the amounts and dates of the respective claims in respect to the collection and payment whereof the breach was alleged. The main end and object of such a course,
15 *however, to wit, the notifying the defendants in the action, fully, of the precise nature and extent of the demand against them, were as well attained by annexing the receipt and list of claims attached, and referring to it as containing a description of said claims.

The court is also of opinion, that the Circuit court erred in refusing to admit the said receipt and list as evidence on the trial of the issue before the jury. The action was not founded on the receipt, and there was no need to make profert of it. It was a mere matter of evidence; and the fact that the first count declared for a breach with respect to the collection and payment of a note not specified in the receipt, and omitted to take any notice of a note which was mentioned in the receipt; or in other words, the variance between the declaration and receipt in describing the amount of the note on Queen, could not invalidate the receipt as evidence of the receipt by Roach of all those claims mentioned in the declaration which appeared from their description to be identical with those mentioned in the receipt. The court ought to have admitted the receipt as evidence in respect to all such claims, and ought to have instructed the jury that it was not evidence to charge the defendants in respect to the note on Queen, on account of the variance between the declaration and receipt in the description of its amount.

It is therefore considered by the court that the said judgment be reversed and annulled, and the verdict set aside; and that the plaintiff in error recover, &c. And this court proceeding to render such judgment as the said Circuit court should have rendered, it is considered that the demurrer to the second breach in the declaration assigned be overruled; and the cause is remanded to the Circuit court of Harrison county for further proceeding, and for a new trial to be had therein.

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16 ***Young v. Highland.**

July Term, 1852, Lewisburg.

(Absent DANIEL and LEE,* Js.)

1. **Trespass—Evidence—Order of Introduction.**—In an action of trespass, assault and battery, the plea is "*son assault demesne*," and the replication is "*de injuria*." It is the plaintiff's right to introduce his evidence first.
2. **Same—Same—Same.**—In such case if the defendant is permitted to commence and introduce his evidence first, it is still the right of the plaintiff to introduce his evidence to prove the assault and battery charged in the declaration.
3. **Evidence—Order of Introduction.**†—It is the right

*JUDGE LEE tried the case in the Circuit court.

†**Plea of Confession and Avoidance—Argument of Counsel—Order**—In Sammons v. Hawver, 25 W. Va. 680, it is said: "Did the court err in refusing to permit the defendants to open and conclude the argument? The pleas, and only pleas, to the action were payment and usury, both affirmative pleas. The

of the plaintiff to commence and introduce his evidence in all cases for unliquidated damages, though the general issue is not pleaded, whether the action is *ex delicto* or *ex contractu*.

This was an action of assault and battery in the Circuit court of Harrison county, brought by John W. Young against Jacob Highland. The declaration contains but one count, and charges that theretofore, to wit, on the 3d of December 1847, at the county of Harrison, the defendant in and upon the plaintiff did make an assault, &c. The only plea was "son assault demesne," to which the plaintiff replied de injuria, and issue was joined thereon. On the trial the following bill of exceptions was taken by the plaintiff, viz:

After the jury was empaneled and sworn in this cause, the plaintiff claimed the right to begin the evidence in the cause, by proving the assault and battery stated in the declaration; and the defendant claimed the right to begin the evidence in support of his plea, by proving the same to be true; and thereupon the matter was referred to the court, which decided that the defendant had the right to open and begin the
17 evidence *in support of his plea, and refused to permit the plaintiff to prove the assault and battery stated in his declaration, until after the defendant had given his evidence in support of his plea. And the defendant then proved that in the fall of 1846, at a church in Harrison county, the plaintiff assaulted the defendant, as stated in his plea, and the defendant then and there in his self-defence resisted the assault so made upon him, without doing unnecessary violence to the plaintiff. And the plaintiff then offered evidence tending to prove, that on the 3d day of December 1847, at a store-house in Milford in said county, distant from the said church about two miles, the plaintiff went into the said store-house, and there met with the defendant, when some angry words passed them, and thereupon the defendant picked up a spade standing in the said store, and with it struck the plaintiff on the head, which felled the plaintiff to the store floor, and the plaintiff's head was cut by the blow so given by the defendant, and that the plaintiff became diseased and disabled by the wounds so inflicted upon him; to the admissibility of the evidence so offered by the plaintiff, the defendant objected and the court refused to permit the plaintiff to give the evidence so offered by him to prove a second assault, the defendant having proved the assault stated in his plea. To the opinions of the court, refusing to permit the plaintiff to begin the cause by proving the assault and battery stated in his declaration in the first instance, and refusing to permit the plaintiff to prove the assault and battery by him so offered to be proved after the defendant had given his evidence to prove the assault stated in his plea, the plaintiff excepts, and his exception is signed, sealed and made part of the record.

There was a verdict and judgment for the defendant; whereupon the plaintiff applied to this court for a supersedeas, which was awarded.

18 *Fry, for the apppellant.
Hoffman, for the appellee.

MONCURE, J., delivered the opinion of the court.

This was an action of assault and battery. The declaration contained but one count.

The only plea was son assault demesne; to which the plaintiff replied de injuria; and issue was joined thereon. Verdict and judgment were rendered for the defendant. On the trial of the issue a bill of exceptions was made part of the record. The errors assigned in the case are in the two opinions expressed in the bill of exceptions; and we think that both of them were erroneous.

First—we think the Circuit court erred in refusing to permit the plaintiff to begin the cause by proving the assault and battery stated in his declaration. According to the well settled English practice, the party who substantially asserts the affirmative of the issue has generally the right to begin; and if the record contain several issues, and the plaintiff holds the affirmative in any one of them, he is entitled to begin. 1 Greenl. Ev. § 74. As was said by President Tucker, in Steptoe v. Harvey, 7 Leigh 501, 544, "The rules as to the right of opening and concluding in the courts of England are substantially the rules which have been held to prevail with us." And the two rules of English practice above stated may, therefore, be regarded as settled rules of our practice also. These rules, as applicable to cases where the damages are liquidated, are thus well laid down by Archbold, in the first vol. of his Law of Nisi Prius, p. 5, (49 Law Library, p. 58:) "The party who has added the similiter (supposing there to be but one issue) has a right to begin; or if there be two or more issues, then, if the plaintiff have added the simil-

defendants clearly had the right to open and conclude the argument to the jury. But it is said the defendants waived this right. They claimed it before the bond was read to the jury. This certainly did not amount to a waiver. After the evidence was in, they still had the right to open and conclude to the jury in argument. The denial of this right was error. (B. & O. R. R. Co. v. P. W. & Ky. R. R. Co., 17 W. Va. 848, and cases cited; Singleton v. Millet, 1 Nott. & McCord 355; Brooks v. Barrett, 7 Pick. 94; Huntington v. Conkey, 33 Barb. 219; Corkey v. Leus, 15 B. Mon. 27; Harris v. Kent, 11 Ind. 126; Steptoe v. Harvey, 7 Leigh 501; *Young v. Highland, 9 Gratt. 16.*)"

In Colley v. Sheppard, 31 Gratt. 318, 322, the principal case was cited to the point that, since pleas of release and payment are pleas in confession and avoidance, they put the *onus probandi* upon the defendant, and thus give him the right to open and conclude. See generally, monographic *note* on "Arguments of Counsel" appended to Coleman v. Com., 25 Gratt. 865; monographic *note* on "Bonds" (Div. I) appended to Ward v. Churn, 18 Gratt. 801.

iter in any one of them, he has a right to begin; but if the defendant have added the similiter in all of them, he has the
19 right to begin. Another test *is: Suppose no evidence at all is given, who would be entitled to the verdict? If the defendant, the plaintiff must begin; if the plaintiff, the defendant must begin." But whether, in actions for unliquidated damages, the plaintiff has in all cases a right to begin, no matter what the pleadings may be, is a question on which the cases both English and American, have been conflicting. In the case of Bedell v. Russell, decided at nisi prius, R. & M. 293, Best, C. J., observed that but for the authorities he should have thought that the onus of proving damages gave the plaintiff a right to begin; but he further said, that it being of the utmost consequence that the practice should be uniform, he should consider himself bound by the cases; and he directed the defendant's counsel to begin. See 14 Eng. C. L. R. 398, note c. In the case of Cooper v. Wakley, also decided at nisi prius, 14 Eng. C. L. R. 395, Lord Tenterden, doubting as to the practice, went out of court to confer with Bayly, Littledale and J. Parke, Js., then sitting in an adjoining court; and on his return said: "I am of opinion that the defendant has a right to begin. The general rule is, that that party on whom the affirmative lies has to begin; and in one at least of the cases cited the plaintiff was seeking to recover unliquidated damages: I mean the case of Bedell v. Russell." In the case of Cotton v. James, decided at nisi prius in 1829, one year after the decision of the last mentioned case, and reported in 1 Moody & Malkin 271, 22 Eng. C. L. R. 305, the rule which was recognized in the two cases just cited was again followed. In an able note appended by the reporters to the last mentioned case, after saying that "this case seems to complete the series of those by which the doctrine that the plaintiff is entitled to begin, where he has to prove damage sustained, have been for the present overruled," and that "the practice appears now to be completely settled by decisions," they proceed further to say
20 that *"there are some circumstances which render it rather doubtful whether the practice will long continue so. It certainly has been understood that the inclination of the principal practitioners at the bar is not favorable to the rule as now laid down," &c. And in considering what, in the event of the present rule being again called in question, would be the most desirable practice to establish, they maintain with great force the propriety of allowing the plaintiff to begin in all actions for unliquidated damages. Afterwards, in the case of Carter v. Jones, 6 Car. & Payne 64, decided in 1833, it was resolved by the fifteen judges that the plaintiff shall begin in all actions for personal injuries, libel and slander, though the general issue may not be pleaded, and the affirmative be on the defendant. That resolution settled the English practice in actions of tort to which it applied. But in actions upon contract it seems to have been an open question of practice in that country, until the recent case of Mercer v. Whall, referred to by the counsel of the appellant. That was an action of covenant for unliquidated damages, and came on to be heard at nisi prius, before Denman, C. J., in 1844. The defendant had the affirmative of the issue. On the trial a question arose as to the right to begin; and his lordship ruled that the plaintiff had that right, since it lay on him to prove some damage. Verdict for plaintiff. A rule nisi was obtained for a new trial on the ground of misdirection, and of an improper ruling on the right to begin. The case was decided by the Court of Queen's Bench in 1845, and is reported in the 48 Eng. C. L. R. 447. Lord Denman, C. J., delivered the unanimous judgment of the court. He commences it by saying that "the natural course would seem to be, that the plaintiff should bring his own cause of complaint before the court and jury, in every case where he has anything to prove, either as to the facts necessary for
21 his obtaining a verdict, or as *to the amount of damages to which he conceives the proof of such facts may entitle him." Of the disadvantages that may result from a contrary rule, one he says "is the strong temptation to a defendant to abuse the privilege. If he well knows that the case can be proved against him, there may be skillful management in confessing it by his plea, and affirming something by way of defence which he knows to be untrue, for the mere purpose of beginning." This observation he illustrates by a variety of cases. He then refers to the practice which had prevailed at nisi prius, in regard to which he said, "I can speak of my own impression arising from attendance at nisi prius as a barrister near thirty years, and corresponding as far as I have observed, with the general opinion of the bar. I never doubted that the plaintiff was privileged and required to begin whenever anything was to be proved by him. The simplicity and easy application of this mode of practice would recommend it to adoption if the question were new; and would raise a great probability that the common sense of old times had sanctioned it as a part of our system. It frequently occurred, that in an action of trespass, with plea of justification under a right, the defendant claimed to begin. He said 'I admit the trespass and the burden of proving the defence rests on me.' The answer constantly given was: 'I the plaintiff have the right to begin, because I go for substantial damages. I claim to disprove your right in the first place, if I think proper; but at all events to possess the jury of the extent of the mischief you have done me.' On such occasions the judge took upon himself to decide whether the plaintiff really went for substantial damages. If he did, it was always assumed that he must begin." In reference to the case of Cooper v. Wakley, which

is the leading case in support of the right of the defendant in such cases to begin, the chief justice said, "An appeal may be 22 made to all who *were then practicing at the bar, whether the decision was not universally felt to be wrong, both as against principle and as an innovation." —"If ever a decision was overruled on great deliberation and by an undeviating practice afterwards, it is that in Cooper v. Wakley, Mood. & M. 248." In reference to the resolution of the fifteen judges before referred to, he says, "An ingenious argument was used at the bar that this resolution did not declare the law as the judges understood it, but merely enacted a new practice which they thought more convenient than the old. But I cannot think this explanation admissible. The judges have never assumed the right of sacrificing the law to their sense of convenience. The balance of convenience might have some effect on their minds as an argument to show how the rule of practice was; but their duty was limited to a declaration of that rule which they never would have promulgated if they had not believed it to be the law. The rule of practice thus declared is confined to the case then under consideration (which was an action of tort,) wisely avoiding any matters not then before the judges. Contented with the correction of what was thought a grievous mistake, they excluded from their consideration every other point, and left the practice on actions of contract in its former state." He then proceeds to enquire how that practice stands, shows that the same general reason applies to both classes of cases, and concludes that in actions of contract, as well as of tort, for unliquidated damages, the plaintiff has always a right to begin. We have stated thus fully the view of Chief Justice Denman in the case of Mercer v. Whall, because they are very able, and are strikingly appropriate to the case under consideration. That case has firmly established the rule of practice in England, and being well sustained by reason and authority, we consider it a rule of our practice also. It is very impor- 23 tant that *a uniform rule of practice on the subject should exist, and we know of none which would be more convenient, simple and just than the one just mentioned.

Secondly—we think the Circuit court erred in refusing to permit the plaintiff to prove the assault and battery stated in his declaration after the defendant had given his evidence to prove the assault stated in his plea. The declaration, as we have before said, contains but one count, and is in the usual form of a declaration for an assault and battery. It uses general language, and though it contains the usual and proper averments of time and place, it would have been sustained on the general issue by proof of any assault and battery whenever or wherever committed; for a variance as to time and place is immaterial. If the defendant had pleaded the general issue, the plaintiff could not have proved more than one act of assault and battery; but might have proved any one of several distinct acts, at his pleasure: and the defendant could not have compelled him to rely on one act instead of another by alleging or proving that the plea was intended to apply to the former, and that to allow the plaintiff to select the latter would operate a surprise on the defendant. But the only plea in the case was son assault demesne; to which the replication was, de injuria. The plea uses the same general language as the declaration does, and professes to refer to the same assault and battery. It would have been sustained by proof of any assault made by the plaintiff on the defendant followed immediately by an assault and battery of the defendant on the plaintiff, and the plaintiff could not have avoided that consequence by showing that the declaration and replication were both intended to refer to a different assault and battery. The plaintiff by replying de injuria, admits that any assault and battery which the defendant may justify by proving that the plaintiff made the first assault, is the as- 24 sault *and battery for which the action is brought. If, therefore, several assaults and batteries are committed by the defendant on the plaintiff, and any of them can be justified, the plaintiff ought either to have in his declaration as many counts as there were assaults and batteries, or, if he has but one count, and the plea is son assault demesne, he ought to reply by way of new assignment. Otherwise a verdict must be rendered against him, though he may be able to prove, and actually prove, that other assaults and batteries were committed on him by the defendant which cannot be justified. Whenever the defendant sustains by proof his plea of justification, all the evidence of the plaintiff referring to any other assault and battery than that which is justified becomes irrelevant and must be disregarded by the jury. But if the defendant offers no evidence to sustain his plea of justification, or fails to sustain it to the satisfaction of the jury, the plaintiff may prove any assault and battery committed on him by the defendant, even though it may be different from that which the defendant intended or attempted to justify; and on proving it, will be entitled to recover, just as if the plea had been the general issue instead of justification. Where the plea of justification is sustained by proof, the pleadings are all considered as referring to that assault and battery which is justified: where the plea is not sustained by proof, they are considered as referring to that assault and battery which is proved by the plaintiff in making out his case. There is no variance between the allegata and probata in either case; and the defendant has no more cause to complain of surprise in the latter, than the plaintiff has in the former. In fact the defendant rarely, if ever, is surprised in such a case by proof of a different assault

and battery from that which he expected to be proved; while the plaintiff may be, and doubtless sometimes is. The plea of son assault demesne in this respect is like
25 the *plea of liberum tenementum: The object of both is, generally, to compel a new assignment; a more particular setting out of the cause of action. Where liberum tenementum is pleaded, if instead of new assigning, the plaintiff replies generally, the defendant will succeed if he proves that he has any freehold in the county. The act complained of as a trespass will then be considered as having been committed on that freehold. But if the defendant does not fully make out his justification, the plaintiff will be entitled to recover for any cause of action which he may prove before the jury, and which may not vary from that stated in his declaration. It is not enough for the defendant that he considers, and attempts to prove, himself entitled to a certain freehold in the county; he must fully prove himself to be so entitled before he can have any evidence of the plaintiff of a trespass committed on another freehold, excluded from the consideration of the jury. The same principle, for the same reason, applies to the issue made up in this case. The plaintiff should have been permitted to prove the assault and battery by him offered to be proved. Whether that evidence would avail him or not depended upon whether the defendant should make out his justification: and whether that was made out or not, was a question which the jury alone had the right to decide. The whole case was before the jury at the same time; and it was proper that the whole evidence should have been before them. The court in assuming that the defendant had proved his justification, and therefore refusing to permit the plaintiff to prove the assault andd battery by him offered to be proved, invaded the province of the jury which might have disbelieved the evidence of the defendant, or considered that it did not make out his justification. The evidence offered by the plaintiff should have been admitted; and then the court might have instructed the jury to disregard
26 it, if the justification *was made out to their satisfaction. The propriety of admitting the evidence would have been more obvious if the plaintiff had, as he should have been permitted to begin: The irrelevancy of the evidence could not then have appeared until after it was given in and after the defendant also had given in his evidence.

For these reasons we are for reversing the judgment of the Circuit court, setting aside the verdict and remanding the cause for a new trial to be had therein. On which new trial, if it be had on the issue as now made up, the plaintiff shall be permitted to begin and to prove the assault and battery by him offered to be proved on the former trial. But leave may be given to the parties, if they desire it, to amend their pleadings and make up other issues.

27 *Cox &c. v. Romine.

July Term, 1852, Lewisburg.

(Absent DANIEL and LEE,* Js.)

Sale of Land—Bonds—Assignment of—Priority†—Case at Bar.—A sells and conveys land to M, and takes bonds for the purchase money, retaining the vendor's lien, one of which bonds he assigns to R. M sells part of the land to C, and before he conveys, it is agreed between M, C and R, that C shall execute his bond to R in lieu of the bond of M assigned to R by A, and that R shall retain his lien on the land. Before M conveys to C, C by a contract in writing, sells the land to McW, who pays a part of the purchase money to C, without notice of R's lien. There is a conveyance by M to C, but no conveyance by C to McW. R files a bill against C and McW, to subject the land to the satisfaction of his debt. HELD:

1st. Same—Same—Same—Same—Intention of Parties.—That R had a lien upon the land in the possession of C; as such was the intention of the parties.

2d. Same—Same—Same—Secret Liens—Bona Fide Purchasers.—But though it is a general rule that between equities, equal in all other respects, the elder shall be preferred, yet R's lien being secret, and McW having been permitted to take possession of the property, to hold it for a time, and make payments for it without notice, his equity shall be preferred; and the land shall only be liable to the extent of the purchase money unpaid at the time McW received notice of R's lien.

3d. Same—Same—Same.—QUÆRE: If R would have had a lien upon the land in the hands of C, in the absence of evidence that such was the intention of the parties.

This was a bill filed in the Circuit court of Lewis county by Jacob Romine against Philp Cox jr. and John McWhorter, to subject land in the possession of the latter to the satisfaction of a bond executed to the plaintiff by Philip Cox jr. for the purchase money of the land in the possession of McWhorter; which land Cox had purchased of Hugh McQuain, and by an arrangement between them gave his bond to Romine.

The facts are stated by Judge Samuels
28 in his opinion. *There was a decree

*JUDGE LEE had been counsel in the court below.

†**Sale of Land—Bonds—Assignment of—Secret Liens—Bona Fide Purchasers.**—See on this subject, the principal case cited in Briscoe v. Ashby, 24 Gratt. 481, and *note*. See also, citing the principal case, Yancey v. Blakemore, 95 Va. 268, 28 S. E. Rep. 236; Lough v. Michael, 37 W. Va. 679, 17 S. E. Rep. 470, dissenting opinion.

In Hoult v. Donahue, 21 W. Va. 300, it is said: "He who buys an equitable title in ignorance of its nature, and under the belief that he is getting a good legal title, may, therefore, protect himself, by getting in the legal title, even where the effect is wholly to exclude equities prior to his own. Baggarly v. Gaither, 2 Jones Eq. 80; Boone v. Chiles, 10 Pet. 177; Williamson v. Gordon, 5 Munf. 257; The Mutual Assur. So. v. Stone, 3 Leigh 218; *Cox v. Romine, 9 Gratt. 27;* Bayley v. Greenleaf, 7 Wheat. 46; Camden v. Harris, 15 W. Va. 554."

in favor of the plaintiff subjecting the land to the payment of the debt; and from that decree Cox and McWhorter applied to this court for an appeal, which was allowed.

Price, for the appellants.
There was no counsel for the appellee.

SAMUELS, J. It appears in the record, that Arnold sold to McQuain a tract of land, on credit, taking bonds for the price, payable in installments, for which the vendor's implied lien was kept in existence: That one of these bonds for the purchase money was assigned by Arnold to Romine, who, of course, succeeded to Arnold's right to charge the amount of the bond on the land in the hands of the vendee. McQuain sold to Cox a part of the land bought of Arnold, for the price of 255 dollars 26 cents, the amount of principal and interest due on the bond held by Romine. By an arrangement between McQuain, Cox and Romine, Cox executed his bond to Romine for the price agreed on: This was done before Cox received his conveyance from McQuain. In this bond it is stated to have been given for the purchase money of land therein described, which is sufficiently identified with the land bought of McQuain. It appears with sufficient clearness, that Romine and Cox intended to preserve the lien upon the land for this debt. After Cox had contracted with McQuain for the purchase, and before McQuain had made any conveyance to him, Cox contracted in writing to sell the land to McWhorter for 500 dollars, and put him in possession.

Although Cox has since received a deed from McQuain, it does not appear that he has conveyed to McWhorter. In this state of things Romine filed a bill against Cox and McWhorter, asserting that a lien on the land exists for the purchase money, and seeking to enforce it.

29 *Without expressing any opinion on the question, whether a lien may be implied, in a case a vendee gives a bond for purchase money, to a person not standing in the relation of vendor, without anything to show that such was the intention of the parties; yet in this case as the bond assigned by Arnold to Romine was a lien, and as the bond executed by Cox to Romine was given in lieu of that bond, and contains a recital from which we must infer that the lien was intended to exist, I am of opinion that as between Romine and Cox the lien is in full force.

McWhorter, who is in possession, defends himself against Romine's claim, upon the ground that he made his contract with Cox and paid him a large portion of the purchase money, without notice of the lien: Thus the question is presented whether the lien held by Romine or the equitable title held by McWhorter shall prevail.

It may be laid down as a general rule, that between mere equities, equal in all other respects, the elder shall prevail. If however the junior claimant shall have an advantage at law, or superior equity, such party shall prevail. See the cases referred to, 2 White and Tudor's Leading Cases, p. 1; Moore v. Holcombe, 3 Leigh 597; Judge Cabell's opinion in Doswell v. Buchanan's ex'ors, 3 Leigh 365; Bayley v. Greenleaf, 7 Peters' R. 46. Considering the secret nature of Romine's lien; that McWhorter was permitted to take possession of the property, hold it for a time and make payments for it without notice of that lien, I am of opinion his equitable title should prevail over Romine's lien, to the extent of the payments made without notice. This I deem right notwithstanding the case of Beirne's ex'ors v. Campbell, 4 Gratt. 125, which seems to decide otherwise.

Obvious considerations require that all liens or conveyances concerning real
30 property, shall be recorded. *Purchasers, relying upon the records for information, may be misled and defrauded if the secret and unknown liens or conveyances may be set up to their prejudice, after fairly paying money for their purchases; nor is the injury the less because they may have only equitable titles.

In our case it is not likely that any degree of diligence would have apprised McWhorter of Romine's lien. He could reasonably be expected to make enquiry only of such persons as were mentioned in the title papers for the land. Romine who is not mentioned therein should have taken care to have his lien recorded, or to have given notice thereof; and the consequences of his omission should rest upon himself rather than upon McWhorter. I am thus led to the conclusion that the Circuit court erred in giving Romine a preference over McWhorter for his whole debt, instead of so much as McWhorter owed Cox when first notified of the lien.

The decree should be reversed with costs, and the cause sent back to the Circuit court; that it be referred to a commissioner to ascertain in what amount McWhorter was indebted for the purchase when notified of Romine's lien, and the land held liable for that amount only.

The other judges concurred in the opinion of Samuels, J.

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31 *Friend v. Wilkinson & Hunt.

July Term, 1852, Lewisburg.

(Absent LEE, J.)

1. **Bills of Exchange—Notice of Protest—Burden of Proof.***—In an action upon a bill of exchange by the endorsee against the endorser, where it is proper to send the notice of protest by the mail, and it has not arrived at as early a day as in the regular course of the mail it might have come if started at the proper time, the *onus* is upon the plaintiff to prove that it was put into the mail at the proper time.

***Bills of Exchange—Notice of Protest—Burden of Proof.**—The principal case holds that where it is proper to send notice of protest, of a bill of exchange, by mail, the burden of proof is upon the plaintiff to

2. **Evidence—Motion to Exclude—Objection Must Be Specified.**†—When a party moves the court to exclude evidence, he should specify the evidence to which he objects: And where the motion is to exclude a mass of evidence, some of which is proper to be received, the motion may be properly overruled on account of its generality.

3. **Bills of Exchange—Protest—Damages—Case at Bar.**—A bill of exchange having fallen due and been protested before the act allowing three *per cent.* damages, and interest upon the costs of protest, went into operation, such damages and interest are not recoverable thereon.

This was an action of debt in the Circuit court of Kanawha county, brought by Wilkinson & Hunt against Joseph Friend, upon two protested bills of exchange, each for 1,000 dollars. The facts are stated by Judge Allen in his opinion.

There was a verdict and judgment for the plaintiffs; and thereupon Friend applied to this court for a supersedeas, which was awarded.

There was no counsel for the appellant.

B. H. Smith and Doddrige, for the appellees.

ALLEN, J. This is an action of debt brought by the endorsees against the endorser upon two bills of exchange drawn and made payable in Cincinnati, and protested for nonpayment. On the trial the appellant, the defendant in the court below, 32 took two bills of exceptions. *The first sets out, that on the trial the appellees introduced evidence to prove the handwriting of the endorser, and offered in evidence the bills, with the protests attached; and introduced evidence tending to prove the notice of protest; to the introduction of all which evidence the appellant objected; but the court overruled his objection, and allowed the same to go to the jury; and the appellant excepted.

This exception we think was properly overruled on account of its generality. It is not the province of the court to search out from the whole mass of evidence something which may be objectionable. It is the duty of the party to lay his finger on the testimony and object to it specifically. Any other course would lead to surprise on the other side. Evidence of a secondary nature may be permitted to go to the jury from a knowledge that a party has it in his power to lay a proper foundation for it; but upon a general objection setting out the whole or the great mass of testimony, it may seem that portions of the evidence are improper; whereas if specifically objected to at the proper time, the objection might have been obviated, or the evidence excluded.

After the verdict, the appellant moved for a new trial, and his motion being overruled, he took a second bill of exceptions setting out all the facts proved on the trial. It becomes necessary to consider so much only of this bill of exceptions as shows the times at which the bills arrived at maturity, and the proof touching the notice to the endorser of the protest for nonpayment of the bill at three months. It appears that this bill arrived at maturity, was presented for payment, and protested for nonpayment on the 1st of February 1850: That a notice of protest dated at Cincinnati on the 1st of February 1850, was sent by mail to the cashier of the Bank of Virginia at Charleston, Kanawha county, Va., was re- 33 ceived on the night of *the 7th February, enclosed in a letter post marked Cincinnati, Ohio, and handed by the witness to the appellant on the next day. It was further proved that a letter would arrive at Kanawha court-house in four or five days after it was mailed in Cincinnati, if it came by the direct route. If sent by another route, a letter might be ten or twelve days on the way; or that it might be, and letters sometimes were, delayed at Chilicothe, Ohio, by the regulations in regard to the departure of the mail on the regular route from Cincinnati. Upon this proof the question arises whether the appellant had due notice of the dishonor of the bill. The Bank of Virginia at Charleston, Kanawha, is to be treated as a distinct holder, the bill having been placed there for presentment and collection; and notice was given by it in due time after it was received from Cincinnati. But it seems to me there is not sufficient evidence of the time of the transmission of the notice of the dishonor of the bill from Cincinnati. The party not residing in or near the city of Cincinnati, a notice sent by the mail of the next day, or the next practicable mail, would be sufficient. And the burden of proving a reasonable notice is on the plaintiff. It is, where notice is required, a condition precedent to his right to recover, and he must show a strict performance. In this case it does not appear whether there was a daily mail between Cincinnati and Charleston or not, nor when the notice was put in the post office to be mailed. It is dated on the 1st and was received on the night of the 7th of February; and the proof is that a letter would arrive at Kanawha court-house (Charleston) in four or five days after it was mailed at Cincinnati if it came by the direct route. The notice might there-

show that it was put in the mail at the proper time. This is approved and followed in Corbin v. Planters' Bank, 87 Va. 667, 13 S. E. Rep. 98. See monographic *note* on "Bills, Notes and Checks."

†**Evidence—Motion to Exclude—Objection Must Be Specified.**—When a party moves the court to exclude evidence, he should specify the evidence to which he objects; and where the motion is to exclude a mass of evidence, some of which is proper to be received, the motion may be properly overruled on account of its generality. For this proposition the principal case is cited and approved in Washington, etc., R. R. Co. v. Lacey, 94 Va. 463, 26 S. E. Rep. 834; Norfolk, etc., R. R. Co. v. Ampey, 93 Va. 126, 25 S. E. Rep. 226; Trogdon v. Com., 31 Gratt. 881, and *note*.

See, in accord, Parsons v. Harper, 16 Gratt. 64, and *note*; Kincheloe v. Tracewells, 11 Gratt. 587, and *note*; Harriman v. Brown, 8 Leigh 697; Buster v. Wallace, 4 H. & M. 82.

fore have been placed in the office and mailed on the morning of the 4th and have arrived after night on the 7th, according to this evidence. Being protested on the 1st, it should have been placed in the 34 office to be sent *by the mail of the next day, unless that was Sunday, and if so, by the mail of the third of February if there was such mail, or if not, by the next practicable mail; and it was incumbent on the plaintiff below to show the time it was so placed in the office to be mailed.

The case is similar in principle to the case of Lawson v. Sherwood, 1 Stark. R. 314, 2 Eng. C. L. R. 405, cited in 2 Greenl. Evi. § 186. There the witness proved he had sent a letter containing the notice two or three days after the dishonor of the bill, but could not say whether it was two or three days. Notice on the second day would have been sufficient, but the third day was too late. Lord Ellenborough held the proof insufficient; that the onus probandi in such cases lies upon the plaintiff, and he must show the notice is sufficient. In this case the notice may have been put in the office to be mailed on the 2d and not have been received until the night of the 7th; if so, it would have been sufficient: but it might have been put in the office and mailed on the 3d or 4th and received at the same time; if so, it was too late, unless that was the first mail after the dishonor of the bill. And these were matters which the plaintiff was bound to prove, and probably could have done so by an examination of the notary. I think, therefore, the court erred in overruling the motion for a new trial.

The declaration which contained but one count upon both bills, demanded interest on the costs of protest, and damages after the rate of three per cent. on the principal sum due. The verdict allowed and the court gave judgment for the interest and damages. The three per cent. damages upon the principal, and the interest upon the costs of protest were claimed under the 9th and 11th sections of the Code of 1849, p. 582. Both of the bills had arrived at maturity before the new Code went into operation; 35 and we think the rights *and liabilities of the parties are to be ascertained and measured by the laws in force at the time of the maturity and dishonor of the bill, when the cause of action accrued; and that both for allowing the three per cent. damages, and the interest on the costs of protest, the verdict should have been set aside, and the judgment was erroneous. In Whitworth v. Adams, 5 Rand. 333, the allowing interest on the costs of protest was decided to be erroneous.

In this case there was a general demurrer to the declaration, which was not directly passed upon by the court below. The appellant has not in his assignment of errors objected to the insufficiency of the declaration; and as the case must go back for a new trial, and the plaintiff can there amend his declaration, it is not considered necessary to express any opinion upon the demurrer. I am, for the reasons aforesaid, of opinion that the judgment be reversed, the cause remanded for a new trial, and with leave to the appellees to amend their declaration.

DANIEL and SAMUELS, Js., concurred in the opinion of Allen, J.

MONCURE, J., dissented.

The following is the judgment of the court:

It seems to the court here that the burden of proving due notice of the dishonor of the bill devolved upon the defendants in error, the plaintiffs in the court below, and the proof set forth in the bill of exceptions to the decision of the court overruling the motion for a new trial, does not show that due notice of the dishonor and protest of the three months' bill of exchange was placed in the office to be transmitted by the mail of the 2d and 3d day ensuing such dishonor and protest, or the earliest practicable 36 mail thereafter. And *it furthermore seems to the court that there was error in allowing interest on the costs of protest, and 60 dollars damages on the principal sum in said bills mentioned, being three per centum thereon. It is therefore considered that the said judgment be reversed and annulled, with costs to the plaintiff in error; that the verdict be set aside and the cause remanded, with leave to the defendants in error to amend their declaration, and for a new trial.

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37 *Friend v. Woods.

July Term, 1852, Lewisburg.

(Absent LEE, J.)

Appeal Bonds—Costs—Variance between Declaration and Bond—Case at Bar.—In an action on an appeal bond, the declaration states under a *scilicet*, the costs at a certain sum, and makes profert of the record of the Court of appeals. The defendant craves oyer of the record, and demurs generally. The record is properly set out in all respects; but the costs endorsed by the clerk of the Court of appeals is less than the sum stated in the declaration; that sum including the costs for entering the judgment of the Court of appeals in the court below, and issuing the execution upon it. HELD:

1st. Same—Same—Same—Same.—The profert of the record did not extend to the endorsement of the costs by the clerk, and the variance as to the costs was no ground of demurrer.

2d. Same—Same—Same—Same.—There was no variance, as the costs in the court below were properly embraced in the demand in the declaration.

This was an action of debt upon an appeal bond, brought in the Circuit court of Kanawha county by Wiley P. Woods against Thomas R. Friend and Joseph Friend. The defendants craved oyer of the record of the Court of appeals of which profert was made, and then demurred generally to the declaration. The ground of the demurrer seems to

have been for a supposed variance between the amount of the costs in the Court of appeals as stated in the declaration, and the amount endorsed by the clerk of that court upon the copy of the decree sent to the court below. The declaration stated the costs to be 28 dollars 59 cents. The costs endorsed by the clerk were 26 dollars 91 cents; but the clerk of the Circuit court added for recording the judgment of the Court of appeals and issuing execution, 1 dollar 68 cents, thus making the sum of 28 dollars 59 cents. The court below overruled the demurrer; and there was a verdict
38 upon a writ of enquiry *of damages, and a judgment for the plaintiff. Whereupon Joseph Friend applied to this court for a supersedeas, which was awarded.

There was no counsel for the appellant.
Fry, for the appellee.

DANIEL, J., delivered the opinion of the court.

The court does not deem it necessary to express any opinion on the question, raised at the bar by the counsel of the defendant in error, whether upon the supposition of the existence of the alleged variance between the record vouched in the declaration and that exhibited in reply to the oyer the proper mode of taking advantage of such variance was not by plea of nul tiel record instead of by demurrer; as it seems to the court that there is in fact no such variance.

The verification by the record, or prout patet per recordum in the declaration, cannot be properly regarded as extending to the averment in respect to the amount of the costs. The judgment of the Court of appeals properly ascertained by and to whom the costs were to be paid; but it was no part of its function to fix the amount of the costs. That was a matter to be determined not by a reference to the record of the judgment of the court, but to the certificate of taxation made at the foot of the transcript of the record. The allegations in the declaration are to be construed in reference to this well known state of things; and the averment as to the amount of the costs is, in this view, no part of the description of the judgment. Consequently no variance would be established by showing that the amount of costs averred differed from that taxed. There is in fact however no difference between the amount of the costs averred and that certified. It is true that the declaration avers under a scilicet that the costs amount to the sum of 28 dol-
39 lars 59 cents; and the *clerk of the Court of appeals certifies that they amount to the sum of 26 dollars 91 cents; but on the back of the transcript of the record is a certificate of the clerk of the Superior court of Kanawha, that the costs incurred by the defendant in recording the judgment of the Court of appeals in the Superior court and in issuing execution, are 1 dollar 68 cents. This last sum is a proper charge as constituting a part of the costs of the defendant in his defence expended; and when added to the amount taxed by the clerk of the Court of appeals, makes an amount identical with that averred in the declaration.

No other variance is alleged in the petition or suggested at the bar; and the court on an inspection of the record perceives none. The court is therefore of opinion that there is no error in the judgment, and that it ought to be affirmed with costs.

Judgment affirmed.

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40 *Slack v. Wood.

July Term, 1852, Lewisburg.

Injunctions—Against Judgments—Necessity for Taking Advantage of Remedy at Law—Laches.*—An injunction to a judgment at law dissolved as improvidently granted, without answer, though the bill charges that the judgment was recovered without appearance or defence for money which the plaintiff in the judgment alleged he had paid as surety, though he had not in fact paid one cent of the money, but the same had been paid by another surety, against whom there was a joint judgment with the plaintiff at law; and that of this fact the plaintiff in the bill had no knowledge until after the judgment; and could not therefore have defended himself at law.

This was an injunction to a judgment recovered by Henry H. Wood against John Slack in the Circuit court of Kanawha. Slack had been the high sheriff of Kanawha county, and Wood, James T. Swindler and

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***Injunctions—Against Judgments—Necessity for Taking Advantage of Remedy at Law—Laches.**—To entitle one to relief in equity against a judgment at law, it is not sufficient that injustice has been done him. He must have been guilty of no laches and have done everything required of him to render effectual his defence at law. For this proposition the principal case is cited and approved in the following cases: Allen v. Hamilton, 9 Gratt. 257; Hudson v. Kline, 9 Gratt. 384, 387; Perkins v. Clements, 1 Pat. & H. 153; Green v. Massie, 21 Gratt. 361; Richmond Enquirer Co. v. Robinson, 24 Gratt. 552, and *note*; Goolsby v. St. John, 25 Gratt. 153, and *note*; Yuille v. Wimbish, 77 Va. 315; Dey v. Martin, 78 Va. 4; Rosenberger v. Bowen, 84 Va. 663, 5 S. E. Rep. 697; Canada v. Barksdale, 84 Va. 746, 6 S. E. Rep. 10; Brown v. Chapman, 90 Va. 175, 17 S. E. Rep. 855; Hyre v. Hoover, 3 W. Va. 15; Sperry v. Gibson, 3 W. Va. 525; Vance v. Snyder, 6 W. Va. 31; Shields v. McClung, 6 W. Va. 89; Morehead v. De Ford, 6 W. Va. 320; Harvey v. Seashol, 4 W. Va. 125; Black v. Smith, 13 W. Va. 800; Bias v. Vickers, 27 W. Va. 466; Bloss v. Hull, 27 W. Va. 509; Ensign Mfg. Co. v. McGinnis, 30 W. Va. 542, 4 S. E. Rep. 788; Grafton, etc., R. Co. v. Davisson, 45 W. Va. 14, 29 S. E. Rep. 1029; Smith v. McLain, 11 W. Va. 669; Sayre v. Harpold 33 W. Va. 557, 11 S. E. Rep. 17; *foot-note* to Haseltine v. Brickey, 16 Gratt. 116; monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518. See, in accord with the principal case, Cabell v. Roberts, 6 Rand. 580; Collins v. Jones, 6 Leigh 530; Faulkner v. Harwood, 6 Rand. 125; Haden v. Garden, 7 Leigh 157; Oswald v. Tyler, 4 Rand. 19; George v. Strange, 10 Gratt. 499; Meem v. Rucker, 10 Gratt. 506; Wallace v. Richmond, 26 Gratt. 67, and *note*; Ferrell v. Allen, 5 W. Va. 43;

others were his sureties. Several judgments had been recovered against Slack and his sureties for the defaults of one of his deputies. Upon these judgments executions issued which were returned by the sheriff as paid by James T. Swindler and Henry H. Wood. Subsequently Wood gave Slack notice that he would ask for a judgment against him for the amount of these executions as having been paid by himself; and Slack not appearing, there was a judgment in favor of Wood against Slack for the amount of 318 dollars 61 cents, with interest thereon from the 24th of May 1847, until paid and his costs.

After this judgment had been recovered, Slack applied for an injunction thereto, on the ground that Wood had not paid one cent of the money for which the judgment had been obtained; but that it was paid by the other surety, James T. Swindler; and he alleged that these facts came to his knowledge after the judgment was rendered, and that consequently he could not by any possibility have made his defence at law.

41 *The injunction was granted; and the defendant Wood without answering the bill moved to dissolve the injunction as improvidently awarded; and the court sustained the motion. From this decree dissolving the injunction, Slack applied to this court for an appeal, which was allowed.

Parks, for the appellant.

B. H. Smith and Doddridge, for the appellee.

LEE, J., delivered the opinion of the court.

Wood recovered a judgment against Slack the complainant in the Circuit court of Kanawha county for the sum of 318 dollars 61 cents, being for money claimed to have been paid by him as one of the sureties of Slack in his official bond as sheriff of Kanawha county, together with interest and costs of suit. The proceeding which resulted in this judgment was by notice in writing under the act of assembly in which it was alleged that sundry judgments specified in the notice, had been recovered against Wood as such surety aforesaid, and that he had been compelled to pay the amount specified in the notice, on account thereof. The notice was served upon Slack, but he failed to appear and contest the plaintiff's right to recover; and the court, on hearing the evidence adduced by the plaintiff, rendered judgment in his behalf for the amount above stated. Slack subsequently filed this bill in the Circuit court of Kanawha, stating the recovery of said judgment against him, and exhibiting a copy of the record of the proceeding in which it was had: And he alleged that he had been informed and believed "that Wood had never paid one cent of one of the judgments set out in his aforesaid notice, but that the said judgments being not against the said Wood alone, but against" himself (said Slack) and his securities in his official bond, they were

42 paid by James T. Swindler *(then deceased), another of his said sureties. He further alleged that those facts came to his knowledge after the said judgment had been rendered, and that he had had no knowledge or intimation of them until after that period; and that consequently he could not by any possibility have made his defence at law.

The bill made Wood and the sheriff of Kanawha parties defendants, and prayed an injunction to restrain the collection of the said judgment, and such other and further relief as justice and equity might require. The injunction prayed for was allowed.

The defendants appeared by counsel, and without filing an answer to the bill, gave notice that they would move to dissolve the injunction as improvidently allowed, at a future day of the court. And subsequently the motion having been made, the court by its order did dissolve the injunction on the ground assigned: And to this decree a supersedeas has been allowed.

The grounds on which a court of equity will interfere to grant relief against a judgment at law in the nature of a new trial, are confessedly somewhat narrow and restricted. It is not sufficient to show that injustice has been done, but it must appear also that it was not occasioned by the inattention of the party complaining: And a bill seeking relief of this character is watched by equity with extreme jealousy. Bateman v. Willoe, 1 Sch. & Lef. 201. In delivering his opinion in that case, Lord Redesdale said that "Rules are established, some by the legislature, some by the courts themselves, for the purpose of putting an end to litigation; and it is more important that an end should be put to litigation than that justice be done in every case." Ib. 204.

In the case of Floyd v. Jayne, 6 John. Ch. R. 479, Chancellor Kent states the settled doctrine and practice of the court

43 of equity as well as of courts of *law, to be, that a party is not entitled to relief after verdict upon testimony which with ordinary care and diligence he might have procured and used upon the trial at law: And he adds that "it would be establishing a grievous precedent, and one of

Knapp v. Snyder, 15 W. Va. 434; Alford v. Moore, 15 W. Va. 597.

Judgments at Law—When Equity Will Grant New Trial.—In Zickefoose v. Kuykendall, 12 W. Va. 29, it is said: "It is admitted that after-discovered evidence, to afford a proper ground to awarding a new trial, whether the application be made to a common-law court, or to a court of equity, must (1st) have been discovered since the former trial; (2d) be such as reasonable diligence on the part of the party seeking the new trial could not have secured at a former trial; (3d) be material in its object and not merely cumulative, corroborative or collateral; (4th) must be such as ought to produce an opposite result on the merits. Read's Case, 22 Gratt. 946; Adams v. Hubbard, 25 Gratt. 129; *Slack v. Wood, 9 Gratt. 53;* Brown v. Speyers, 20 Gratt. 296; Gillilan v. Ludington, 6 W. Va. 128; Arthur v. Chavis, 6 Rand. 142." See, in accord, citing the principal case, Smith v. McLain, 11 W. Va. 658.

great public inconvenience, to interfere in any other case than one of indispensable necessity and wholly free from any kind of negligence."

This doctrine has been fully recognized in this court by repeated adjudications. Beirne v. Mann, 5 Leigh 364; Oswald, &c. v. Tyler, &c., 4 Rand. 19; Faulkner's adm'x v. Harwood, 6 Rand. 125. And to the same effect are De Lima v. Glassell's adm'r, 4 Hen. & Munf. 369; Turpin v. Thomas, 2 Hen. & Munf. 139; Tapp v. Rankin, 9 Leigh 478; Donnally v. Ginnatt's adm'r, 5 Leigh 359; Haden v. Garden, 7 Leigh 157; Turner v. Davis, Id. 227; Auditor v. Nicholas, 2 Munf. 31; Arthur v. Chavis, 6 Rand. 142; Fenwick v. Macmurdo, 2 Munf. 244. In the case of Faulkner's adm'x v. Harwood, it was held that a court of equity will not grant relief merely because injustice has been done: The party applying for a new trial, to entitle himself to it, must show that he has been guilty of no laches; that he has done everything that could reasonably be required of him to render his defence effectual at law. And the reasons for establishing and enforcing this rule and practice are given by Judge Carr, in his opinion, with his accustomed clearness; and they seem to apply in all their force to the present case. The complainant alleges that at the time of the rendition of the judgment at law against him he was ignorant of the fact that the money due on the judgments recovered against him and his sureties had been paid by James T. Swindler, and that no part whatever had been paid by Wood. But he does not allege that he used due diligence or made any efforts or enquiries before the trial at law to obtain information upon this subject.

44 And *it would appear that by the exercise of reasonable diligence, and by making proper enquiry in the proper quarters, he might have been readily led to discover whether Wood had in fact paid any of the moneys claimed to have been paid by him for the complainant, and if any, the amount thereof; and of this information when obtained he could have fully availed himself in his defence in the court of law. His failure to institute any such enquiry when served with Wood's notice would seem to be exactly that sort of inattention and laches on his part which should serve to debar him from any claim for relief in a court of equity against its consequences. The court is therefore of opinion that the injunction to the judgment at law upon the grounds assigned in the bill was improvidently granted; and that there is no error in the order of the court dissolving the same; which is accordingly affirmed, with costs to the appellee.

Decree affirmed.

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45 *Price's Heirs v. Price's Adm'r.

July Term, 1852, Lewisburg.

1. **Turnpikes—Statutes—Construction—Case at Bar.**—The act of the 22d of February 1830 to authorize the construction of a turnpike road from Joseph Gaunt's to Price's mountain in the county of Botetourt, provided that the contractor, upon the completion of the road, might erect a toll-gate thereon, and take certain tolls for nineteen years. The act of the 1st of March 1831 provided that when the road was completed over Caldwell's mountain, the commissioners might authorize the contractor to erect a toll-gate on that part of the road, and collect half the tolls authorized by that act: and when the whole road was completed they were to authorize the erection of another gate, and full tolls to be taken. The commissioners did, upon the completion of the road over Caldwell's mountain, authorize the contractor to erect a gate and take half tolls: and when the whole road was completed they authorized another gate and full tolls to be taken. Upon the construction of these acts it was held that the nineteen years for which by the act of 1830 the contractor was authorized to take tolls upon the road, did not commence to run until the road was completed and the second toll-gate was erected.

2. **Same—Same—Same—Same.**—In the construction of these statutes all the attendant and surrounding circumstances were taken into consideration.

The case is fully stated by Judge Lee in his opinion.

Hudson, for the appellants.
John T. Anderson, for the appellee.

LEE, J. On the 22d of February 1830 the general assembly passed an act entitled "An act to authorize the construction of a turnpike road from Joseph Gaunt's to Price's mountain in the county of Botetourt," by which commissioners were appointed to locate said road and to contract for its construction at a grade in no part to exceed five degrees, in the manner and upon the terms prescribed in the act. The third section of the act provided that to indemnify and compensate the contractor on said work, he should be authorized on

46 *the fulfillment of his contract, to erect a gate on the said road, and to demand and receive tolls for the use of the same at a certain rate thereby prescribed; with a proviso that the rights and privileges thereby granted should terminate from and after the expiration of nineteen years from the erection of the gate or receiving tolls on said road.

On the 1st of March 1831 an act passed amendatory of the above mentioned act, by which the commissioners were authorized to contract for the construction of the road over Caldwell's mountain (a part of the line of the contemplated work), at a grade of six instead of five degrees, as prescribed by the fomer act. And it provided that when the same should be completed and received by the said commissioners, they should be authorized to empower the undertaker to erect a toll-gate thereon at such place as they might designate, and demand and receive one-half of the rate of tolls allowed by the act of the 22d of February 1830. It also gave them power to extend the said road from Gaunt's to a point one-

half mile east of the house lately the residence of James Davis, and to contract for bridges over Craig's and Barber's creeks: And provided that when the entire work should be completed, the commissioners should be empowered to authorize the contractor to erect two toll-gates on the said lane of road, at such points as they might designate, and thereafter at each to demand and receive, in lieu of the tolls authorized by the act of 1830, tolls at a different rate prescribed by the act, being an increase taking the two gates authorized by that act together upon the rates authorized for a single gate by the act of 1830. But if the commissioners should deem the tolls authorized by that act an inadequate compensation to the undertaker of the work, they were required to dispense with the bridging of Barber's and Craig's creeks: And moreover it was provided that if in the
47 progress of the *work, such a portion of it should be completed as in the opinion of the commissioners ought in justice to the contractor to entitle him to indemnity before the whole should be finished, they were authorized under the control of the Board of public works to increase the half tolls thereby allowed, to full tolls.

Under the provisions of these two acts the commissioners on the 30th of June 1831 entered into a contract of that date with Jacob Price for the construction of said road from its western terminus to a point one-half mile east of the late residence of James Davis, according to certain specifications embraced in the contract; and the said Price also stipulated that if the legislature should before the completion of said line of road pass an act authorizing its extension from its eastern terminus to Fincastle, he would construct that portion of road also, as a part of the whole line and to be taken and considered as embraced in the indemnity provided by the act of 1st March 1831, without further compensation: or in the event of his failure to undertake the making of that addition to the road, the commissioners reserved the right to contract with others for the construction and make provision out of the tolls for their compensation. It was further provided that nothing contained in the contract was to be construed as dispensing with the two bridges mentioned in the act, but that it was understood that the said Price was to build them whenever required by the said commissioners, as part of the consideration he was to receive in the form of tolls from the road.

The extension to Fincastle contemplated in the contract was provided for by an act passed February 8, 1832, entitled "An act conferring certain powers on the commissioners of the road from Fincastle to Price's mountain," which authorized the commissioners to require the contractor to make it upon the same terms and conditions and for the same compensation provided by the act of the 1st of March 1831.

48 *It appears that in the progress of the work, and after that portion of the road over Caldwell's mountain had been completed, the contractor Price obtained from the commissioners leave to erect a toll gate thereon and to charge half tolls for the travel over that finished portion of road, under and by virtue of the provision to that effect contained in the act of the 1st of March 1831. When this gate was erected does not precisely appear, but it was more than nineteen years before the filing of the bill in this cause.

On the 1st of August 1834 the entire line of road was received by the commissioners as completed in conformity to the contract, and by virtue of the authority given them by the act of 1831, they thereupon authorized the said Price to erect another toll-gate on the line of said road at or near its western terminus; and thereafter he received the full tolls authorized by the act of March 1st, 1831, at both the said gates.

Price subsequently departed this life, and the complainant in this cause qualified as his administrator: And after the expiration of nineteen years from the erection of the first gate (that upon the portion of road across Caldwell's mountain), at which half tolls were charged, a doubt having arisen whether the right to receive any tolls at that gate had not ceased, he filed this bill in the Circuit court of Botetourt, praying the aid and instruction of the court upon that point, and also in regard to other difficulties which he alleged had arisen touching the administration of the estate. The distributees of Jacob Price, deceased, were made parties defendants. And subsequently the cause coming on to be heard by consent of parties upon the question of the right to collect tolls on said road, the court was of opinion that the right to collect tolls at each gate ceased at the end of nineteen years from its erection: And as it appeared the first gate, that on the Caldwell's mountain section at which half tolls had been charged
49 during *the progress of the work, had been erected more than nineteen years previously, the court by its decree held that the right to take tolls at that gate had ceased: and directed that the complainant should thereafter demand and receive tolls at the other gate only, until the 1st of August 1853, when the right to demand tolls at it also would expire. And to this decree an appeal has been allowed from this court.

The question thus presented for the adjudication of the court is, whether the term of nineteen years for which the contractor was entitled to demand and receive tolls at the gate first erected upon that portion of the road over Caldwell's mountain is to be computed as commencing from the time at which it was placed thereon for the purpose of collecting half tolls authorized by the act of 1831, during the progress and until the completion of the whole work, or whether that period is to be considered as commencing on the 1st of August 1834 when the whole work was declared completed and taken off the hands of the contractor by the commissioners, and when they authorized him to erect a second gate under the provi-

sions of that act, continuing also the one first erected. And this question depends for its solution upon the proper construction of the several acts above referred to taken together as a whole. It is true neither the act of 1831 nor that of 1832 contains any limitation of the term for which the right to take tolls upon the road is to continue. But it cannot be doubted that the limitation of nineteen years contained in the act of 1830 is preserved by the sixth section of the act of 1831 and equally applies to the two gates authorized by that act to be erected as to the single gate provided for by the act of 1830.

The original act of 1830 for the construction of this improvement provided for a road with a grade not to exceed five degrees: And it authorized the erection of but a single gate for the collection of tolls 50 for the whole *road; and it was not to be erected until the work should be fully completed. No contract was made by the commissioners for the construction of the road under the provisions of this act until after the passage of the amendatory act of the 1st of March 1831. The object and purpose of this last mentioned act would seem to be the better to promote the success of the enterprise by holding out stronger inducements to contractors to undertake the work than those offered by the first: for although it authorized the commissioners to extend the work to a point eastward of its original terminus, and to require bridges across the two creeks named, yet it authorized the road to be made over Caldwell's mountain at a grade of six degrees instead of five, as required by the first, and when the road should be completed over that mountain it authorized a gate to be erected and tolls to be demanded at half the rate authorized by the act of 1830. And upon the completion of the whole work it authorized the erection of two gates instead of one, at each of which tolls were to be paid at a rate prescribed differing from that of the former act, but taking the two together for the whole road, considerably improved and affording a better compensation to the contractor. And for the purpose of securing an adequate compensation to the contractor, it required the commissioners to dispense with the two bridges contemplated if they should deem the compensation otherwise inadequate. And moreover if in their opinion during the progress of the work, justice to the contractor required it, they were empowered under the control of the Board of public works to increase the half tolls thereby allowed to full tolls. All these various provisions would seem to evince a disposition on the part of the legislature to improve upon the inducement held out in the first act to contractors to undertake the work. The chancellor in his opinion embodied in the decree states 51 that this act was for the *benefit of the contractor, but he considered that benefit to consist only in this, that he was thereby enabled to receive compensation for the work finished, and not required as by the original act, to wait until the whole road was completed before he received any tolls. But it may be questioned whether there was any advantage in this to the contractor, if his term of nineteen years as to the gate first erected commenced when he began to collect the half tolls: because those half tolls were not half the whole tolls allowed for the entire work by the act of 1831, but only of the rates allowed by the act of 1830. And thus for those years during the progress of the work in which he was receiving only half the rates provided by the act of 1830, he was receiving less than half of the tolls authorized by the act of 1831, and less than those authorized at either of the gates after the completion of the work; and yet according to this view, those years are part of and to be deducted from the term for which he was to be entitled to collect tolls at that gate. The only compensation for this loss is that he was enabled to receive the half tolls somewhat in advance of the time when he was to receive full tolls at both gates; but this may have been quite inadequate.

By the act of 1831 some additional work is provided to be done not required by the act of 1830: And as it was thereby contemplated that that portion of the road over Caldwell's mountain should be first constructed, it might not have seemed unreasonable that during the progress of the work and until it should be fully completed, some compensation should be made to the contractor for the travel over that finished portion in the form of the half rates thereby temporarily allowed.

It is clear from the provisions of these acts that the tolls allowed to be collected by the contractor were intended as compensation not only for the construction of the work but also for keeping it in repair. The duty to keep in repair continues as 52 long as the correlative *right to demand tolls, but no longer. Now though the act of 1831 expressly authorizes two several gates to be erected on the road at convenient points, it recognizes no division of the line of the road into sections with reference to these two gates, nor does it attach any portion of its length to either. If then the right to demand tolls at the gate first erected has expired, there is a portion of the road which the contractor is no longer bound to keep in repair. But how is this portion to be ascertained? Some portions of the road may require much greater labor and expense to keep them in repair than others; and the difficulty is further increased by the fact that the gate which the decree discontinues is that erected on the portion of road over Caldwell's mountain for the purpose of collecting half tolls for the use of that portion during the progress and until the completion of the whole work; and the road was to be extended both eastwardly and westwardly from the termini of that mountain section. The difficulties and great inconvenience which the construction given to these acts by the chancellor would necessarily involve would seem to create

strong doubts of its correctness; and as the acts themselves make no provision by which they can be avoided, it may not be unreasonable to infer that the legislature did not contemplate any such state of things, but intended that the whole road should be kept up alike for the full term of nineteen years commencing and ending at the same time; and consequently that the right to take the full tolls authorized by the act of 1831 should continue for the whole road for the like period.

The act of 1830 authorized full tolls at the rates therein prescribed for the allotted term commencing on the completion of the entire work thereby contemplated. The act of 1831 authorized like full tolls to be collected at each of two gates according 53 to a modified tariff which *it prescribed, when the entire work should be completed: And it seems to me that the computation of the term for which the right to demand full tolls at each gate, should commence at that period and continue from the time it was taken off of the hands of the contractor by the commissioners for the full term provided by the act of 1830. And I do not think that the provision in the act of 1831 authorizing the collection temporarily of half tolls made under the circumstances and with the views which it would seem probable led to its introduction, was intended to control or modify the right to full tolls at each gate for the full term prescribed; but was designed to be an additional remuneration to the contractor offering a further inducement to engage in the work.

I am of opinion therefore that the court below erred in directing the discontinuance of the first gate erected and the collection of tolls at the other only; and that the decree should be reversed.

The other judges concurred in the opinion of Lee, J.

Decree reversed.

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54 *Drake v. Lyons.

July Term, 1852, Lewisburg.

Bonds—Judgment by Assignee—Injunction—Parties*—Case at Bar.—D and T sell land to L, and each receives a part, and takes L's bonds for one-half the balance of the purchase money. L not being able to complete the contract, it is agreed between the parties that it shall be rescinded, and the land is surrendered, and D and T deliver to L his bonds, except one that D had assigned away. On this bond a judgment was recovered by the assignee, and L filed a bill to enjoin it, making the assignee and D parties. HELD:

1st. T is not a necessary party.

2d. L is not entitled to have the judgment enjoined as against the assignee.

3d. Same—Same—Rights of Obligor—Case at Bar.—The agreement to rescind the contract being proved, L is entitled to recover from D the amount of the bond assigned by D; but D being liable as assignor of that bond, L is not to collect it until he shall have paid off the judgment, or D is otherwise released from his liability as assignor.

This was an injunction to a judgment in the Circuit court of Wood county. The case is stated in the opinion of the court.

B. H. Smith, for the appellant.
Fisher, for the appellee.

ALLEN, J., delivered the opinion of the court.

Lyons purchased of Drake and Thorpe a small tract of land in Wood county, for which he agreed to pay the sum of 600 dollars. Of this, 100 dollars was paid in property at the time of the sale, and as Drake alleges was received by Thorpe. For the residue of the purchase money Lyons executed six notes, four for 100 dollars each, and two for 50 dollars, three of them made payable to Drake and three to Thorpe. 55 *Drake assigned one of the 100 dollar notes made payable to him, to Farrow, who subsequently assigned portions thereof to others. Upon this note a judgment was recovered by Farrow as assignee against Lyons, who thereupon obtained an injunction setting up various grounds for relief, of which it is unnecessary to notice any but one. In his bill he alleges that after the contract, finding himself unable to complete the purchase, the contract, by mutual agreement, was rescinded: That he surrendered up the title bond executed to him by the vendors, and received from Thorpe the notes he had executed to him, and Drake promised to surrender his; and that Drake thereafter took possession of the land sold and gave a deed of trust upon it. Drake in his answer admits that the contract was canceled and the lot was surrendered to him; but avers it was expressly understood that the appellee Lyons was to pay the 100 dollar note which he had assigned to Farrow. On the hearing the court considering that as the agreement to cancel the contract was made after notice of the assignment the rights of the assignees could not be affected by the rescission of the contract of sale, and therefore dissolved the injunction and dismissed the bill as to the assignees: thus giving them the benefit of their judgment. From this portion of the decree Lyons has not appealed, and he is the only party who could complain of it.

But the court furthermore considering that the contract of rescission was proved, and that Drake had no right to require Lyons to pay the 100 dollar note, gave Lyons a decree over against Drake for the amount thereof. From this decree Drake has appealed, and assigns as error, that Thorpe, who united in the sale of the land, was a necessary party, before the court could rescind the contract. The court did not rescind or cancel the contract: the bill alleged that the contract had been rescinded

*See monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518; monographic *note* on "Assignments"; monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

by the parties; the title bond and
56 *possession surrendered, and that Thorpe had delivered up his notes. The answer of Drake admits the agreement to rescind, and its execution by a surrender of the property to himself; and that he thereafter conveyed it in a deed of trust: And the deposition of Thorpe and the other evidence shows that the contract of rescission was fully executed by the surrender of the title bond, and giving up to the vendors possession of the premises. There was no controversy, therefore, as to the rescission of the contract; it was admitted: Nor was there any necessity for a decree to rescind; the contract was fully executed.

But Drake avers there was an agreement at the time of the rescission personal to himself, with which Thorpe had no concern, by which Lyons assumed to pay the note he had assigned to Farrow. To the decision of this controversy growing out of the rescission of the contract of sale, it was not necessary that Thorpe should have been a party; and there was no error in proceeding to hear the cause without requiring him to be made a party.

It is further assigned as error that the court had no authority to rescind, and that it did not rescind, the contract of rescission. These objections have already been answered. The court was not called upon to rescind and did not rescind because that contract had been fully executed. Upon the merits as between Drake and Lyons, if the latter did agree to pay the assigned note as alleged by Drake, the burden of proof was on him to show it, and he has failed to do so. Every presumption is against the pretension that Lyons who had already lost the 100 dollars paid at the time of the purchase, should have agreed to pay still more to be relieved from a purchase he was unable to complete.

But we think there was error in decreeing that Lyons should recover from Drake the 100 dollars, and that he might at once enforce payment thereof by execution.
57 *Drake had assigned the note executed by Lyons to Farrow. If the assignee should fail in collecting the money from Lyons, Drake as assignor would be responsible. But in the mean time he may have been compelled to pay the decree against him to Lyons or any transferee of Lyons. The right of Lyons to a decree over results from his being compelled to pay to Drake's assignee a note which Drake should have surrendered, and for which, if not paid, Drake would be responsible. Lyons should not have been permitted to collect the decree from Drake until he had paid off the judgment on the note, or released Drake from his liability as assignor of the note on which the judgment was obtained. We think this is a substantial error which might have subjected Drake to irreparable loss, a result by no means improbable, as the record shows Lyons had been discharged as a bankrupt. For this error so much of the decree as authorizes Lyons to collect the amount decreed in his favor against Drake before he shall show to the court that he has paid off the amount of the judgment enjoined, or that Drake has been otherwise released from his liability as assignor of the note upon which said judgment was rendered, should be reversed, with costs to the appellant.

MONCURE, J. I concur in the decree, except that I think the appellee Lyon should have his costs as the party substantially prevailing, on the principle of the case of Handly v. Snodgrass, 9 Leigh 484, and the cases therein referred to, especially the case of Roberts v. Jordans, 3 Munf. 488.

The decree of the court was as follows:

The court is of opinion there is no error in so much of the decree as dissolved the injunction and dismissed the bill as to all the defendants except the appellant; or as adjudged and ordered that the appellee
58 Lyons *pay to the defendants in the court below, except the appellant, their costs; or as adjudged that the appellee Lyons was entitled to recover of the appellant 108 dollars 3 cents, with interest on 100 dollars, part thereof, from the 1st April 1841, that being the amount of the judgment at law sought to be enjoined, and also the costs by the appellee, the said Lyons, in that behalf expended. But the court is further of opinion that said decree is erroneous in authorizing the appellee, the said Lyons, to proceed at once to enforce payment of the decree in his favor against the appellant before he had exhibited evidence that said judgment enjoined had been paid, or that the appellant had been released from his liability as assignor of the note upon which the judgment was rendered. Therefore reversed, with costs, so far as the same is herein declared to be erroneous, and affirmed in all other respects; and cause remanded with instructions to retain the cause as between the appellant and the appellee Lyons, with liberty to the appellee Lyons to move for leave to sue out execution for the debt, interest and costs decreed in his favor against the appellant, upon showing to the court that he has paid off the amount of the judgment mentioned in the bill, and thereby sought to be enjoined, or that the appellant has otherwise been released and discharged from all liability as assignor of the note upon which judgment was rendered.

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59 *Tyree & als. v. Wilson.

July Term, 1852, Lewisburg.

(Absent LEE, J.)

[58 Am. Dec. 218.]

Deputy Sheriff—End of Term—Continued Liability of Sheriff.*—In the first year of V's term of office as high sheriff, an execution goes into the hands of

***Deputy Sheriff—End of Term—Continued Liability of Sheriff's Sureties.**—A deputy sheriff has authority to act after the term of office of the sheriff is ended, in the completion of duties, the execution of which

T. one of his deputies, who returns it levied on personal property and not sold for want of bidders. V qualified the second year as high sheriff, and gave different sureties, and T again qualified as his deputy; and there was no order displacing him. At the end of the second year another person qualified as high sheriff, and then the plaintiff in the execution caused a *venditioni exponas* to issue, directed to V, late high sheriff, which came into the hands of T, and was returned by him "satisfied." HELD:

1st. **Same—Same—Same.**—T was the depty of V for the purposes of this execution, when he made the return of "satisfied," and the high sheriff and his sureties are responsible for his acts.

2d. **Sheriffs—New Bond—Liability of Sureties on Old Bond.**†—The levy having been made during the first year of the high sheriff's term of office, the sureties of that year are responsible.

This was a notice in the Circuit court of Fayette county, by William Wilson against the high sheriff of the county and his sureties, to recover money made upon an execution by William Tyree, one of his deputies. The facts are stated in the opinion of the court. There was a judgment for the plaintiff for the sum of 232 dollars 2 cents, with damages at the rate of fifteen per cent. per annum from the 5th day of June 1848, till paid and costs. Whereupon the sureties applied to this court for a supersedeas, which was awarded.

Price, for the appellants.
Caperton, for the appellee.

60 *ALLEN, J., delivered the opinion of the court.

This as a proceeding by notice to recover from the sheriff of Fayette county and his sureties money collected by his deputy on an execution.

The sheriff gave bond and qualified on the 17th of March 1840. On the 8th of September 1840, a fi. fa., made returnable on the 1st Monday of November following, was placed in the hands of William Tyree, who had qualified and was acting as deputy for the sheriff, and was returned by said deputy executed on personal property, and not sold for want of bidders.

The high sheriff qualified and gave bond, with different sureties, under a second commission, on the 16th of March 1841. Tyree again qualified as deputy sheriff at the same term; and there was no order made thereafter, displacing him; and at the end of the second year another person qualified as sheriff. On the 24th of March 1848, the plaintiff caused a venditioni exponas to issue, which was directed to E. D. Vandal, late sheriff of Fayette county, which came to the hands of William Tyree, and was returned by him as deputy of said Vanal, "satisfied."

Upon this state of facts it becomes necessary to determine whether, at the time of this last return, Tyree was the deputy of the high sheriff in this transaction, so as to bind his principal; and if he was, which set of sureties, those of the first or second year, would be responsible.

It being impossible for the high sheriff to attend personally to everything pertaining to his office, the law, from the necessity of the case, allows him to make a deputy, and implicitly gives him power to execute all the ordinary offices of the sheriff, where the personal presence of the sheriff is not required by law. Bac. Ab. title Sheriff, letter H.

The full power to do any act or thing which his principal might have done
61 is so essential, that according *to Holt, C. J., giving the opinion of the court, in Parker v. Kett, 1 Salk. R. 95, the power of the deputy cannot be restrained to be less than that of his principal, save only that he cannot make a deputy.

The authority of the deputy being thus unlimited as to extent, must also be equally indefinite as to duration, unless it be revoked. Accordingly, it was held, in Jackson v. Collins, 3 Cow. R. 89, that the authority of the deputy was limited by the duration of the authority of the principal, and did not cease when a new sheriff had taken the office.

In that case, the deputy had sold land by virtue of an execution, and had given the purchaser a certificate that he would be entitled to a deed at the expiration of 15 months; and he executed the deed about a year after the high sheriff went out of office. The court held that an execution against the property of the defendant, partly executed by the old sheriff, shall be completed by him, and that, quoad hoc, he is in office, and the acts of a deputy, in relation to such an execution, are the acts of the principal.

So in Larned v. Allen, 13 Mass. R. 295, warrants were placed in the hands of a deputy to collect. He collected a part before his principal went out of office; and having been appointed a deputy by the succeeding sheriff, collected the residue of the warrant after his last appointment. In an action againts the sureties in a bond given by the deputy to the first sheriff, it was decided that as the warrants were put into his hands when he was deputy of the plaintiff, his

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was commenced during the term, and the sureties of the sheriff are responsible for acts of the deputy thus done after the term of his principal has expired. Ballard v. Thomas, 19 Gratt. 24, citing the principal case. See also, *notes* appended to the principal case reported in 58 Am. Dec. 213; monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

†**Sheriff—New Bond—Liability of Sureties on Old Bond.**—Where an execution went into the hands of a sheriff, was levied, and part of it collected and returned more than a year before a second bond was given, the sureties on the bond at the date of the levy are liable although a *venditioni exponas* may have subsequently issued and the money been collected after the second bond had been given. Wooddell v. Bruffy, 25 W. Va. 469, citing the principal case, and Tyree v. Donnally, 9 Gratt. 64.

See also, monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

power to complete the execution of them continued by virtue of the plaintiff's appointment; and the plaintiff had judgment.

The same principle was affirmed in Hill v. Fitzpatrick, 6 Ala. R. 314; and The People v. Baker, 20 Wend. R. 602.

In this court, the principle has been recognized, and acted upon in Dabney's adm'r v. Smith, 5 Leigh 13, and
62 *Douglas v. Stump, 5 Leigh 392. In these cases, administration having been committed to the sheriff, the administration had been conducted by the deputy after the sheriff's term expired; and it was held that the principal and his sureties were answerable for the deputy's administration after as well as before the term expired.

In the last case Tucker, president, said that the acts of the deputy, after the expiration of the sheriff's term of office, are to be considered as the sheriff's official acts, unless he took the proper steps to remove the deputy. These authorities show that the appointment and authority of the deputy continue as long as the principal has any duty to perform as sheriff, which may be performed by the deputy, unless the authority is revoked, or the principal dies.

That the sheriff, after he is out of office, is authorized and may be compelled to sell the goods which he has levied on under an execution, is well settled. The same sheriff who begins an execution must end it. 2 Wms. Saund. 47 m, n 2.

In England, according to the opinion of Holt, C. J., in Clerk v. Withers, 6 Mod. R. 299, a case twice elaborately argued, if a sheriff returns a levy and no sale for want of bidders, he may, if out of office, sell without a venditioni exponas. If he continue in office, he may be compelled to sell by a venditioni exponas; and if he be out of his office, a distringas nuper vicecomitam goes to the new sheriff to distrain the old sheriff to sell. But these writs give him no new authority to sell, but are only intended to quicken him to do his duty, and also to give the parties interested the benefit of an official return, upon which, under our statutes, summary proceedings may be had. The writ of distringas is obsolete in Virginia, and is in fact rendered unnecessary by the 23d section of the act concerning executions, 1 Rev. Code 533. That
63 act provides, that *if the goods taken by the sheriff, or any part thereof, remain in his hands unsold, he shall make return thereof accordingly; and thereupon the clerk is required to issue a venditioni exponas to such sheriff directed. The directions of the act apply as well to a sheriff whose term of office has ceased, as to him whose office continues. In the case under consideration, the levy was made by the officer who qualified and gave bond on the 17th March 1840, as the execution was issued and levied before the expiration of the term of office for that year; and the sureties for that year were properly proceeded against upon the return of the deputy on the venditioni exponas.

Judgment should be affirmed with costs. Judgment affirmed.

64 *Tyree & als. v. Donnally.

July Term, 1852, Lewisburg.

(Absent LEE, J.)

Deputy Sheriff—End of Term—Continued—Liability of Sheriff*—Case at Bar.—G qualified as high sheriff in 1845, with L and T as his deputies. During the year a *fi. fa.* against D and T went into the hands of L, who returned it, "levied, and not sold for want of bidders." After G's term of office had expired, viz: in 1847, the plaintiff sued out a writ of *venditioni exponas*, directed to G, late high sheriff, upon which the deputy T made a return "that he had received $500, which, after deducting sheriff's commissions, gives a credit of $472 50, 16th of June 1846, which is all that I have made:" HELD:

1st. **Same—Same—Same—Same.**—That the levy of the *fi. fa.* by one deputy and the return on the *venditioni exponas* by another, of the receipt of the money, does not impair the right of the plaintiff in the execution to subject the high sheriff.

2d. **Same—Same—Same.**—The high sheriff cannot object to the fact that the deputy T, who received the money, was a defendant in the execution.

3d. **Same—Same—Same—Same.**—The sheriff being authorized to sell by virtue of the levy under the *fi. fa.* and as a consequence to receive the money; and the *venditioni exponas* giving him no new authority, if prior to the issuing of the last writ, he sold the property or received the money, it was his duty to return the truth of the case upon the writ, so as to give the plaintiff the benefit of the return: And the high sheriff is therefore liable to the plaintiff, though the money was received by the deputy T before the *venditioni exponas* was issued.

4th. **Sheriff—Necessity of Demand before Suit.**—Where the plaintiff in the execution lives in the county, no demand of the money is necessary before proceeding to subject the high sheriff.

5th. **Same—Judgment—Clerical Error—Case at Bar.**—In entering the judgment, damages are given from a date anterior to the date of the return of the *venditioni exponas*. As this writ is properly described in the notice, and damages from the return day thereof claimed, and it is made a part of the record, the error was merely clerical, and might have been corrected by the court in term, or by the judge in vacation, upon motion, by reference to the writ. It is not therefore a ground for reversing the judgment, but the same will be amended and affirmed, if there is no other error.

65 *6th. **Same—Interests—Statutes**—The statute gives fifteen *per cent. per annum* interest against a sheriff for failing to pay over money received on an execution. The law upon the subject of appeals gives six *per cent.* in lieu of interest. This last statute does not control or apply to the first.

This was a notice in the Circuit court of Fayette county, by Van B. Donnally against John Guinn, late sheriff of the county, and his sureties, to recover money made upon an execution by William Tyree, one of his deputies. The facts are stated in the opinion of the court. There was a judgment in favor of the plaintiff for 472 dollars 50 cents, with damages at the rate of fifteen per cent.

*See *foot-note* to Tyree v. Wilson, 9 Gratt. 59.

per annum, from the 6th of November 1843, till payment, and his costs. Whereupon, the sureties applied to this court for a supersedeas, which was awarded.

Price, for the appellants.
Caperton, for the appellee.

ALLEN, J., delivered the opinion of the court.

This is a supersedeas to a judgment rendered upon notice, against the sureties of John Guinn, late sheriff of Fayette county, in his official bond. It appears from the bill of exceptions, that Guinn qualified as sheriff on the 13th of March 1845, and remained in office until the end of the year, when he was succeeded by another sheriff. That at the time of Guinn's qualification, William Tyree and Thomas A. Lewis qualified as his deputies, and continued as such: That during the year a fi. fa. in favor of the defendant in error against Dickenson and William Tyree came to the hands of the deputy, Thomas A. Lewis, who made a return of "levied, and not sold for want of bidders;" and that on the 5th of August 1847, there was issued a writ of venditioni exponas, made returnable on the 1st Monday of November following, and directed
66 to Guinn, *late sheriff, upon which William Tyree, the deputy, made a return in the following words: "Received of H. M. Dickenson the sum of 500 dollars on the within execution, which, after deducting sheriff's commissions, gives a credit of 472 dollars 50 cents, 16th June 1846, which is all that I have made."

The duty of the sheriff who has levied an execution, to go on and complete it, and the authority of the deputy to act after the expiration of the sheriff's term of office, were considered in the case of Tyree against Wilson. In this case it is objected that the levy on the fi. fa. was made by one deputy, and another deputy returned on the venditioni exponas, the receipt of the money.

This I think does not affect the rights of the plaintiff in the execution. He has no control over the appointment of deputies, or the distribution of the business amongst them. The law knows but one sheriff of the county; and it is his business to see that process directed to him is executed by the proper officer. There is nothing to show that the plaintiff in the execution intermeddled in any way with the arrangements or proceedings of the sheriff.

It is further objected, that the deputy Tyree was a defendant in the execution. The bill of exceptions does not show any such proofs. But if the fact were so, it could not impair the plaintiff's rights, nor would it lay in the mouth of the sheriff to say he had permitted a deputy who was interested to interfere with the execution.

It is moreover alleged, that it appears by the return on the venditioni exponas, that the money was received before the date of the writ. The sheriff was authorized to sell by virtue of the levy under the fi. fa., and as a consequence to receive the money. The venditioni exponas gives him no new authority. If prior to the issuing of the venditioni exponas he sold the property or received the money, it was his duty to
67 return the *truth of the case on the venditioni exponas, so as to give the plaintiff in the execution the benefit of the return.

It is assigned as error, that there is no evidence of a demand. The objection does not seem to have been made in the court below, nor does it appear that the plaintiff in the execution resided without the county. If he resided within the county, it was the duty of the sheriff to seek him out and pay the money, or have it in court on the return day of the writ.

In entering the judgment, damages are given for 15 per centum per annum from the 16th of November 1843 until paid, a period long anterior to the payment of the money, and before any execution issued. This is clearly a clerical mistake. The writ of venditioni exponas is correctly described in the notice, and damages from the return day thereof claimed. The original debt bore interest from the year 1843, and that date was inadvertently inserted in the order. The plaintiff in the execution proceeds upon the return, and is by law entitled to the damages from the return of the execution only. But the mistake in the date is one which we think could have been amended by the court below in term, or by the judge in vacation, upon motion. The execution is set out in the notice and made part of the record by the bill of exceptions. There is, therefore, a paper whereby the judgment may be safely amended, according to the Code 681, § 5. And as the amendment has not been made, though it ought to be, this court, by the 6th section, may now make it and affirm the judgment, if there be no other error.

The statute gives fifteen per cent. per annum interest against a sheriff for failing to pay over money. The law upon the subject of appeals gives six per cent. in lieu of interest. The court will consider this last statute as not controlling or applying to the first.

Judgment amended and affirmed.

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68 *Early v. Wilkinson & Hunt.

July Term, 1852, Lewisburg.

(Absent LEE, J.)

1. Notes—Signing*—Case at Bar.

$913 50 *Kanawha County, October 3d*, 1850.

Four months after date, I promise to pay to Wilkinson & Hunt, or order, without offset, negotiable and payable at the office of discount and deposit of the Bank of Virginia at Charleston, Kanawha, nine hundred and thirteen dollars and fifty cents, for value received.

Robert H. Early,
[*For Sam'l H. Early.*]

HELD: Upon the face of the paper it is the note of Robert H. Early.

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*Notes—Signing by Agent.—See monographic *note* on "Agencies" appended to Silliman v. Fredericks-

2. **Same—Same—Parol Evidence.**†—Parol evidence is admissible to prove that the note was intended to be the note of Robert H. Early.

3. **Same—Same—Same—Case at Bar.**—Proof that another note was executed by Robert H. Early to another person, about a month previous to the execution of this, with the same addition excepting the brackets, and that the reason given by him for the addition of the words "for Sam'l H. Early" was, "that in the case of the death of either his brother or himself the note would show on what account or for whose benefit it was given," held to be competent evidence; the only question being why were these words "for Sam'l H. Early," written at the foot of the note?

4. **Judgment—Reversal—Evidence Erroneously Admitted.**‡—But if the evidence was improper, yet as the court had properly instructed the jury, that upon the face of the paper it was the note of Robert H. Early, the admission of the evidence could not have been injurious to the defendant; and it is therefore no ground for a reversal of the judgment.

This was an action of debt in the Circuit court of Kanawha county brought by Wilkinson & Hunt against Robert H. Early. The facts are stated in the opinion of the court. There was a verdict and judgment for the plaintiffs; and Early applied to this court for a supersedeas, which was awarded.

69 *Fry, for the appellant.

B. H. Smith and Doddridge, for the appellees.

MONCURE, J., delivered the opinion of the court.

This was an action of debt brought by Wilkinson & Hunt against Robert H. Early on a negotiable note in the following form:

$913 50. Kanawha County, October 3d, 1850.

Four months after date, I promise to pay to Wilkinson & Hunt or order, without offset, negotiable and payable at the office of discount and deposit of the Bank of Virginia at Charleston, Kanawha, nine hundred and thirteen dollars and fifty cents, for value received.

Robert H. Early,
[For Sam'l H. Early.]

The defendant demurred generally to the declaration, and also pleaded nil debet. The plaintiffs joined in the demurrer, and joined issue on the plea. The demurrer was overruled, and verdict and judgment were rendered for the plaintiffs. On the trial of the issue the plaintiffs offered to introduce the note as evidence, which the defendant admitted to be wholly in his handwriting: but he objected to its introduction, on the ground that on its face it purported to be the note of Samuel H. Early, and was variant from the note described in the declaration. The court overruled the objection, and permitted the note to be given in evidence; to which the defendant excepted. The question which was first argued before us, and first presents itself for our decision, arises upon the opinion of the court overruling the objec-

burg, etc., R. Co., 27 Gratt. 119; Lile's Notes to 1 Min. Inst. 99.

†**Same—Signing—Parol Evidence.**—Parol evidence is admissible to prove that a note signed in one name was intended to be and was in fact the note of a person of a different name. Ambach v. Armstrong, 29 W. Va. 746, 3 S. E. Rep. 44.

See the principal case also cited in R. F. & P. R. Co. v. Snead, 19 Gratt. 354; Devendorf v. West Virginia, etc., Co., 17 W. Va. 152; Johnson v. Welch, 42 W. Va. 18, 24 S. E. Rep. 586.

See monographic *note* on "Agencies" appended to Silliman v. Fredericksburg, etc., R. Co., 27 Gratt. 119.

Descriptio Personæ.—See principal case cited in Fidelity, etc., Co. v. Shen. Val. R. R. Co., 33 W. Va. 784, 11 S. E. Rep. 66; State v. Hudkins, 34 W. Va. 372, 12 S. E. Rep. 496.

‡**Reversal of Judgment—Evidence Erroneously Admitted or Excluded.**—In Poindexter v. Davis, 6 Gratt. 493, it was said: "There are, doubtless, cases in which a judgment ought not to be reversed for an error of the court in excluding or admitting evidence, or giving an improper or refusing a proper instruction to the jury, where it appears that such error could not possibly have prejudiced the party. But that can never be predicated of a case depending, as this did, upon parol testimony, the weight and credit of which must of course be determined by the jury."

In Wiley v. Givens, 6 Gratt. 285, the jury was allowed to consider certain evidence which should have been excluded. The point was made in the appellate court that the judgment should be affirmed because no injury had been done by admitting the evidence, since the jury would have been warranted in its finding by the whole evidence. But the appellate court held that it could not undertake to decide what influence the evidence in question may have had on the minds of the jury; that it could look no further than to the propriety of the instructions as to the admission of the evidence and if there was error in the decision in regard to them, then the cause must be sent back for a new trial.

In Rea v. Trotter, 26 Gratt. 600, instructions were given by the lower court which were erroneous, some because they were misleading, and one because it held a certain fact incompetent evidence to prove a certain contract. Though it was insisted by a counsel that the judgment should not be reversed on this account since the party excepting to the instructions was not thereby injured, the court, citing and seemingly approving the case of Wiley v. Givens, said that it must reverse the judgment without undertaking to decide whether or not justice had been done by the verdict and judgment. But as to instruction number 7 (p. 592 of the opinion), the court said: "Without deciding whether the circuit court erred or not in giving this instruction, it is enough to say that the error, if any, is not to the prejudice of the plaintiff in error, who has therefore no right to complain of it." The court seems to make the same decisions concerning instructions 8 and 9 which were erroneous because not supported by any evidence.

(As to when a judgment should be reversed because an erroneous instruction has been given, see *footnote* to Colvin v. Menefee, 11 Gratt. 87.)

But, in Binns v. Waddill, 32 Gratt. 593, the court, in discussing the case of Wiley v. Givens, said: "That case came within the influence of the principle

tion to the note as evidence; and perhaps also, upon the judgment of the court upon the demurrer. That question is, whether the note upon its face purports to be the proper note of Robert H. Early, who 70 wrote and signed it, or of *Samuel H. Early, for whom it appears, by the words in brackets at the foot of the signature, to have been given?

An agent, in executing a note for his principal, supposing him to have authority to execute such note, may bind either himself or his principal. Whether the one or the other be bound, depends upon the intention of the parties; and that intention must appear from the note itself. If the name of the principal be not referred to in the note, the agent who signs it is alone bound. The difficulty arises only in those cases (which however are numerous) in which the name of the principal is referred to either in the body of the note or at the foot of it. "As the forms of words in which contracts may be made and executed," says Chief Justice Shaw, in Bradlee v. Boston Glass Co., 16 Pick. R. 347, "are almost infinitely various, the test question is, whether the person signing professes and intends to bind himself, and adds the name of another to indicate the capacity or trust in which he acts, or the person for whose account his promise is made; or whether the words referring to a principal, are intended to indicate that he does a mere ministerial act, in giving effect and authenticity to the act, promise and contract of another. Does the person signing apply the executing hand as the instrument of another, or the promising and engaging mind of a contracting party?"—"The true and best mode of an agent's signing or endorsing a promissory note for his principal, where he means to make the latter and not himself personally responsible thereon," says Story in his work on Promissory Notes, § 68, "is to sign, or endorse, the same, 'A B, (the principal,) by his attorney or agent C D.' If the signature be 'C D, for A B,' (the principal,) it will be equally available, though not so formally correct. But in the practice of common life, there are many deviations from 71 this course, and occasionally *they give rise to great embarrassments, in endeavoring to ascertain whether, in the actual language used, the agent is personally bound, or the principal alone is bound, or both. Neither is it possible to extract from the authorities any consistent rules to guide us in this matter of interpretation." See Story on Agency, § 274–278; 1 American Leading Cases, 2d edition, p. 625–634, notes.

In the great number and variety of cases on this subject in the reports, not one has been found in which the note was similar in form to that which was executed in this case. The note in this case is in the perfect form of a negotiable promissory note of Robert H. Early, except that under his signature are the words "(for Sam'l H. Early,)" in brackets. Without the addition

that a misdirection of the trying court is always ground of reversal, unless it can be plainly seen from the record that the error did not, and could not, affect the verdict. Rea's Adm'x v. Trotter & Bro., 26 Gratt. 585, was decided on the same ground. Town of Danville v. Waddill. On the other hand, the converse of the proposition is equally true, that if the appellate court is satisfied that the jury, in rendering their verdict, could not have been influenced by the misdirection, it will not, merely because of such misdirection, reverse the judgment. See also, 9 Vol. U. S. Digest, N. S., p. 538, sec. 635, 682."

Again, in Gerst v. Jones, 32 Gratt. 529, it is said: "It may be conceded, for the purposes of the argument, that the evidence adduced is illegal, and yet it does not follow the judgment must, therefore, be reversed. It is very true that, as a general rule, where improper evidence is admitted, the court will set aside the verdict, because it is impossible to say what effect the evidence may have had on the mind of the jury; but that rule does not apply where all the facts are certified, and upon those facts the appellate court clearly sees the prevailing party is entitled to the verdict independently of such evidence. If the court is satisfied that the testimony could not possibly have had any influence on the mind of the jury prejudicial to the objecting party, and that a verdict in his favor must have been set aside, there could be no sort of propriety in disturbing that verdict. 2 Gra. & Wat. on New Trials, pp. 635, 645, 651; see 9 Vol. United States Digest, First Series, p. 638, sec. 635, 682, where numerous cases cited; see Danville Bank v. Waddill, 27 Gratt. 448." See also, *foot-note* to this case.

Though the court errs in admitting, or refusing to admit, certain evidence, if it is manifest that the party excepting could not have been prejudiced thereby such error can afford no ground for reversal of the judgment. See principal case; Southern, etc., Co. v. Trear, 29 Gratt. 255; Payne v. Com., 31 Gratt. 855, and *foot-note* collecting many cases; Payne v. Grant, 81 Va. 173; Vaughan v. Com., 85 Va. 674, 8 S. E. Rep. 584; Bernard v. R., F. & P. R. R. Co., 85 Va. 794, 8 S. E. Rep. 785; Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. Rep. 713. This statement of the rule seems to be supported by the great weight of authority. For it is simply a most specific statement of the broad general rule that where it clearly appears that an error of the lower court could not affect the merits of the cause, nor in any way be prejudicial to the party appealing, the appellate court will not reverse the judgment on the ground of such error. See Kincheloe v. Tracewells, 11 Gratt. 588, and *foot-note*.

But, where it is not manifest that no injury is done by the improper admission or exclusion of evidence, the verdict cannot be sustained. Reusens v. Lawson, 91 Va. 258, 21 S. E. Rep. 347. See also, Binns v. Waddill, 32 Gratt. 593; Gerst v. Jones, 32 Gratt. 529; Southern Mut. Ins. Co. v. Trear, 29 Gratt. 255; Payne v. Com., 31 Gratt. 855, and *foot-note*; Vaughan v. Com., 85 Va. 675, 8 S. E. Rep. 584.

Nevertheless, when exception is taken to the admission or exclusion of evidence, the bill should be so framed by the insertion of proper matter as to make the error, if any, complained of, apparent, otherwise the exception will generally be unavailing. Harman v. Lynchburg, 33 Gratt. 43.

And generally, where the court below excludes evidence, adduced by a party, from a jury, or

of these words, it is certain that Robert H. Early would alone have been bound on the note, even though he may have given it as the known agent of Samuel H. Early. On the other hand, it may be said that if these words had been added, without being enclosed in brackets, and Robert H. Early had authority to sign the note as agent for Samuel H. Early, the latter would alone have been bound on the note, though the mode of executing the note by procuration would not, in that case, have been strictly formal. The question then depends alone upon the import of the brackets; and though it may seem strange that we should give so much import to a circumstance apparently so slight, yet we are of opinion that it is sufficient to turn the scale, and to indicate an intention on the part of Robert H. Early not to do "a mere ministerial act in giving effect and authenticity to the promise of another," but "to indicate the capacity or trust in which he acted, or the person for whose account his promise was made." In the construction of the note, the whole of it should be taken together, and effect must if possible be given to every part of it. It is not presum-
72 able *that any word or sign in the note was used without some meaning. We must presume, therefore, that something was intended by the use of the brackets. What was thereby intended? The ordinary use of brackets in printing, is to enclose a parenthesis; which is defined by lexicographers to be, "a sentence so enclosed in another sentence as that it may be taken out without injuring the sense of that which encloses it." Applying that definition to this case, the parenthesis "for Samuel H. Early" may be taken from this note without injuring the sense of the balance, as understood and intended by the parties. The words, "I promise to pay," in the body of the note, will then plainly refer to Robert H. Early, whose name is thereto subscribed as maker. If Robert H. Early had intended to bind, not himself, but Samuel H. Early as maker of the note, he would have given more prominence to the name of the latter, which then would have been the important name. He would not have enclosed it in brackets, so that it might be taken from the note without injuring the sense of the balance. He would rather have enclosed his own name in brackets, as the name of the mere agent by whom it was signed. They were worse than useless, on the supposition that Samuel H. Early was intended to be bound. They certainly cannot contribute in any way to show such an intention. On the other hand, we think they serve to show a contrary intention, an intention to take from the words enclosed the effect they might otherwise have; to give greater prominence to the name of Robert H. over that of Samuel H. Early, and to indicate that the former was the promiser, and the latter the person for whose account the promise was made, and to whom, as between themselves, the amount of the note was to be charged. This we believe is the only meaning of which the brackets are susceptible: It is a rational meaning, and is consistent
73 *with every other part of the note. We therefore believe it was the meaning in which they were used by the author of the note, in whose handwriting it was wholly written, and who would seem to have been familiar with the proper manner of drawing such instruments.

After the court had permitted the note to be given in evidence to the jury, the plaintiffs introduced a witness for the purpose of proving that about a month before the note to the plaintiffs was given, a similar note was given to him, except that the words "for Samuel H. Early" were not enclosed in brackets, which note was exhibited on the trial; that credit was given by the witness in that transaction to Robert H., and not to Samuel H. Early; and that when the note was written and handed to him, signed "Robert H. Early, for Samuel H. Early," witness asked Robert H. why he had made and signed the note in that form, to which he replied, that in the case of the death of either his brother or himself, the note would show on which account, or for whose benefit it was given, &c., &c. To the introduction of which parol testimony and the note offered in connection therewith, the defendant objected, on the ground that it was irrelevant and inadmissible. But the court overruled the objection, and permitted the evidence to go to the jury, to which the defendant also excepted. The questions arising on this opinion of the court, and argued by the counsel, were: 1st, whether parol evidence was at all admissible in the case; and if so, 2dly, whether the evidence offered was not irrelevant, and on that ground inadmissible.

First, as to the admissibility of parol evidence in such a case. There is certainly no better settled general rule of law than that parol evidence is inadmissible to contradict or vary the terms of a written contract. There is another general rule,
74 which has been *established and recognized by a long series of decisions, (but which has been said to be not perfectly accurate as a definition,) that parol evidence is admissible to explain a latent but not a patent ambiguity. There are cases which would seem rather to fall under the head of patent than of latent ambiguity, in which parol evidence has been held to be admissible. Judge Story, in the case of Peisch v. Dickson, 1 Mason's R. 9, after referring to the rule in regard to patent

refuses to admit evidence offered by a party, and such party excepts to such action of the court, the appellate court will not reverse the judgment of the court below for such action, unless it can be seen from the record, that the evidence, so excluded or rejected, was relevant to the issue, and that such party *may have been* prejudiced by the exclusion or rejection of such evidence. Bowyer v. Seymour, 13 W. Va. 12. (Italics ours.) See also, on this subject, Bart. Law Pr. (2d Ed.) 1334 *et seq.*

and latent ambiguity, says, "The difficulty lies not in the rule itself, but in applying it to particular cases, where the shades of distinction are very nice. There seems indeed to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities; and that is, where the words are all sensible, and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties. In such a case, I should think that parol evidence might be admitted, to show the circumstances under which the contract was made, and the subject matter to which the parties referred." The case of a note signed by one person for another, (at least where it is doubtful on the face of the note which of the two is intended to be bound,) would seem to be one of the intermediate class referred to by Judge Story, or to be governed by the same principle. The doubt in that case is, whether the person who signed the note intended to bind himself or another; and that doubt may be perfectly removed by proof of the surrounding circumstances, in regard to which a court of construction may be placed, by parol evidence, as nearly as possible in the situation of the party whose written language is to be interpreted; the question being, what did the person thus circumstanced mean by the language he has employed? 1 Greenl. Evi. § 295. "The patent ambiguity of which Lord Bacon speaks," 75 say the *same author, "must be understood to be that which remains uncertain to the court after all the evidence of surrounding circumstances and collateral facts, which is admissible under the rules already stated, is exhausted." Id. § 300. And "no judge is at liberty to pronounce an instrument ambiguous until he has brought to his aid, in its interpretation, all the lights afforded by the collateral facts and circumstances which, as we have shown, may be proved by parol." "The language may be inaccurate," says Wigram, in his admirable treatise on the interpretation of wills, p. 175-6; "but if the court can determine the meaning of this inaccurate language, without any other guide than a knowledge of the simple facts, upon which, from the very nature of language in general, its meaning depends, the language, though inaccurate, cannot be ambiguous. The circumstance that the inaccuracy is apparent on the face of the instrument cannot in principle alter the case." It has been decided in several cases, that where an ambiguity arises on the face of an instrument, whether the person signing it, or the person for whom it is given, was intended to be bound, parol evidence is admissible to remove the ambiguity. Mechanics Bank of Alexandria v. The Bank of Columbia, 5 Wheat. R. 326, unanimously decided by the supreme court in 1820, is a leading American case on the subject, and expressly decides the question affirmatively. So does the case of Lazarus v. Shearer, 2 Alab. R. 718. In the case of Bradlee v. Boston Glass Co., 16 Pick. R. 347, before cited, parol evidence was introduced by the plaintiff without objection, and commented on by the learned chief justice, in delivering the opinion of the court. Indeed, we have seen no case in which parol evidence for such a purpose has been held to be inadmissible. The case of Stachpole v. Arnold, 11 Mass. R. 27, was much relied on by the counsel of the appellant in this case, to show that such evidence is 76 inadmissible. *In that case the name of the principal did not appear on the face of the note; and it is a familiar and well settled principle that he cannot be bound in such case. The note on its face was plainly the note of the person whose name was thereto signed, and of no other person; and to have admitted parol evidence to show that it was intended to be the note of another, would have been directly contrary to the rule which declares such evidence inadmissible to contradict or vary a written contract. The great object of the judge, in his learned opinion in that case, was to show that this rule is not confined to specialties, or even contracts under the statute of frauds, but extends to all written contracts. Not one word is said in the whole opinion which indicates that parol evidence would be inadmissible where it is doubtful on the face of the instrument which of several persons was intended to be bound; but the contrary is indicated throughout the whole opinion. After laying down the general rule of exclusion of such evidence, on page 31, he adds, "provided the contract is perfect in itself, and is capable of a clear and intelligible exposition from the terms of which it is composed." Again, on page 32, he says, that a "contract in writing, perfect in itself, and containing no ambiguity on the face of it incapable of explanation, cannot be enlarged or diminished by oral testimony. And on page 33, in speaking of the notes on which the suit was brought, he says, 'they have no ambiguity upon the face of them," &c.

Secondly, as to the irrelevancy of the evidence in this case. There is perhaps no question of greater difficulty in the administration of justice, than that which often arises in regard to the relevancy of evidence to the issue. It is the duty of the court, says Philips, "to confine the evidence to the points in issue, that the attention of juries may not be distracted, nor the public time needlessly consumed; but in de- 77 ciding *that the evidence of any particular circumstance is not receivable upon this ground, the court must impliedly determine that no presumption to be drawn from that circumstance ought properly to have an effect upon the minds of the jury." It is obvious therefore that a great deal must necessarily be left to the discretion of the court of trial, in determining whether evidence is relevant to the issue or not. The question involved in the issue in this case was, why were the words "for Samuel H. Early" written at the foot of the note?

Was it for the purpose of binding him as maker of the note, or merely for the purpose of indicating as between him and Robert H. Early, that the note was given by the latter on the account and for the benefit of the former? As tending to throw light on this question, the plaintiffs proved that less than a month before the note was executed another note was given by the defendant similar in all respects to that, except as to amount, and payee, and in the omission of the brackets; and that the reason given by the defendant for adding the words "for Sam'l H. Early" at the foot of the note, was "that in the case of the death of either his brother or himself, the note would show on what account or for whose benefit it was given." We are not prepared to say that this evidence did not tend to throw light on the question, and was irrelevant, supposing that there was such ambiguity on the face of the note as to render parol evidence admissible on the principles before stated. We do not mean to deny the correctness of the cases cited from East and Peake by the counsel of the appellant, (7 East 108; 5 Day's Esp. Peake Ca. 95,) nor to contend that proof of one contract may be proof, by inference, of another. We mean only to say, in the language of Philips, (edition of 1849, vol. 1, p. 461,) that "it may frequently be very proper, and in some cases absolutely necessary, to look beyond the transaction which is 78 the immediate subject of enquiry *into previous transactions, for the purpose of making a just inference as to the knowledge of the parties, their motives or intention;" and to say, that this case, on the supposition above made, may come within that principle. The object of the evidence in such a case, is not to set up a contract, but to remove an ambiguity apparent on the face of the contract. In the case before cited from 5 Wheat. 326, other transactions were proved; and a check executed about the same time and in the same form (though upon a different bank) with that on which the suit was brought, was offered in evidence and held to be admissible.

But we have gone into the consideration of these two questions, in regard to the admissibility of parol evidence, and the relevancy of the evidence in this case, not because it was necessary to decide them, but because they were discussed by the counsel, and are interesting questions, and we thought it might not be improper to express our views upon them. In this case we have already decided that the note upon its face was the note of Robert H. Early; and the plaintiffs, after introducing it, ought to have rested their case. The parol evidence offered by them to prove that the note was what it purported to be, was unnecessary, and therefore improper. Without it the jury would have been compelled, under the instruction of the court, to have found a verdict for the plaintiff. But should the judgment, on that ground, be reversed? For what purpose? To be remanded to the court below that the same verdict and judgment may be rendered on the note without the evidence? The public time may have been needlessly consumed by the introduction of the evidence in the court below, but can that time be regained by the consumption of more time in another trial? We therefore think, that even if parol evidence be inadmissible in such a case, and 79 *the evidence in this case was irrelevant, the judgment should not be reversed.

For these reasons, we are for affirming the judgment.

DANIEL, J. This is quite a novel case, and I have experienced much difficulty in bringing my mind to a satisfactory judgment on the questions which it presents. My first impressions were, I must confess, strongly in favor of the views urged by the counsel of the plaintiff in error; but on more mature reflection, I have felt constrained to concur in a judgment affirming that of the Circuit court. He who is sought to be charged with the performance of a written promise or engagement, made by himself in person, and endeavors to discharge himself of liability on the ground that his relation to the instrument is that of a mere agent for another, cannot complain of being subjected to a harsh requirement, when held bound to maintain that the instrument does unequivocally disclose such relation. It is true that in the case of Key v. Parnham, 6 Harr. & John. 418, it is stated as a rule, (and I have no doubt correctly,) that "wherever, upon the face of an agreement, a party contracting plainly appears to be acting as the agent of another, the stipulations of the contract are to be considered as operating solely to bind the principle, unless it manifestly appears by the terms of the instrument that the agent intended to superadd or substitute his own responsibility for that of his principal." Still the further rule asserted in the notes to the American leading cases, vol. 1, p. 626, as fairly to be deduced from the decisions, is, I think, equally true, viz: that "in determining whether a party contracts personally or as agent, the presumption is in favor of the former; that is, a party will be bound personally, unless his character of agent be clearly disclosed."

Does the note on which this suit 80 was brought show, *by plain and unambiguous words or signs, that the plaintiff in error was acting as the mere agent of another in its execution? I think not. The fact that the note was a negotiable one, and the consideration that any recital about the relation of the parties in the body of the instrument might therefore be regarded as informal, made it the more incumbent on the plaintiff in error, if indeed he was acting as the agent of another, to manifest his character, plainly, in the signature. I do not think that he has done so.

It is conceded by the counsel for the plaintiff in error that, in the signature and affix thereto, the form most generally used

to designate the execution of a note by an agent has been departed from; yet he has referred to several cases decided by the supreme court of Massachusetts, in which, where the form of disclosing the name of the agents and principals in the signature was (with the exception hereinafter to be noticed) like that employed here, the principals were held bound.

When the usual mode of signing a note by attorney is adopted, A B by C D, no room is left for doubt or construction. The inference is plain, that the person who makes the note is performing a mere ministerial act in its execution. But where the note is signed, as it is in the case before us, "Robert H. Early for Samuel H. Early," or, as in Long v. Colburn, 11 Mass. R. 96, "Pro William Gill—J. S. Colburn," the intention of the parties is by no means so manifest. A doubt arises whether the person executing the note is acting as a mere agent, or is in fact giving his own note for and on account of the debt of another. In the case just above mentioned, and in other cases of a like character cited at the bar, counsel contended for the latter construction; and though overruled, and as I think properly overruled by the court, still it must be conceded that the meaning of the parties is not, in such cases, wholly free from doubt.

81 *The signature to the note here, however, is not simply "Robert H. Early for Samuel H. Early." The only words on the face of the paper which could denote an agency, or disclose that Samuel H. Early was in anywise connected with the transaction ("for Samuel H. Early,") are included in marks or signs of parenthesis, which are generally used to indicate that the clause or words thus marked or included are not essential in the construction of the sentence. Has not the maker of the note thus given to the payee the privilege (as contended for by the defendant in error) to read the note as if the words "for Samuel H. Early" were not on it at all? Be this as it may, the construction in favor of a mere agency by Robert H. Early in the execution of the note was not so clear as to justify the court in withholding the note from the jury.

The evidence offered by the defendant in error, after the introduction of the note, was, I think, improperly received. The declaration of his purpose and intention in respect to another isolated note, and having no connection with the one in suit, made by Robert H. Early at the time of its execution, could not be properly resorted to as furnishing any evidence of what he intended by the language and course adopted by him in the execution of the note in controversy: such testimony was wholly irrelevant.

I do not perceive, however, how the plaintiff in error could have been prejudiced by its introduction. Having rested his defence on the construction to be given to the paper, and the court having permitted it to go to the jury, their verdict against him, in the absence of any further testimony, must have followed as a necessary consequence. The production of further testimony by the defendant in error in aid of the construction given by the court could, in the state of the case, be of no benefit to himself

82 or injury to his adversary. *I regard the introduction of such testimony, therefore, under the circumstances, as merely idle, and though improper, as furnishing no ground on which to found error.

I am for affirming the judgment, with costs to the appellee.

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NOTE BY JUDGE MONCURE.

After the judgment had been affirmed in this case, and during the same term, the counsel for the plaintiff in error presented to the court a petition for a rehearing, which was not granted. The argument contained in that petition is long and ingenious; but on the fullest consideration I am capable of giving it, my conviction of the correctness of the opinion of the court remains unchanged.

The question first presented for decision was, whether the note, on its face, and without reference to extrinsic evidence, purported to be the note of Samuel H. Early, or of Robert H. Early. My opinion was, and is, that without the brackets it would have been, *prima facie*, the note of Samuel H. Early, and that with the brackets it was, *prima facie* at least, the note of Robert H. Early: But that, in either case, extrinsic evidence would have been admissible to repel the presumption. The effect of the brackets, according to my interpretation, is only to shift the burden of proof. I can see nothing unreasonable in this. It is well settled that an agent may either bind himself or his principal by his contract; and that whether one or the other is bound, must depend on the construction of the contract. The evidence on the face of a contract entered into by an agent, predominates in favor of its being the contract, sometimes of the principal, and at other times of the agent. The line of separation is often indistinct. It has been decided in several cases, that though the proper form of signing a promissory note by procuration is "A B" (the principal), by "C D" (the agent), yet a note, signed "C D for A B," is, *prima facie*, the note of the principal, if there be nothing on the face of the note to repel the presumption. I am not disposed to question the correctness of the decisions on this subject, which have been numerous and uniform, and should have the effect of settling the law. I think it probable, however, that persons unacquainted with these decisions would generally consider a note, signed "C D for A B," as the note of C D, unless there was something on its face to show that it was the note of A B. But this case presents a new feature—such as appears in no reported decision. The words "for A B" are enclosed in brackets. On which side of the indistinct line of separation does this new case fall? The case *without* the brackets would have been very near the line, though on that side which binds the principal. *With* the brackets, it may still be near the line, but, I think, is on that side of it

83 *which binds the supposed agent. Were the brackets used without some meaning? It would be contrary to the best settled rules of construction to suppose that they were. Then, with what meaning were they used? In my view of the case, they indicate an intention to

cut off the words they enclose from the rest of the note, so far as R. H. E. and the payees or holders were concerned; and the words were added as a memorandum between R. H. E. and S. H. E., to shew that R. H. E. was to pay out of the funds of S. H. E., or to charge the payment over to him. A person who executes a bond as surety sometimes adds the word "security" to his name, and sometimes encloses the word in brackets, not for the purpose of affecting the obligee, but as a memorandum between himself and his principal. With a similar view the word "ex'or," "adm'r" or "guardian" is often added to a signature. The words "for Samuel H. Early" were admitted by R. H. E. to have been added to his signature to the note to Duling for the purpose of shewing for whose benefit it was given, and not for the purpose of binding S. H. E. or exempting R. H. E. from liability; and though a judgment was rendered on that note against S. H. E., who was *prima facie* liable (the words "for S. H. E." in that case not having been enclosed in brackets), yet there can be no doubt, I think, but that on proof of the extrinsic facts, a judgment could have been recovered against R. H. E. While such an addition, without the use of brackets, is sometimes made merely as a memorandum between the principal and agent, I think that with the use of them it would never be made for any other purpose. But surely it cannot be unreasonable to give to the addition enclosed in brackets the *prima facie* effect of a mere memorandum between the principal and agent, and to throw upon the agent the burden of shewing that it was intended to make not him but the principal liable.

The facility which would be afforded to the forgery of commercial and other paper, and the difficulty which would attend the prosecution and proof of the forgery, were urged in the petition as reasons against the construction adopted by the court. The opinion of the court is of course based on the fact that the brackets were made by the agent; and merely expounds their meaning, supposing them to have been so made. In determining the preliminary question of fact, whether they were so made, the objections urged would be entitled to consideration. But that fact being determined in the affirmative, I do not see what consideration they are entitled to in deciding the question of law arising therefrom. It would have been almost as easy to have perpetrated a forgery in this case by cutting that part of the paper which contained the words "for S. H. E." from the rest, as by enclosing them in brackets; and the former mode would have been more apt to be resorted to than the latter. I do not see the difficulty which the counsel for the appellant seems to see in framing an indictment for such a forgery. "Proof of the altering of a part of a genuine instrument will support an indictment charging the defendant with having forged the instrument itself." Archbold's Crim. Pl. 358. There is no doubt that any, the slightest, alteration of a *genuine instrument in a material part, whereby a new operation is given to it, is a forgery; as for instance, making a lease of the manor of Dale appear to be a lease of the manor of Sale by changing the D to S; "or making a bill of exchange for £8 appear to be for £80 by adding a cipher to the 8." Id. The forgery of a cipher is nothing more than the forgery of brackets joined together. If it be said that the forgery of the cipher might have been prevented by writing out the 8; so also the forgery of brackets may be prevented by executing notes in the proper form of procuration, as "A B by C D."

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The learned counsel seems to have conceded in the petition, what I understood him to deny in the original argument, that parol evidence was admissible to remove the ambiguity, if any, arising from the form of the signature. But he still contended that the evidence offered for that purpose in this case was inadmissible. When I prepared the opinion of the court, my individual impression was that the evidence would have been admissible if the note had not on its face purported to be what the evidence tended to prove it was; but as the court was unanimously of opinion that the note on its face purported to be the note of R. H. E., and as Judge *Daniel* was of opinion that the evidence would not have been admissible, and the other two judges had formed no opinion on that question, it was therefore left undecided in the opinion pronounced by the court. To affirm the judgment it was necessary to decide, either that the note purported on its face to be the note of R. H. E., or that the parol evidence was admissible. We unanimously decided the former, but did not decide the latter, deeming it unnecessary to do so. My individual impression in regard to the latter remains unchanged; but as the court has given no opinion upon it, I have not since given the question much further consideration, and will take no further notice of it here.

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85 ***Gardner v. Neal.**

July Term, 1852, Lewisburg.

(Absent LEE, J.)

Sheriffs—Commissions on Ca. Sa.—Case at Bar.—A sheriff is entitled to commissions on a *ca. sa.* executed on the defendant, who, after taking the benefit of the prison bounds, pays the amount of the execution to the plaintiff, by whom he is thereupon discharged from custody before the return day of the execution.

This was an action of covenant instituted in the Circuit court of Wood county by Cincinnatus J. Neal against William S. Gardner. The action was founded on a covenant which bore date on the 29th of December 1841, and the object was to recover from the defendant the amount of the commissions on certain executions which the plaintiff claimed to be entitled to as deputy sheriff. The facts, as agreed by the parties, are: That on the 1st of December 1841, nine writs of ca. sa. issued from the Circuit court of Wood county against Robert S. Smith, which went into the hands of the plaintiff, then a deputy sheriff of Wood county; that he executed these writs before the return days thereof, viz: on the 16th of December 1841; and Smith being in custody under these executions, gave a prison bounds bond in each case, and took the benefit of the prison rules. That whilst he was so in the bounds he sold to the defendant Gardner two houses and lots in Parkersburg; and Gardner, as part of the consideration of these houses and lots, agreed to pay off the executions to the creditors, and to pay to the sheriff his commissions and fees on said executions, if he was by law entitled to commissions on the

amount of said executions. That Gardner, in pursuance of this agreement, paid
86 to *the creditors the amount respectively due to them on the executions, and executed to the plaintiff the covenant on which the action was brought, binding himself to pay the commissions if the sheriff was entitled to them: and thereupon Smith was discharged out of custody, and the action was afterwards instituted. And it was agreed that if the plaintiff was entitled to the commissions, judgment should be rendered in his favor for 110 dollars 73 cents, with interest thereon from the 20th day of December 1841 till paid, and costs.

The court below decided in favor of Neal, and thereupon Gardner applied to this court for a supersedeas, which was awarded.

J. J. Jackson and Fisher, for the appellant.

Grattan, for the appellee.

MONCURE, J., delivered the opinion of the court.

The only question which this case presents for our decision is, whether a sheriff is entitled to commission on a ca. sa. executed on the defendant, who, after taking the benefit of the prison bounds, pays the amount of the execution to the plaintiff, by whom he is thereupon discharged from custody before the return day of the execution?

It was decided by the court of King's Bench, in the case of Slackford v. Austen, 14 East's R. 468, that the sheriff in the execution of a ca. sa. must pursue the mandate of the writ and be ready at the return day, not with the money, but with the body; that he had no right to receive the money, and if he did, though he should return the fact, and that he was ready to satisfy the plaintiff, he would be answerable as for an escape. It was decided by the same court, in the case of Crozer v. Pilling, &c., 10 Eng. C. L. R. 271, that a plaintiff is bound to accept from a defendant
87 in custody *under a ca. sa. the debt and costs, when tendered, in satisfaction, and to sign an authority to the sheriff to discharge the defendant out of custody.

But by our statute law, 1 Rev. Code of 1819, p. 534, § 28, it is provided, that where a ca. sa. is served on a debtor, he may tender to the officer serving it slaves or personal property to the value of the debt and costs for which the execution issued; which property the said officer shall receive, and proceed to sell, as in the case of goods taken under a fi. fa., and shall thereupon discharge such debtor out of custody. The right of the debtor to tender property, and the obligation of the officer to receive it and discharge the debtor under this law, continues, at least, until the return day of the execution. So long as the debtor may tender property, so long may he tender money, in discharge of his body from custody under a ca. sa. The right to tender property necessarily implies a right to tender money for that purpose. See 1 Rob. Pr. 551. The right of the debtor to tender property or money in discharge of his body is not impaired by his taking the benefit of the prison bounds, which is but an enlargement of the jail, and in which he is still a true prisoner in the eye of the law. 1 Munf. 76. There can be no doubt but that the officer, returning the facts on a ca. sa., that he had served it on the debtor who had taken the benefit of the bounds, and afterwards paid the debt and costs before the return day of the execution, and that he had thereupon discharged the debtor out of custody, and was ready to pay the money to the plaintiff, would be liable for the same on his official bond. Nor can there be any doubt but that the officer in such case would be entitled to a commission. Can the debtor, after the ca. sa. has been served, while it is in full force, and before the return day, deprive the officer of his commission, by paying the money to the plaintiff? Certainly a debtor, after a
88 fi. fa. has been levied, cannot *deprive the officer of his commission, by paying the money to the plaintiff before the sale of the property levied on. And why should the officer be deprived of his commission in the former any more than in the latter case? His trouble and responsibilities are at least as great in the former as in the latter. In each case, the execution has been levied, and in neither is it functus officio when the payment is made. In the one case, the debtor may pay the money in discharge of his goods; in the other, in discharge of his body; and we think the officer is as much entitled to his commission in the one case as in the other. We are therefore for affirming the judgment.

Whether the officer would have been entitled to commission if the money had been paid after instead of before the return day of the ca. sa., is a question which we do not mean to decide, because it does not arise in this case. Here the money was paid before the return day. The fact is not expressly so stated in the case agreed, but it is necessarily inferrible from what is therein stated. The ca. sas. were issued on the first, and executed on the 16th of December 1841, and the money must have been paid on or before the 29th of the same month, as the covenant on which the suit was brought bears date on that day. They could not have been returnable to December rules, because there were not fifteen days between the test of the writ and the said rules, and there was no term of the Circuit court during that month. The return day, therefore, must have been later than December 1841.

Judgment affirmed.

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89 *Roach v. Gardner.

July Term, 1852, Lewisburg.

1. **Practice—Demurrer to Declaration—Case Agreed—Waiver of Demurrer.***—In an action at law the de-

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***Summons—Insufficiency of—Waiver.**—In Moore v. Douglass, 14 W. Va. 729, it is said: "But waiving this, I think it should be taken and held in this case

fendant demurs to the declaration, and afterwards agrees the facts, and that the court shall render a judgment upon the case agreed, which is done. He thereby waives his demurrer to the declaration.

2. **Injunctions — Bond — Accrual of Liability.**†—The plaintiff in an injunction dismissed his bill at rules. The defendant in that suit may bring his action on the injunction bond immediately, without waiting until the order of dismission is confirmed at the next term of the court in which the injunction suit was pending.

This was an action of debt upon an injunction bond in the Circuit court of Wood county, brought by William S. Gardner against John J. Malcolm and Jesse Roach. The defendants demurred generally to the declaration, and to each assignment of breaches therein; and the plaintiff joined in the demurrer. Subsequently, the defendant Malcolm pleaded his discharge as a bankrupt, upon which the plaintiff replied that there was no such record; and that issue was found for Malcolm. At the same term the defendant Roach and the plaintiff agreed the facts, of the execution of the bond on which the action was founded, the granting the injunction to Malcolm; that at the September rules for Wood county in 1843 Malcolm in person dismissed his bill, and that a decree against him was then entered by the clerk in favor of the plaintiff for his costs. That afterwards at the April term 1844 of the Circuit court of Wood county, there was an order confirming the dismission at rules; and that the action on the injunction bond was commenced on the 11th of October 1843. And it was further agreed that if on the foregoing facts
90 the law is for the plaintiff, the *judgment is to be rendered in his favor for the sum of 192 dollars 62 cents, with interest on 123 dollars 55 cents from the 11th February 1847 until paid; which sum includes debt, interest, damages, costs at law and in equity: if the law is for the defendant, then judgment is to be rendered for him. Upon the case agreed the Circuit court rendered a judgment for the plaintiff: whereupon Roach applied to this court for a supersedeas, which was awarded.

Fisher, for the appellant.

There was no counsel for the appellee.

LEE, J., delivered the opinion of the court.

In this case the plaintiff in error assigns two grounds upon which, as he contends, the judgment of the court below is erroneous and ought to be reversed: One is, that the court erred in overruling the demurrer to the declaration, treating the rendition of final judgment in favor of the plaintiff in the court below as a virtual overruling of the demurrer; and the other, that the court erred in giving judgment for the plaintiff on the case agreed, the law arising thereon, as the plaintiff in error contends, entitling him to the judgment of the court in his favor.

Two grounds of objection to the declaration are alleged: One, that it contains no averment of the nonpayment of the debt (the penalty of the injunction bond on which the action was founded) in the declaration mentioned; and the other, that it appears from the face of the declaration, that the chancery suit to obtain the injunction on which the injunction bond was executed with the usual condition, had been dismissed by the complainant therein at rules, and that the suit on the injunction bond for breach of its condition was instituted before the said office dismission had or could have been confirmed by the
91 court, *the next term of the court after the said office dismission not commencing by law until some time after the suit had been instituted. But the court deems it unnecessary to express any opinion upon the sufficiency of the declaration, because it seems to the court that the plaintiff in error, by entering into the agreement of the facts of the case on the record, and formally submitting that the court should render its judgment in the case upon that state of facts, must be held to have waived and abandoned the demurrer to the declaration which he had previously filed. He had filed no plea whatever, nor sought to make any issue of fact; and subsequently came in, and the facts being agreed, consents that the judgment of the court shall be for the plaintiff or for the defendant in the action, as the court shall be of opinion that the law upon those facts was for the one or for the other. It can scarcely be supposed, that if he had intended to rely upon his demurrer, he would have entered into an agreement resting the case upon the facts agreed; and the court can only regard these parties as having intended to put an end to the litigation between them by invoking the judgment of the court upon the facts, without regard to the previous pleadings in the case. The court is therefore of opinion, that the agreement entered of record was a sufficient reason for the court passing by the demurrer to the declaration, and proceeding at once to render its judgment upon the agreed case. And this view of the case, the court think, is supported by the opinion and judgment of the court in the case of Royall v. Eppes, 2 Munf. 479.

The other ground of error assigned goes to the foundation of the plaintiff's action. It appears that the chancery suit in which this injunction bond had been given, was dismissed at September rules 1843. The action was commenced on the 11th of

under the circumstances appearing, that the defendants by their action and consent, etc., waived any defect existing in the summons for insufficiency of description, which could be supplied by the verdict of the jury at the trial. A party may by his acts and agreements waive a demurrer. See Brodie v. Clator, 8 W. Va. 599; *Roach v. Gardner, 9 Gratt. 89.*" See the principal case cited in Shepherd v. Brown, 30 W. Va. 18, 3 S. E. Rep. 189.

†**Injunctions—Bond—Accrual of Liability.**—See monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

92 October 1843, *some months before the next term of the court after such dismission; and it is insisted by the plaintiff in error, that the right of action upon the injunction bond was inchoate only, and not consummate until this office dismission had been confirmed by the court, or at least not until after the rise of the then next court. This is doubtless correct as to office judgments, including office dismissions, in suits at law; and the case of Evans v. Freeland, 3 Munf. 119, is a sufficient authority to show that a scire facias upon an office judgment in a suit at law, which does not aver that the office judgment was confirmed by the court or by rise of the next court, will be fatally defective. But the court thinks there is a difference in this respect in proceedings under the act of 1819 in suits at law and suits in equity. The act provides, in regard to the latter class of cases (1 Rev. Code, p. 213, § 78), that upon the complainant's dismissing his bill or the defendant's dismissing the same for want of prosecution, the complainant shall pay costs, to be taxed by the clerk of the court; for which costs an attachment or other process of contempt or an execution may issue at the election of the defendant, returnable on any return day; thus, evidently, contemplating nothing further to be done to render the dismission final and absolute, but providing the means at once for compelling the payment of the costs incurred by the dismission of the suit. Nor does the court regard the operation and effect of this provision as modified or altered by the terms of the clause concerning the limitation of the period within which a suit, dismissed in the office or in court, might be reinstated, found in the act of March 7th, 1826; nor that it was intended by the last named act to require anything more to render an office dismission perfect than was required by the act of 1819.

93 *The court is therefore of opinion, that upon this voluntary abandonment of his injunction by the complainant, by the dismission of his suit, a breach of the condition of his bond was committed, for which an action accrued immediately; and that the defendant in error was not bound to wait until after the rising of the court at its next term, but could bring his suit on the bond at once. And no error to the prejudice of the plaintiff in error appearing in the said judgment, the same is to be affirmed with costs.

Judgment affirmed.

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94 *Mairs v. Gallahue.

July Term, 1852, Lewisburg.

1. **Erection of Dam—Petition—Allegations.**—In a petition for leave to erect a dam, the petition, which was *ore tenus*, states that the applicant is owner of the banks on both sides of the stream. This is in effect a statement that he is the owner of the land, and especially as it appears from other parts of the proceedings that he is the owner of the land on both sides of the stream.

2. **Same—Same—Same—Statute.**—The petition states that the applicant desired a writ of *ad quod damnum* to issue for the purpose of erecting a water grist mill, &c. This is a sufficient compliance with the statute, which says: "When any person desiring to build a water grist mill," &c.

3. **Same—Same—Inquisition—Construction.***—Where, upon a fair and reasonable construction of the inquisition, it is substantially responsive to the requirements of the statute, that is sufficient.

4. **Same—Same—Failure to Specify Height of Dam—Jury May Specify in Inquisition.**—Where the petition, or the order of the court directing the writ of *ad quod damnum* to issue, does not specify the height of the dam proposed to be erected, it is proper and correct for the jury to specify it in their inquisition.

5. **Court of Appeals—Correction of Error by County Court in Circuit Court—Objection in Supreme Court.**—There is an exception for the refusal of the County court to continue the cause on account of the absence of a material witness: But on appeal to the Circuit court by the exceptant the case is again heard upon the record of the County court and upon the testimony of witnesses then examined before the court, one of whom is the witness referred to in the exception; and the judgment of the County court is affirmed. The want of the witness's testimony before the County court cannot be the subject of complaint in the court of Appeals.

6. **Same—Practice—Case at Bar.**—An exception is taken to the judgment of the County court authorizing the erection of the dam, on the ground that it would be injurious to the health of the neighborhood; and the evidence is stated in the exception. The Circuit court passes upon that question upon full evidence, and to its opinion there is no exception. And as both the County and Circuit courts were satisfied upon that point, the court of

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***Erection of Dam—Inquisition—Construction—Eminent Domain.**—In Bridge Co. v. Comstock, 36 W. Va. 276, 15 S. E. Rep. 73, it is said: "It is a general rule that he who seeks to exercise the extraordinary power of taking private property for public utility must follow strictly the mode of procedure prescribed by law. Supervisors v. Stout, 9 W. Va. 703. But I take it that when, upon a fair and reasonable construction of the inquisition (and proceedings), it is substantially responsive to the requirements of the statute, that is sufficient. *Mairs v. Gallahue, 9 Gratt 94;* Railroad Co. v. Foreman, 24 W. Va. 662."

Also, in Varner v. Martin, 21 W. Va. 546, it is said: "The court of appeals of Virginia, while acts of this character were enforced, constantly recognized the constitutionality of such acts, and often as a matter of course where the acts were complied with, recognized the right of the owners of such mill sites to condemn lands for the erection of such dams for such water grist mills, and also to condemn lands to be overflowed by the erection of such mill dams. The following are some of the many cases wherein there was this silent recognition of the right to condemn lands for such purposes: Bernard v. Brewer, 2 Wash. 77 (top page 99); Wroe v. Harris, 2 Wash. 126 (top page 162); Noel v. Sale, 1 Call 495 (top page 431); Wilkinson v. Mayo, 3 H. & M. 565; Coleman v. Moody, 4 H. & M. 1; Dawson v. Moons, 4 Munf. 535; Smith v. Waddill, 11 Leigh 532; Hunter v. Matthews, 1 Rob. 468; *Mairs v. Gallahue, 9 Gratt. 94.*"

Appeals will presume that the proofs showed the health of the neighborhood would not be affected by the erection of the dam.

95 *7. **Leave to Erect Dam—Provision for Ferry—Case at Bar.**—The judgment of the court giving leave to erect the dam provides that the applicant shall keep a ferry boat at the crossing of a public road over the stream across which the dam is to be erected. HELD:

1st. **Same—Same—Authorized by Statute.**—This is authorized by the statute, 2 Rev. Code 227, § 5; and as the County and Circuit courts have held upon the proofs that a ferry boat at that place will sufficiently remedy any impediment to the crossing of the stream, the court of Appeals will presume that they acted rightly; nothing being shown to the contrary.

2d. **Same—Same—Duty of Keeping up—Incident to Grant.**—The duty of keeping up the ferry boat is not merely personal to the grantee of the privilege of erecting the dam; but it is a condition and incident of the grant, and attaches to it into whose hands soever it may pass.

3d. **Same—Same—Kind of Boat.**—The kind of boat to be kept must be such an one as the exigencies of the travel and trade on the road shall require.

4th. **Same—Same—Free Passage.**—It is the duty of the party required to keep up the ferry boat to ferry the public over the stream without charge.

The facts of the case are sufficiently stated in the opinion of Judge Lee.

Fisher, for the appellant.
B. H. Smith, for the appellee.

LEE, J. This was an application on behalf of the appellee, S. M. Gallahue, to the County court of Jackson, under the act of assembly, for leave to erect a dam across Big Sandy creek in said county, for the purpose of working a water grist mill and saw mill. The applicant claimed to be the owner of the banks on both sides of said creek, at a place specified, and prayed a writ of ad quod damnum for the purpose of erecting such mills and dam on said lands. The writ was awarded, and an inquest taken, which was returned to the court. The appellant, Thomas Mairs, and four other persons named, appeared in court, and upon their motion were admitted as defendants to contest the application; and they moved the court to quash the proceedings; which motion was overruled by the court; and the defendants excepted.

96 They also moved the *court to continue the cause, on the ground of the absence of a person who would be an important and material witness on their behalf, if present. This motion the court also overruled; and the defendants excepted. The court thereupon proceeded to hear the case, and after having heard the evidence and weighed all the circumstances, decided in favor of the application, and gave the leave asked for; providing and stipulating, however, in the order, that the applicant, for preventing any impediment to the crossing of the creek where a certain road passed, should keep a ferry boat for the public convenience where the said road crossed. From this order granting the leave aforesaid, Mairs and Kearny applied for and obtained an appeal to the Circuit court of said county of Jackson. And the cause coming on to be heard in that court on the transcript of the record of the proceeding in the County court, and also upon the testimony of the witnesses introduced and examined in the Circuit court by the parties, that court was of opinion that leave to erect said dam was properly given by the County court, and the judgment of the County court was affirmed. And to this judgment of affirmance Mairs obtained a supersedeas from this court.

Several objections have been urged in this court to the regularity of this proceeding, which will be noticed in the order in which they were taken.

The first objection is, that the petition sets forth that the applicant "owned the banks" on both sides of the creek, instead of alleging that he "had the fee simple property in the land on both sides of the stream." The petition in this case was, as it properly might have been, ore tenus; Mead v. Haynes, 3 Rand. 33; and the terms in which its purport and effect are noted on the record should not, perhaps, be the subject of very nice criticism. The terms "owner of the land," "having the fee simple property in the lands,"

97 *"proprietor of the land," seem to be used indifferently in the act, and to be intended to have the same import. And the expression "owned the banks on both sides of the creek," evidently meant that he owned the land on the banks. Indeed, where the petition, as noted, states that he desired the writ of ad quod damnum to issue, it says, "for the purpose of erecting a water grist mill and saw mill on said lands. Taking the whole together, no doubt can arise as to the meaning intended; and it appears also in a subsequent part of the record, the inquest of the jury, that the applicant was the owner of the lands on both sides of the creek at the place in question.

It is argued that a river properly consists of water, bed and banks; and that if one own the banks only, he does not own the water or the bed. The act, however, does not speak of property "in the bed" of the stream, but only in the land on both sides; and it has long since been decided that where the applicant owns the land on both sides of the stream, the presumption is that the bed of it belongs to him also, and therefore it is unnecessary for him to set it forth in his application. Wroe v. Harris, 2 Wash. 126; Neale v. Cogar, 1 A. K. Marsh. R. 589. I think there is nothing in this objection.

The next is, that the petitioner states he desired a writ of ad quod damnum to issue for the purpose of erecting a water grist mill, &c., whereas the statute says, "when any person desiring to build a water grist mill," &c. The difference is merely verbal and not material, the party's intention to build a mill, &c. being sufficiently and plainly expressed.

It is contended that the inquest is defective, and exception is taken both to its frame and structure and to the language in which it is expressed. It may be true that it is not drawn with very great clearness or precision, nor according to the rules
98 of grammatical construction *and correct composition. But giving to its language a fair and reasonable interpretation, there is no difficulty in ascertaining its true meaning, and that it is substantially responsive to all the requirements of the statute. The expression in the inquest that the jurors "proceeded to view the premises, to wit, the mill to be erected," may be an inaccurate one, or it may be that the mill-house had in fact been erected, though leave for the dam had not been yet obtained. But either way, it certainly cannot vitiate. With regard to the ownership of the lands of the persons named in the inquest, the fair construction is not that Gallahue was the owner of those lands, but that the jury proceeded to view the premises; also the land above and below the abutment; also the lands of the persons named; and that those persons were the owners of the land above and below the lands of Gallahue, which it was supposed might probably be overflowed or damaged; and a finding that their lands would not be overflowed, and that no damage would accrue to any of the proprietors, is substantive compliance with the statute. The finding "that fish of passage or ordinary navigation will not be obstructed is precisely equivalent to a finding that neither will be so obstructed. The finding that the dam may be erected eight feet high, if irregular, could do no harm; but in fact it was altogether proper and correct for the jury to specify the height of the dam of which they were undertaking to describe the probable consequences and effects, inasmuch as neither in the petition nor in the order of the court nor in the writ had the height of the proposed dam been specified. Morgan v. Banta, 1 Bibb's R. 579. And the judgment of the court giving such leave, should specify the height of the dam allowed, and in this case is to be understood as allowing a dam of the height mentioned in the inquest of the jury. There being thus no substantial
99 defect apparent *on its face, the county court properly overruled the motion to quash the proceeding.

Upon their application for a continuance of the case, the contestants did not show any sufficient reason to entitle them to it; and if they had, still they had ample opportunity of offering, and perhaps did offer, the testimony of the witness, Dr. Adams, on the trial in the Circuit court; and the want of his testimony on the trial in the County court cannot now be the subject of complaint here.

With regard to the testimony of the physicians and others, touching the probable injurious effects of the erection of the dam on the health of the neighborhood, set out in the second bill of exceptions taken on the trial in the County court, it may be said to be at least very unsatisfactory. But however that may be, the Circuit court afterwards passed upon that question, upon full evidence, and to its opinion upon it no exception has been taken. And as the County court and the Circuit court were both satisfied upon that point, this court can but take it for granted that the proofs showed the health of the neighborhood would not be annoyed.

It is objected that the judgment of the court giving leave to erect the dam, by the provision which it contains requiring the applicant to keep a ferry boat at the crossing of the road, shows that the effect of the dam would be to drown a ford, and that for that reason the leave should not have been granted. And the case of Morgan v. Banta, 1 Bibb's R. 579, is referred to in support of the position. It is true the opinion of the court in that case was to the effect, that if, on an application to build a dam, it appeared that the neighborhood was already sufficiently supplied with mills, the fact that a public road was likely to be obstructed by it would be a sufficient reason for refusing the application. But it is to be observed that the Kentucky
100 *statute concerning mills, with reference to which the court in that case was speaking, unlike ours, (at this day,) contained no provision authorizing the court to lay the party under conditions for preventing impediments to the convenient crossing of the stream on which the dam is to be erected. 2 Morehead's and Brown's Digest, 1215. In the case of Morgan v. Banta, the party offered to submit to terms that would secure the uninterrupted crossing of the stream, but the court held that it had no power either to impose such terms or to enforce them. At the revisal of 1819, a provision was introduced into our Code expressly authorizing the court to lay the party under conditions for that purpose, thereby clearly recognizing the right to grant the leave even in cases in which the effect of the dam might be to obstruct a ford; the party being laid under proper conditions to remedy the inconvenience. And as in this case both the County court and the Circuit court have held, upon the proofs, that a ferry boat at this place will sufficiently remedy any impediment to the crossing of the creek, this court will presume that they acted rightly, and prescribed a proper and sufficient expedient for the purpose, nothing being shown to the contrary.

It is true, exception is taken to the terms in which the duty of keeping a boat is prescribed, and it is urged that it is made a duty merely personal to Gallahue himself, and does not extend to his heirs or alienees. And it is asked, how long is it to last? And if Gallahue die or alien the property, who is bound? Again, it is said, that the order of the court does not prescribe the kind of boat to be kept; whether a flat boat, skiff or canoe; and though it requires the applicant to keep a boat, it does not require him to ferry the public over. It may be

questioned whether this is not rather a matter of police regulation, within 101 the *discretionary powers of the court, touching the exercise of which the contestant can scarcely be permitted to raise questions in this form. But however this may be, I do not think the exception maintainable. The duty to keep up a ferry boat is not merely personal to the grantee of the privilege of erecting the dam; it is a condition and incident of the grant, and attaches and adheres to it, into whose hands soever it may pass. The party who takes the dam, takes it cum onere; and he who undertakes to keep it up, must take care to keep up the ferry boat also at his peril. And if he fail to do so, the law provides ample remedy for the neglect. The kind of boat obviously intended by the order to be kept up, is that which the exigencies of the travel and trade on the road shall require, whether it be a flat, skiff or canoe. And the duty of keeping it up as a ferry boat, plainly and manifestly implies the duty of ferrying the public over the stream without charge, compensation for the service having been already allowed to the applicant in the privilege granted him to erect and keep up the dam.

Upon the whole case, I am of opinion that the record shows no error to the prejudice of the appellant, and that the judgment of the Circuit court should be affirmed, with costs to the appellee.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

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102 *Armstrong v. Stone & Wife.*

July Term, 1852, Lewisburg.

1. **Possession of Child—Habeas Corpus—Petition—In Whose Name.**—The petition for a writ of *habeas corpus* to obtain possession of a child, may be in the name of the infant by his next friend, or in the name of the person claiming the possession. And where it is the mother of the child who is claiming the possession, and she is a married woman, it may be in the names of her husband and herself.
2. **Same—Same—Office of Writ.**—The proper office of the writ of *habeas corpus* is to release from illegal restraint; and where the party is of years of discretion and *sui juris*, nothing more is done than to discharge him. But if he be not of an age to determine for himself, the court or judge must decide for him, and make an order for his being placed in the proper custody; and to enable it to do so, must determine to whom the right to the custody belongs.
3. **Parent and Child—Infant—Custody—Habeas Corpus—Discretion of Court.**†—The father being dead, the mother is entitled to the custody as of right; and she does not lose this right by a second marriage. But where she is seeking by the writ of *habeas corpus* to have the child placed in her custody, the court may exercise its discretion, and determine whether, under all the circumstances, it is best for the infant that he should be assigned to the custody of the mother.
4. **Same—Same—Same—Same—Case at Bar.**—A case in which a female child was taken from the custody of its grandfather and grandmother and delivered to the mother, though she was married to a second husband; all the parties being respectable.

This was a proceeding in the Circuit court of Jackson county.

The facts are stated in the opinion of the court.

B. H. Smith, for the appellant.
Fisher, for the appellees.

ALLEN, J., delivered the opinion of the court.

James Stone and Serlie his wife presented a petition to a judge of the Circuit court, alleging that a female infant child, the daughter of the female petitioner by 103 *a former husband, was illegally retained in the possession and custody of the appellant, John J. P. Armstrong, the paternal grandfather of the child, and prayed that a writ of habeas corpus ad subjiciendum might be awarded them. The petition was verified by affidavit, and the judge, by his order referring to the petition, awarded to the infant the writ, which issued in the usual form, and was made returnable before the Circuit court of Jackson county at a special term. On the return day the cause was docketed and continued, and on a subsequent day the appellant appeared and moved to quash the writ, the order awarding it, and the petition of the relators. This motion the court overruled, being of opinion that it was not competent to make such motion until a return was made to the writ, and that after the return it would be competent to make any defence of which he might avail himself on a motion to quash. The appellant thereupon made a return and produced the infant; and the evidence on both sides being heard, the court directed the child to be restored to the custody of its mother, the female petitioner. From this decision the defendant below has appealed.

The first error assigned is the refusal of the court below to quash the proceedings, because it is alleged the petition should have been made by the infant by her next friend.

This objection is based upon the provisions of the Code, p. 613, which it is argued varies from the act contained in 1 Rev. Code 468, § 1, which enacted that whenever

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*For monographic note on Parent and Child, see end of case.

†Parent and Child—Infants—Custody—Habeas Corpus.—Upon a writ of *habeas corpus* for the custody of an infant the court will exercise its discretion as to who is the proper custodian. For this proposition the principal case is cited and approved in the following cases: Coffee v. Black, 83 Va. 569; Mathews v. Wade, 2 W. Va. 467; Rust v. Vanvacher, 9 W. Va. 609, 611, 612; State v. Reuff, 29 W. Va. 757, 2 S. E. Rep. 804; Green v. Campbell, 35 W. Va. 702, 14 S. E. Rep. 214; Cunningham v. Barnes, 37 W. Va. 754, 17 S. E. Rep. 311.

any person detained in custody, whether charged with a criminal offence or not, shall, by himself or by some other person in his behalf, apply, &c., and show by affidavit or other evidence, probable cause to believe that he is detained in custody without lawful authority, &c. The Code provides that the writ shall be granted to

any person who shall apply for the
104 same *by petition, showing by affidavit or other evidence, probable

cause to believe he is detained without lawful authority; omitting the words by himself or some other person in his behalf, found in the act of 1819.

We think there is no substantial difference between the two enactments. Both acts depart, in many particulars, from the act of 31 Charles 2, which was limited to cases of detainer for criminal or supposed criminal matter, all other cases of unjust imprisonment being left to the habeas corpus at common law; whereas our act extends to all cases where a person is detained without lawful authority. 2 Tuck. Com., book 2, chap. 68. In all such cases, therefore, the provisions of the statute come in place of the common law; and as it was the leading intent of all the statutory provisions on this subject to extend and simplify this great and efficacious remedy for all illegal confinement, the words of the statute should be liberally construed so as to carry out that intent. Whether the application or petition be preferred by the party himself, or in his name or by another in his behalf, probable cause to believe he is detained by unlawful authority must be shown by affidavit or other evidence. When this is shown the writ is awarded to him, and the application would be treated as made by him unless disavowed. Where the person alleged to be detained illegally labors under disabilities, it would seem to be more appropriate to issue the writ on the petition of the person asserting the claim to the custody, than upon the petition of the person detained by his next friend. In either mode there is a person liable for the costs, and from whom the bond provided for in the 3d section may be required. The party contesting the claim sustains no injury, is deprived of no benefit, whether the one mode or the other be adopted, and should not be permitted to defeat the writ by mere

personal objections.
105 *It is objected that the petition is

in the name of the husband and wife, and that although the mother might be entitled to the custody of the child, the right is personal, and does not devolve on the second husband; and therefore he improperly joined in the petition. It may be conceded that there is no devolution of authority to the husband; but until it is also shown that a second marriage forfeits the right of the mother, there is nothing in the objection; for she could not institute any proceeding to assert the right unless her husband united. The enactment in the Code 533, § 7th, does not apply to this case. There may be a guardian during the lifetime of the father or mother, or both of them. That section, as a general rule, gives the custody of the ward and the care and management of his estate to the guardian, but provides that the father, if living, and if dead, the mother, while she remains unmarried, shall, if fit for the trust, have the custody of the person of the minor and care of his education. This is not a controversy between the mother and a regularly appointed guardian for the custody of the minor, in which case only would the statute apply.

It is further argued that it is not the function of a writ of habeas corpus to try rights of property or settle questions of guardianship, but simply to release from improper confinement; and if it appear there is no improper restraint upon the minor, the court should not interfere.

It is true that a contest for the guardianship could not properly be determined upon a writ of habeas corpus. The law has prescribed another form for settling such controversies. In England the chancellor, representing the king as parens patriæ, has jurisdiction to determine controversies concerning the guardianship of a minor, and may control the right of a father to the custody of his child. De Manneville v.

De Manneville, 10 Ves. R. 52. But
106 the courts of law and the *judges

thereof possess no such authority. Ex parte Skinner, 17 Eng. C. L. R. 122. In that case Ch. J. Best said, that no authority had been cited to show that the court had jurisdiction to take a child out of the custody of the father and deliver it over to the mother. Being in the legal custody of the father, if he abused his parental authority, the chancellor might interfere. The same proposition is advanced in The People v. Chegary, 18 Wend. R. 637. In the case of De Lacy v. Antoine, 7 Leigh 438, this court declared, that if, on the return, there was probable cause to believe that the petitioner was detained as a slave, the right to freedom should not be determined on a habeas corpus.

Whilst, therefore, it is undoubtedly true that the proper office of the writ is to release from illegal restraint, and where the party is of years of discretion and sui juris, nothing more is done than to discharge him; yet, if he be not of an age to determine for himself, the court or judge must decide for him, and make an order for his being placed in the proper custody. And to enable it to do so, must determine to whom the right to the custody belongs. The custody of the minor will be assigned to the person having the right, unless it appeared he was an improper person to take it. There being no legal guardian whose rights are involved in the present controversy, and the father being dead, the mother, by reason of nurture, is entitled to the custody as of right, 4 Comyn's Dig. title Guardian, D; Ratcliff's Case, 3 Cope 37. Mellish v. De Costa, 2 Atk. R. 14. And as she seeks by this writ to have the child placed in her custody, the case is one

in which the court can use its discretion whether, under all the circumstances, it is best for the infant to assign it to the custody of the mother. The jurisdiction of the court or judge to determine who has the right to the custody of the minor 107 upon a habeas corpus, *has been uniformly affirmed. King v. Delaval, 3 Burr. R. 1434; King v. Greenhill, 31 Eng. C. L. R. 153. Where the person entitled has the custody and abuses it, the power of the court is limited, and the remedy for the abuse must be administered in another form. But where he has not the custody, and is seeking to be restored to it, the court will exercise its discretion according to the facts, consulting the wishes of the minor, if of years of discretion; if not, exercising its own judgment as to what will be best calculated to promote the interests of the child, having due regard to the legal rights of the party claiming the custody.

In the present case, the mother was entitled to the custody as her legal right: the right was not lost by her intermarriage, there being no legal guardian to the child; and the facts and circumstances disclose nothing which should induce the court, in the exercise of a sound discretion, to deprive her of the custody. The defendant and wife are proved to be persons of exemplary character, warmly attached to their grandchild, who has been treated by them with great kindness and affection. But they are in the decline of life, in doubtful circumstances as to solvency, and somewhat dependent on their own children for a home. The mother and her second husband are shown to be persons of excellent moral character. They have been married two years and have no children; and the husband is an industrious young man, whose father is in good circumstances. The mother, after the death of her first husband, who left no estate, supported herself by teaching school and her own labor; and during that period the child was left in the care of the defendant. The child is in her seventh year, too young to judge for herself upon such a state of facts. The judge, in the exercise of a sound discretion, could not hesitate in saying, in the language of the chancellor in Mellish v. De Costa, 2 Atk. R. 14, that the child 108 had a *natural right to the care and nurture of her mother. The conduct of the mother in permitting the child to remain with the defendant whilst she herself was laboring for her own support, does not impair her right to the custody. Owing to the change in her condition, the interest of the child will probably be promoted by the custody being restored to her.

Judgment affirmed.

PARENT AND CHILD.

I. Parent and Child.
- A. Rights of Parent.
- B. Personal Services.
- C. Transactions between Parent and Child.

II. Bastardy.
- A. Definition.
- B. Presumption of Legitimacy.
- C. Construction of Statute of Legitimacy.
- D. Capacity of Bastards to Inherit.
- E. Bastardy Proceedings against Putative Father.

Cross References.

Infants, appended to Caperton v. Gregory, 11 Gratt. 505.
Seduction.

I. PARENT AND CHILD.

A. RIGHTS OF PARENT.

Right of Parent to Custody of Child.—See monographic *notes* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398; and "Divorce" appended to Bailey v. Bailey, 21 Gratt. 43. See also, Stringfellow v. Somerville, 95 Va. 701, 29 S. E. Rep. 685.

Remedy.—The writ of habeas corpus is the proper remedy for the ascertainment and enforcement of the legal or proper custody of an infant. Green v. Campbell, 35 W. Va. 698, 14 S. E. Rep. 212. See monographic *note* on "Habeas Corpus."

Father's Right of Action for Loss of Child's Services.—The father has the right to the custody of his infant child, with the correlative duty of maintenance, from which there results a right to the child's services; hence, the father is entitled to maintain an action for loss of its services against any one who wrongfully interrupts the rendering of them, or makes the full rendering of them during minority impossible. The loss of service is the gist of the action. Taylor v. C. & O. R. Co., 41 W. Va. 704, 24 S. E. Rep. 631; State v. Reuff, 29 W. Va. 751, 2 S. E. Rep. 801.

Employment of Minor without Parent's Consent.—Where one knowingly engages a minor in a dangerous employment, without the father's consent, express or implied, and the minor is injured in such employment, he is responsible to the father for the consequent loss of the minor's services. This is certainly true when it is against the known will of the father, as in the principal case. Taylor v. C. & O. R. Co., 41 W. Va. 704, 24 S. E. Rep. 631.

Imputation of Negligence.—In Norfolk, etc., R. Co. v. Ormsby, 27 Gratt. 455, it was held that the negligence of parents and guardians was not to be imputed to infant children and wards, disapproving of the doctrine laid down in Hartfield v. Roper, 21 Wend. 615; Norfolk, etc., R. Co. v. Groseclose, 88 Va. 267, 13 S. E. Rep. 454; Dicken v. Salt Co., 41 W. Va. 511, 23 S. E. Rep. 582; Trumbo v. Street-Car Co., 89 Va. 780, 17 S. E. Rep. 124; Roanoke v. Shull, 97 Va. 419, 37 S. E. Rep. 34.

LEWIS, P., said obiter in Norfolk, etc., R. Co. v. Groseclose, 88 Va. 267, 13 S. E. Rep. 454, that if the suit were by the parent for the loss of service caused by the injury to the child, the contributory negligence of the plaintiff would be a good defence, but it is not to be considered where the suit is by the child or his personal representative. Gunn v. Ohio, etc., R. Co., 42 W. Va. 676, 26 S. E. Rep. 546.

Release of Claim to Child's Services.

Emancipation of Child.—Though the father is entitled to the custody of his child's person and to his services during infancy, yet it is competent for the father, notwithstanding he is indebted and insolvent at the time, to release to his son all claim to the latter's services; where the father consents to the son's becoming a partner, this is a relinquishment of all claim to the services of the son, during the existence of the partnership, in the business in which the

son is actively engaged. Penn v. Whitehead, 17 Gratt. 503; Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. Rep. 570; Jackson v. Jackson, 96 Va. 165, 31 S. E. Rep. 78.

Child's Right to Sue for His Wages.—Where the father of a minor does not claim and never has claimed his wages, the minor himself may recover his wages after he comes of age, where he establishes his right to them in other respects. Jackson v. Jackson, 96 Va. 165, 31 S. E. Rep. 78.

B. PERSONAL SERVICES.—"In all cases where compensation is claimed for services rendered near relatives, as a father, brother, grandfather, etc., the law will not imply a promise, and no recovery can be had unless an express contract, or what is equivalent thereto, is shown. It is not enough to establish a moral obligation to pay for them, but an actual promise must be proved, or facts from which such promise can be reasonably inferred, established by evidence so clear, direct and explicit, as to leave no doubt as to the understanding and intention of the parties. Loose declarations to neighbors or friends, or even to the claimant himself, are not enough, particularly when such relative is deceased. It must be shown that the deceased intended to, and did assume a legal obligation to the complainant for such services, of such a character that it could be legally enforced against him. Expressions of commendation or gratitude, or of an intention to remember him in his will, cannot, unless brought home to the knowledge of the claimant, and shown to have been the consideration upon which the services were rendered, to the knowledge of the deceased, be made the basis of a contract obligation. An action cannot be predicated upon intentions merely." Jackson v. Jackson, 96 Va. 165, 31 S. E. Rep. 78; Harshberger v. Alger, 31 Gratt. 52; Stansbury v. Stansbury, 20 W. Va. 31; Broderick v. Broderick, 28 W. Va. 378; Riley v. Riley, 38 W. Va. 283, 18 S. E. Rep. 572; Beale v. Hall, 97 Va. 383, 34 S. E. Rep. 53.

Uncle and Nephew.—Where a minor lives with his uncle as a member of his family, the uncle furnishing him with food, raiment, and shelter, and the minor rendering to his uncle his services, without any contract or mutual understanding as to compensation for support or wages to be paid, such minor cannot recover from his uncle, nor from his personal representative, the value of the services thus rendered, though the value of such services may have been greater than the value of such support. Riley v. Riley, 38 W. Va. 283, 18 S. E. Rep. 569.

Father-in-Law and Son-in-Law.—No compensation will be allowed a son-in-law for nursing his father-in-law, in the absence of a contract express or implied, since, considering the relation between the parties, the services are such that no compensation ought to be expected. Williams v. Stonestreet, 3 Rand. 559.

Conversely, No Action by Father against Son.—On the other hand, no action can be maintained by a father against a son for his board and that of his horse, in the absence of any express contract or engagement to pay for them; hence, an express contract by the son founded on such antecedent services is void for want of consideration. In this case, a deed of trust by the son, to secure the father was held fraudulent as to creditors of the son. Stoneburner v. Motley, 95 Va. 784, 30 S. E. Rep. 364.

Presumption Ceases after Emancipation of Children.—When children leave their father, marry, and set up in life for themselves, the presumption that he gives them their support, ceases. When they come back to the parental roof to live, with adequate means for their support, unless he chooses to give them board, they are under the same obligation to pay their way as any body else, and, under such circumstances, the law presumes a promise from a benefit accepted. Bell v. Moon, 79 Va. 354.

Or Where Father and Son Deal with Each Other as Strangers.—Where the plaintiff avers that he is the natural son of the testator, but there is no proof that the testator, during his lifetime, by any act or word ever acknowledged that any such relationship existed, and there is no evidence to show that they ever dealt with each other, or treated each other in their business relations, otherwise than as strangers; and it appears from the bill and is not denied in the answer, that the plaintiff at the request of the testator lived with his family on the testator's farm and worked for him, that on leaving him, he sued the testator for his labor and recovered, which suit was settled by the testator executing to him his obligation for $400, that afterwards, when testator had become very old and feeble and unable to work his farm, the plaintiff at the testator's request, sold some land he had purchased, and moved on the testator's farm again, and with his own means and labor put it into a saleable condition: *held*, that the plaintiff was entitled to recover for his property and labor expended on testator's farm. Broderick v. Broderick, 28 W. Va. 378.

Expectation of Compensation Induced by Representations of Other Party Sufficient.—Where a minor, residing with a near relative, other than her parents, is led to believe, by the kindness, conduct, and conversations, in jest or earnest, of such relative, that she is to receive compensation for her future services rendered in promotion of his business, in some form, and, in expectation of such compensation, she faithfully performs such services, and he afterwards discharges her without compensating her in the manner in which he led her to believe he would do, and denies all liability to her, she is entitled to recover the actual value of such services, in an action of assumpsit, even though such relative testifies that such promises were made in jest, and he had no expectation or intention of recompensing her for her services, but was only acting towards her *in loco parentis*. Plate v. Durst, 42 W. Va. 63, 24 S. E. Rep. 580.

Express Contract for Compensation.—If a father promise to pay a son for caring for and supporting him it creates a valid demand in favor of the son. Harris v. Orr, 46 W. Va. 261, 33 S. E. Rep. 257.

Services Performed in Expectation of a Legacy.—Where there is an express agreement between a father and a son that the father will devise the home place to the son, or in some testamentary way compensate him for his services, if the son will attend to and take care of him for life, and the son performs his part of the agreement, he is entitled to recover upon a *quantum meruit* for his services if the father's part of the contract is unperformed. It is a valid contract, though not in writing, not forbidden by the statute of frauds, and not barred by the statute of limitations, until the prescribed period has run since the death of the promisor before the bringing of the suit. Cann v. Cann, 40 W. Va. 138, 20 S. E. Rep. 916; Jones v. Jincey, 9 Gratt. 720.

Evidence Showing Absence of Express Contract.—Where the evidence shows that the grandfather promised his grandson, that if he *would stay over with him*, he would pay him, and the plaintiff stays,

this negatives any presumption that there was any antecedent contract for compensation. Jackson v. Jackson, 96 Va. 165, 31 S. E. Rep. 78.

Will Admissible Evidence to Show Rendition of Services.—A will of the testator is admissible evidence to show that the services had been actually rendered, where the will gives a certain sum for services rendered by the plaintiff. Stansbury v. Stansbury, 20 W. Va. 23.

Statute of Limitations.—Even if a daughter has a valid claim for services rendered her mother, as it accrued in the lifetime of her mother, and the statute began to run then, the claim will be barred by the statute when she does not bring action till six years after her mother's death, and though her claim were an equitable claim against her mother's equitable separate estate, the claim will be barred in the same time as at law. Harshberger v. Alger, 31 Gratt. 52.

Insufficient Acknowledgment of the Claim.—The following words in a will are not a sufficient acknowledgment of the debt to take it out of the statute of limitations: "I give to Abraham $8,800.00 in the value of the land, $3,000.00 for his services rendered." The acknowledgment is coupled with a qualification which shows that the debt was satisfied at the same time that the promise was made. The land is given in satisfaction of the claim, if the satisfaction is renounced, the acknowledgment is likewise. Stansbury v. Stansbury, 20 W. Va. 23.

C. TRANSACTIONS BETWEEN PARENT AND CHILD.

Contracts between Parent and Child.—Contracts between parent and child are regarded in equity with a jealous eye, hence in all cases, where the *bona fides* of the transaction is brought in question, it is requisite that the proof be clear, cogent and convincing. Saunders v. Greever, 85 Va. 252, 7 S. E. Rep. 391.

So where a son claims the personal property of his father under a parol purchase; though the property is listed for taxation in the son's name, this only raises a *prima facie* presumption of ownership in the son, which may be overcome by other evidence, especially when it appears that it was so listed merely to avoid an execution levy for a surety debt. Saunders v. Greever, 85 Va. 252, 7 S. E. Rep. 391.

Gifts between Parent and Child.—A court of equity will furnish its aid in making effective a gift of land, by a father to his child when the gift is evidenced by an unsealed instrument, executed by the father and formally delivered to the child. Marling v. Marling, 9 W. Va. 79. See monographic *note* on "Gifts."

Undue Influence.—A reconveyance from a daughter to her father obtained from the daughter by working upon her affection for her father, who was old and feeble and of whom she was very fond, and obtained when she was in a strange place and without giving her the opportunity for deliberation or counsel, will be set aside on the ground of undue influence. Davis v. Strange, 86 Va. 793, 11 S. E. Rep. 406.

When Conveyance Presumed to Be in Satisfaction of a Debt.—Where a father, being indebted to his children, afterwards conveys property to them, which is more than equal to the amount of the debt, this conveyance will be presumed to be in satisfaction of the debt, if there are no circumstances to prove a contrary intention. And although the property conveyed, and the debt, are not *ejusdem generis*, the one may be a satisfaction of the other, if the intention of the testator be apparent that such should be the effect. Kelly v. Kelly, 6 Rand. 176.

Payment by Father of Child's Debts.—If a father make payments in part of a gaming debt of his son, and never reclaim them in his lifetime, but provide by his will a fund for payment of the balance, they should not, after his death, be claimed of his son's estate, but considered as payments, or advancements, to the latter; as payments, to the amount of any previous existing accounts of the son against the father; and beyond that amount, as advancements to the son. Carter v. Cutting, 5 Munf. 223.

Undutiful Litigation Discountenanced.—A court of equity will not countenance the unjust litigation of an undutiful son against his mother, though she is his legal guardian. Myers v. Myers (W. Va.), 35 S. E. Rep. 868.

Naturalization of Parent.—Under § 2172, Rev. U. S. Statute (1873), the children of persons naturalized under any law of the United States, being under the age of twenty-one, shall, if dwelling in the United States, be considered citizens thereof; but the second clause of that section, providing that "the children of parents, who now are or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof," does not apply to children who are over twenty-one when their father was naturalized, even though the father was naturalized before these statutes went into effect. In any event, the word "now" refers to the year 1802, when the statute was originally enacted, hence would not apply to the child of whatever age of a father naturalized in 1866. Dryden v. Swinburne, 20 W. Va. 89.

II. BASTARDY.

A. DEFINITION.—A bastard in Virginia is "one born out of wedlock, lawful or unlawful, or not within a competent time after the coverture is determined; or, if born out of wedlock, where parents do not afterwards intermarry, and the father acknowledge the child; or who is born in wedlock when procreation by the husband is for any cause impossible." 1 Min. Inst. (4th Ed.) 438; Smith v. Perry, 80 Va. 567.

B. PRESUMPTION OF LEGITIMACY.—The presumption of the law is in favor of the legitimacy of the child where recognized by the husband, unless procreation by the husband was impossible for any cause, from his being beyond the seas, and the like. Smith v. Perry, 80 Va. 563; Scott v. Hillenberg, 85 Va. 245, 7 S. E. Rep. 377.

"With respect to procreations during marriage, the presumption is, that all persons born during marriage are legitimate. This presumption can be destroyed only by contrary proof, demonstrating that the child is not the child of the husband; which, again, can only be done by showing that, from his continued absence from his wife, at or about the time of procreation, or from the impotency of his body, it is impossible that he should be the father. This presumption, in favor of legitimacy, is so strong, and the exceptions thereto are held under such strictness, that, where a man was divorced from his wife, *propter perpetuam generandi impotentiam*, and then married another woman, who had issue during the marriage, that issue was holden to be his, on the ground that a man may be *habilis et inhabilis diversis temporibus*. It is not, therefore, a mere circumstance of probability that will operate in this case to bastardize the issue. Such issue will

be held to be legitimate, unless it be conclusively shown, that a person, other than the husband, must necessarily and unavoidably have been the father. This doctrine applies, *a fortiori*, it is believed, to cases of procreation before the marriage." ROANE, J., in Bowles v. Bingham, 3 Munf. 601.

Evidence to Repel Presumption Must Be Clear and Positive.—The presumption of legitimacy is not rebutted by proof of circumstances, which only create doubt and suspicion. To repel the presumption of legitimacy in any case, the evidence must be clear and positive. Scott v. Hillenberg, 85 Va. 245, 7 S. E. Rep. 377.

What Evidence Insufficient.—Where the parents of the supposed bastard lived together as husband and wife and reared the child as their own, and the pretended father only sets up his claim, after the child's death, in order to succeed to his property, though respectable witnesses assert their belief that he is the father, on the ground that the mother did have an older child by the pretended father, who was acknowledged to be his child, nevertheless, this was held insufficient and the presumption of legitimacy prevailed. Smith v. Perry, 80 Va. 563.

Nonaccess of Husband Must Be Proved beyond Reasonable Doubt.—Nonaccess of the husband to the wife must be proved beyond all reasonable doubt; so where the preponderance of evidence is in favor of the legitimacy of the issue, the question will be decided in favor of legitimacy. Scott v. Hillenberg, 85 Va. 245, 7 S. E. Rep. 377.

Husband's Declarations.—A husband's declarations that a child born in wedlock is not his, are not sufficient evidence to prove it illegitimate; notwithstanding it was born only three months after the marriage, and a separation, between his wife and himself, soon after took place by mutual consent. Bowles v. Bingham, 2 Munf. 442.

Mulatto Child of White Parents.—Where husband and wife are both white persons and a child is born of the wife during their wedlock and cohabitation; upon the trial of an issue, whether this child is the legitimate child of the husband, evidence that the child is a mulatto, and that, in the course of nature a white man and a white woman cannot procreate a mulatto, is admissible and proper, TUCKER, P., saying: "It is not this or that particular impossibility that bastardizes the child. The essence of the rule is, that if it be impossible that the husband can be the father, the child is a bastard. The cases of the husband being beyond sea, imprisoned, impotent, and the like, are but instances of the application of the rule. Even nonaccess, if proved, though the parties are in the same kingdom, will suffice. How, then, if the impossibility rests upon the laws of nature itself? Shall it be less regarded? Shall the white child of a white couple be bastardized, upon questionable proof that the husband was rendered impotent by disease; and shall we legitimate a negro because he was born in wedlock? The learned judges give no countenance to such opinions." Watkins & Wife v. Carlton, 10 Leigh 575.

C. CONSTRUCTION OF ACT LEGITIMATING THE ISSUE OF VOID MARRIAGES, LEGITIMATES THE ISSUE OF A SECOND MARRIAGE, THOUGH FIRST HUSBAND IS STILL ALIVE.—Under the statute which declares that "The issue of marriages deemed null in law shall nevertheless be legitimated," Code Va., § 2554, the issue of a woman by a second marriage, which took place during the lifetime of her first husband, are legitimate. Stones v. Keeling, 5 Call 143, approved in Heckert v. Hile, 90 Va. 390, 18 S. E. Rep. 841, where the issue of a second marriage born before the dissolution of the first marriage, were held legitimate, and the case of Greenhow v. James, 80 Va. 636, was held not to be in conflict with this decision nor that of Stones v. Keeling, *supra*.

Legitimation by Subsequent Marriage and Recognition.

Act of 1785 Retroactive.—A child born out of wedlock in the year of 1776 was legitimated by the subsequent intermarriage of his parents and acknowledgment by his father in 1778, under the act of 1785, taking effect 1st Jan. 1787, providing that: "Where a man, having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated." Sleigh v. Strider, 5 Call 439.

Such Issue Are Entitled to Share in the Distribution of Their Father's Estate.—An illegitimate child, born before the first of January, 1787, of parents who intermarried also before that period (the father, who died in 1799, having recognized the child by his will as his own, though born before wedlock), is entitled to an equal distribution of the father's unbequeathed estate, with his other children born after the marriage, being legitimated by the act of 1785. Rice v. Efford, 3 H. & M. 225.

Such Issue Deemed "Issue of the Marriage."—Issue born before the intermarriage of their parents, are to be deemed "issue of the marriage," where the parents afterwards intermarry, so as to prevent them from being mere volunteers under a marriage settlement. Coutts v. Greenhow, 2 Munf. 363.

But this decision was discredited, or at least held not to apply where such subsequent intermarriage was illegal, or where the parties, being a white person and a negro went out of the state to be married, though the marriage was valid where celebrated. Greenhow v. James, 80 Va. 636.

Effect of Recognition before Marriage, or after Death of the Person Born Out of Wedlock.—Where a bastard marries and dies, leaving a legitimate child: and then the parents of the bastard marry and the father of the bastard, before the father's marriage, and in the lifetime of the bastard, recognizes her as his child; and so recognizes her after his marriage, which is after the bastard's death, it was held that the child of the bastard may inherit through his mother, from her father. Ash v. Way, 2 Gratt. 208. See present statute, Code Va. 1887, § 2553, which provides that recognition may be before or after marriage.

Statute Does Not Apply to a Subsequent Void Marriage.—The provision of the Code of Va. 1887, § 2553, that "If a man having had a child or children by a woman, shall afterwards intermarry with her, such child, etc., if recognized by him before or after marriage, shall be deemed legitimate," does not apply to a marriage made absolutely void by the terms of the statute, *e. g.*, a marriage between a white person and a negro. LEWIS, P., and RICHARDSON, J., dissenting. Greenhow v. James, 80 Va. 636.

Construction of Act Legalizing the Marriage of Negroes.—The Act of Assembly of February 27, 1866, "To legalize the marriage of colored persons then cohabiting as husband and wife" applies to the issue of such marriages, whether born before or after the passage of said act, and whether there had been any formal marriage ceremony or not. Smith v. Perry, 80 Va. 563. "This law, in effect, antedates the marriage, and makes it valid from the time the

relation began, and their children are legitimate whether recognized or not, if the cohabitation continued until the day of the passage of the law, and it was not in the power of the father to bastardize the children begotten by him, if he was still cohabiting with the mother. Where the connection and cohabitation has ceased before the passage of the law, the legitimacy of the child depends upon the recognition of the father." LACY, J., in Smith v. Perry, 80 Va. 563.

To Be Construed Liberally.—Such a law, being remedial, must be construed so as to advance the remedy and extend the relief. Smith v. Perry, 80 Va. 567.

The Question of Bastardy, Settled in Other Respects, as in Case of Valid Marriage.—Where in a case under that law it is charged that the supposed bastard was begotten by one not the husband, the question of bastardy must be settled as that question would be, when bastardy is charged against a person born during coverture or recognized during coverture, though born before. Smith v. Perry, 80 Va. 563.

D. CAPACITY OF BASTARDS TO INHERIT AND TRANSMIT INHERITANCE.

May Transmit Inheritance on the Part of Their Mother.—Under the statute of Virginia directing the course of descents, 1 Rev. Code, ch. 96, Code 1887, § 2552, bastards are capable of transmitting inheritance on the part of their mother; and where a bastard dies intestate, leaving no children or descendants, but leaving his mother surviving, and two bastard brothers, by other fathers, the estate will pass to the mother and the two bastard brothers; but the two bastard brothers, being regarded as of the half blood only, will each inherit only half so much as the mother. Garland v. Harrison, 8 Leigh 368; Hepburn v. Dundas, 13 Gratt. 219; Thomason v. Andersons, 4 Leigh 118.

PARKER, J., in Garland v. Harrison, 8 Leigh 368, said: "I have no doubt that it was intended by the 1 Rev. Code, ch. 96, § 18, Code 1887, § 2552, to bestow upon illegitimate children the same capacities of inheriting from and through their mother, and passing inheritance to and through her, as they possess under the 19th section, Code 1887, § 2553, relating to subsequent legitimation, in respect to both parents; that is to say, to make them in all respects the legitimate children of their mother."

Take with Legitimate Children as "Children" of Their Mother.—Upon a devise to a daughter for life, and at her death the property to be equally divided among her children, an illegitimate child of the daughter will take with her legitimate children. Bennett v. Toler, 15 Gratt. 588. See Thomason v. Andersons, 4 Leigh 118.

E. BASTARDY PROCEEDINGS AGAINST PUTATIVE FATHER.

Residence of Woman.—The law does not require that the woman, who makes the complaint, should have resided a year in the county before the birth of the child, but, "for the preceding year," *i. e.*, for a year preceding her complaint. Tennant v. Brookover, 12 W. Va. 337.

May Make Complaint before Any Justice of Her County.—It is not necessary for the warrant to show in what district or township the woman resided, nor that she resided in the same district or township in which the justice, before whom she made the complaint, resided. If she had resided for a year in the county, she might go before any justice in any township thereof and make the accusation. Neither was it necessary for the warrant to be returned before the justice of the *township* or *district*, in which the accused is found. The law requires the justice, if it be a proper case, to issue a warrant directed to the sheriff of, or constable in, any *county* where the accused may be, requiring him to be apprehended and taken before a justice of *any* township of the county, in which he may be found. Tennant v. Brookover, 12 W. Va. 337.

Charge Must Be in Writing.—But if it appears that the charge before the magistrate by the mother of the bastard child was not taken down in writing, according to the provisions of the act, the judgment must be reversed and the complaint dismissed. Howard v. Overseers, 1 Rand. 464; Mann v. Com., 6 Munf. 452.

One or More of the Overseers of the Poor Must Be Parties to the Proceedings.—A person accused of being the father of a bastard child, cannot lawfully be bound to support such child, unless it appear that the warrant was issued by the magistrate upon the application of the overseers of the poor, or one of them, or that they, or one of them, were parties to the cause in the court making the order against such person. Mann v. Commonwealth, 6 Munf. 452.

It Must Appear That Child Has Been or Is Likely to Be Chargeable to the Parish.—Under the 18th section of the act of 1792, "providing for the poor," etc., a person is not to be bound to support a bastard child, unless it appear that such child has either actually been, or is likely to be, chargeable to the parish. And where the bastard child has never been placed on the parish list, but has been supported without any engagement of the overseer of the poor respecting it, the court is not authorized to enter a retrospective judgment, compelling its alleged father to pay for its previous maintenance. Fall v. Overseers of Augusta County, 3 Munf. 495.

But It Is Immaterial Whether Anything Has Been Actually Paid for the Support of the Child or Not.—Where the county court makes an order against the putative father of a bastard child, that he shall pay to the overseer of the poor twenty dollars a year for seven years, though the overseers of the poor may never have paid anything for the support of the child, they are entitled to recover these annual sums from the putative father. Willard v. Overseers of Poor of Wood County, 9 Gratt. 139.

Proceedings May Be Instituted by a Married Woman.—An order of the county court that the putative father of a bastard child, whose mother was a *married* woman, who had been deserted by her husband should pay to the overseers of the poor a certain sum annually for six years, commencing from the birth of the child, was held proper, though the statute applies in terms only to single women. 2 Rev. Code 1819, p. 272; Code 1873, p. 923, § 1; Lyle v. Overseers, 8 Gratt. 20.

After Judgment Rendered and Bond Given, the Defendant Cannot Be Rearrested.—In a proceeding in bastardy against the putative father, after the defendant has been arrested, the case tried before a jury, and verdict rendered, and judgment rendered upon the verdict, and the defendant has given bond, approved by the court, to insure compliance with the order of the court as to the payment of money for the maintenance of the child, the cause is ended, and the law does not authorize the rearrest of the defendant to compel him to comply with the judgment of the court, or to give a new bond to secure such compliance. Barbour County Court v. O'Neal, 42 W. Va. 295, 26 S. E. Rep. 182.

Accrued Installments Payable When Judgment Rendered.—It is not error for the court to render a judgment ordering the defendant to pay a certain amount for the maintenance of a bastard child at the end of every year, and requiring the defendant to give bond for the performance of the order, though one of the installments became due six months before the judgment was rendered; for though he cannot go back and pay the first installment, yet he can pay it when he executes the bond. Tennant v. Brookover, 12 W. Va. 337.

Mother Has Power to Compromise the Proceedings.—Under the statutory provisions of this state, a bastardy proceeding can only be instituted by the mother of the child; and unless the county court assumes the prosecution thereof, and orders the suit to proceed in its name, she has the right to compromise and dismiss the same. Failure regularly to continue such suit from term to term, or require a renewal of his recognizance, operates as a discharge of the accused, and such proceeding can only be renewed by the mother in the manner provided by law. Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. Rep. 812.

Note Given in Compromise Valid.—A note given to a woman in compromise of a bastardy proceeding is binding and valid, and on sufficient consideration, and the payment thereof cannot be avoided on the ground that the compromise of such proceeding is contrary to public policy, or against public morals. Nor can the innocence of the putative father be set up as a defence against the recovery of such note, in the absence of fraud on the part of the obligee in procurement thereof. Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. Rep. 812.

Jurisdiction of Courts in West Virginia.

Act of Dec. 9, 1873, Not Applicable to Causes Then Pending in Circuit Courts.—The Act of Dec. 9, 1873, "To amend and re-enact chapter 80 of the Code," touching the maintenance of bastards, was not retrospective and did not take away from the circuit courts their jurisdiction to try warrants of bastardy, which had issued and under which recognizances had been taken, requiring defendants to appear in said courts, before the passage of said act, but the proceeding should conform as far as possible to that act. Tennant v. Brookover, 12 W. Va. 337.

Evidence.

Complainant's Chastity Not in Issue.—In a prosecution for bastardy against the putative father of a bastard child, under the provisions of chapter 80 of the Code, the character of the complainant for chastity is not involved in the issue. Swisher v. Malone, 31 W. Va. 442, 7 S. E. Rep. 439.

Admissibility of Evidence of Previous Sexual Intercourse of Complainant—Must Be Capable of Affecting Paternity of Child.—Upon the trial in such a proceeding the defendant will not be permitted to introduce evidence to prove that the complainant has at any time had carnal connection with other men, unless such connection has occurred within such a period before the commencement of her gestation that it is possible that one of such other persons may have been the father of the child. Swisher v. Malone, 31 W. Va. 442, 7 S. E. Rep. 439.

Inadmissible Where Defendant Admits Having Had Intercourse with Complainant.—If a single woman, having been delivered of a bastard child, on her oath, charge a certain man with being its father, and aver that there is no possibility of her being mistaken, it is competent for the person accused to invalidate her testimony by proving that, about nine months before its birth, she was guilty of criminal intercourse with other men. But if the defendant admit that he, also, had criminal intercourse with her about the same time, such proof should be rejected, and he may be confined to proof of the general character of the mother. Fall v. Overseers of Augusta County, 3 Munf. 495.

Inadmissible Merely to Impeach Complainant's Testimony.—If upon such trial the complainant upon the witness stand, in her examination in chief or upon cross-examination, has testified that she has never had connection with any man other than the defendant, he cannot, for the purpose of impeaching her testimony, or of showing that he is not the father of the child, introduce testimony tending to show that she has had such carnal connection with other men, unless it has occurred so near the commencement of her gestation that some person other than the defendant may be the father of the child. Swisher v. Malone, 31 W. Va. 442, 7 S. E. Rep. 439.

Costs—To Whom Given.—The defendant cannot assign it as error that the court gave the costs to the overseers of the poor for the use of the plaintiff instead of to the plaintiff herself since it does not concern him. Tennant v. Brookover, 12 W. Va. 337.

Appellate Jurisdiction.—The superior courts of law have jurisdiction to grant writs of supersedeas to orders of the county or corporation courts, binding persons accused of being the fathers of bastard children, to support such children. Mann v. Commonwealth, 6 Munf. 452.

When Appellate Court Should Itself Render Judgment.—In a bastardy proceeding, the county court having decided in favor of the putative father, and the overseers of the poor having spread the facts upon the record by an exception, and taken an appeal to the circuit court, that court, upon reversing the judgment of the county court, should not send the cause back for a new trial, but should render a judgment in favor of the overseers of the poor for the amount appearing to be due, but without interest. Willard v. Overseers of the Poor of Wood County, 9 Gratt. 139.

Irregular to Admit New Evidence in Appellate Court.—On an appeal from an order of a county court, providing for the support of a bastard child, it is irregular for the appellate court to receive new evidence of the fact, which was not before the county court, but the judgment of the lower court will not be reversed for this error alone. Howard v. Overseers, 1 Rand. 464.

Bastardy Proceedings Now Abolished in Virginia.—"This provision for the maintenance of bastard children being applicable only to white women, an apprehension arose that it was in conflict with the provision of the Civil Rights Act of 1866 (Rev. Stats. U. S. p. 348, §§ 1977 *et seq.*), or to amendment XIV. of the United States Constitution, and under the influence of that groundless apprehension, the whole doctrine touching the charging of putative fathers with the maintenance of bastards has been repealed. (Acts 1874-5, p. 94, ch. 112.) The apprehension is deemed to be groundless, because the proceeding is not for the benefit of the mother, who is not legally bound to support the child, but for the relief of the county." 1 Min. Inst. (4th Ed.) ch. 9, p. 148.

109 *Bowyer's Adm'r & als. v. The Giles, Fayette and Kanawha Turnpike Co.

July Term, 1852, Lewisburg.

(Absent LEE, J.)

1. **Suit by Corporation—Denial of Incorporation in Answer—Failure to Prove Incorporation—Effect.***—A plaintiff in equity claims to be an incorporated company. The defendant in his answer denies that the company had been legally organized, and calls for proof of its organization. The only proof is the *ex parte* affidavit of a witness, which is excepted to by the defendant's counsel. HELD: That the plaintiff having failed to prove the legal organization of the company, the bill should be dismissed.

2. **Appellate Practice—Remanding of Cause—Case at Bar.**—In such a case there is a sale of defendant's land under a decree in the cause, and a final decree directing the purchaser to pay the purchase money to the plaintiff; and the defendant appeals. This court would reverse the decree and dismiss the bill but for the injury that decree would do to the appellant. But the purchase money being in the hands of the purchaser, this court will reverse so much of the decree as directs the purchase money to be paid to the plaintiff, and remand the cause, with directions to have the purchase money collected and paid to the appellant, and then to dismiss the bill at the cost of the plaintiff.

This was a bill filed in the Circuit court of Fayette county, by the Giles, Fayette and Kanawha turnpike company, to attach the effects of Peter Bowyer, an absent defendant, in the hands of James T. Waite and Thomas G. Clay. The bill charged that Bowyer was a subscriber for eight shares of the capital stock of the company, for which he had not paid; that he had removed to and lived in the state of Indiana; and that Waite and Clay were indebted to him. And making them all parties, the plaintiffs asked that the debt due from Bowyer to the company might be paid by Waite and Clay.

110 *The plaintiffs afterwards amended their bill, and charged that the debt due from Waite and Clay to Bowyer was for the purchase money of land, the title to which Bowyer had retained. That he therefore had a lien on the land for the payment of the debt, which the plaintiffs were entitled to enforce; and that Waite and Clay were insolvent. They asked therefore that the land might be sold for the payment of the debt, and that their claim upon Bowyer might be paid out of the proceeds.

Bowyer and Waite answered the bill. Bowyer set up several grounds of defence, one of which was that the company had not been legally organized; and he called for proof of its organization.

This cause came on to be heard together with another brought by Bowyer against Waite and Clay to enforce the payment of the debt they owed him, when the court held that the plaintiffs had a right to resort to the fund in the hands of Waite and Clay for the satisfaction of the amount due to them from Bowyer; and that Bowyer had a right to assert his vendor's lien on the land in the bill mentioned for the payment of the purchase money, which was 500 dollars, with interest from the 1st of October 1842. And it was decreed that Waite and Clay should pay the plaintiffs, the turnpike company, the sum of 270 dollars 63 cents, with interest on 200 dollars, a part thereof, from the 20th January 1848 till paid, and their costs; and that they should pay the residue of the said 500 dollars, with interest as aforesaid, to Bowyer, the plaintiff in the second suit. And it was further decreed, that if the money was not paid within thirty days, that the land should be sold by commissioners named in the decree, on a credit of six, twelve and eighteen months.

A sale of the land was made under the foregoing decree, and it was purchased 111 for 410 dollars by John *Bowyer, who executed his bonds for the purchase money. And the causes coming on again to be heard, a decree was made in favor of the turnpike company for the amount of its claim out of the fund, and in favor of Bowyer for the balance; and a decree was made in favor of Bowyer against Waite and Clay for the balance due to him from them.

After this decree was made Peter Bowyer died, and his administrator with the will annexed and heirs applied to this court for an appeal, which was allowed. The other facts upon which the decision of this court was founded, are stated in the opinion of the court.

G. N. Johnson, for the appellants.
Price and B. H. Smith, for the appellee.

DANIEL, J., delivered the opinion of the court.

This court, without deciding on the other defences set up by the testator of the appellant in his answer to the original and amended bills of the appellees, is of opinion that there is no competent and sufficient proof in the cause of the legal organization of the company. Proof of its organization having been distinctly called for, it was incumbent on the appellees to have furnished it. The only proof which they have furnished is the ex parte affidavit of Alfred Beckley, who states that he was present, on the 14th day of February 1840, at the house of Major Henry Montgomery in Fayette county, at a meeting of the stockholders of the company; that a majority of all the votes, representing 20,000 dollars, or one-half the capital stock of said company, was present, by proxy or in person; and that the company was then and there duly and properly organized and constituted pursuant to the act conferring the charter and also the general act regulating the establishment and organization of 112 *turnpike road companies. And upon this affidavit there is endorsed an exception to it, as being ex parte and illegal, signed Bailey and Reynolds, who it is but

*See monographic *note* on "Corporations (Private)" appended to Slaughter v. Com., 13 Gratt. 767.

fair to presume were acting as the attorneys of the defendant. The appellees having brought their cause to a hearing on this vague and incompetent proof of their organization, the Circuit court ought to have dismissed their bill. And this court would now proceed to set aside the interlocutory and final decrees made in the cause and dismiss the bill, were it not that such a course would work injustice to the appellant. It seems that when this suit was first heard in the Circuit court there was also pending in the same court a suit brought by Peter Bowyer, the testator of the appellant, against Waite and Clay, to subject certain lands sold them to the payment of the purchase money. On the 4th September 1848, both causes were heard together, and the court, declaring its opinion that the company had a right to resort to the funds in the hands of Waite and Clay for the satisfaction of the balance of the stock subscribed by Bowyer, and that Bowyer had a right, in his suit, to assert his vendor's lien against the lands in the hands of his vendees for the payment of the purchase money therefor, to wit, 500 dollars, with interest thereon from the 1st of October 1842, till paid, decreed that Waite and Clay should pay to the company the sum of 270 dollars 63 cents, with interest on 200 dollars, part thereof, from the 20th of January 1848 (that being the balance claimed to be due to the company by Bowyer on account of his subscription for stock), and also the costs of the suit of the company against Bowyer & als., and that Waite and Clay should pay the residue of the amount due on account of the purchase money of the lands to Bowyer; and also further decreed that unless Waite and Clay should pay
113 the said sums, as adjudged, *within thirty days, the lands should be sold on certain terms in the decree specified. A sale was made and reported, and the two causes were brought on again, to be heard together, finally, on the 2d April 1849, when the court confirming the sale made an order for the collection of so much of the purchase money as should be sufficient to satisfy the amount due to the company, and its payment to them; and also gave a decree for Bowyer against Waite and Clay for the balance of the money due by them for their purchase, after deducting the net amount of the proceeds of the sale made under the order of the court.

In this state of things, to set aside the decrees, or so much of them as is prejudicial to the rights of the appellant, and dismiss the bill without further order, would be unjust to the appellant, as the fund arising for the sale made by the order of the court, and to which he is entitled, would thus be left, in the hands of the purchaser, undisposed of. It appears, from the report of the commissioners who executed the order of sale, that the lands were purchased by John Bowyer; but it nowhere appears whether he and the appellant are the same person. Under these circumstances it is deemed proper to set aside so much of the interlocutory decree of the 4th September 1848, as orders Waite and Clay to pay to the company the sum of 270 dollars 63 cents, with interest and the costs of suit, and also so much of the final decree as orders the collection from the purchaser of the sum of 343 dollars 29 cents, and its payment to the company, and to affirm the balance of said decrees in other respects, with costs to the appellants; and to remand the cause to the Circuit court, with directions to make an order for the collection of the money due on the purchase made at the sale ordered by the court, and the payment of its net proceeds to the appellant, in
114 *part satisfaction of the amount due by Waite and Clay, if the purchaser and appellant are different persons; and if not, to order that the appellant, as administrator of P. Bowyer, retain the amount due by him on his purchase, and apply the same as a credit on the debt due by the said Waite and Clay, and to dismiss the bill at the costs of the company. Decree accordingly.

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115 *Hassler's Lessee v. King.

July Term, 1852. Lewisburg.

Deeds*—Acknowledgment—Case at Bar.—A deed bearing date on the 25th November 1786, is made by citizens of Virginia, as appears on its face, conveying land in Virginia to a citizen of New York; and on it there is a certificate under the hand and official seal of the mayor of New York, of the same date with the deed, of the acknowledgment of the deed before him by the grantors. This deed was recorded in the clerk's office of the county court of Jackson, in which county the land is situate, on the 7th of March 1833. HELD:

1st. Same—Same—Presumption.—That the certificate of the mayor of New York, being full and particular, and being made in his official capacity and under his official seal, should be presumed

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***Deeds.**—See on the subject the following cases citing the principal case: Campbell v. Hughes, 12 W. Va. 186, 200, 203; Lohrs v. Miller, 12 Gratt. 460; Shue v. Turk, 15 Gratt. 264; Clinch River, etc., Co. v. Kurth, 90 Va. 744, 19 S. E. Rep. 878.

See monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564.

Statutes—Repeal—Rights Acquired under Old Law.—In Forqueran v. Donnally, 7 W. Va. 142, it is said: "Courts will not readily intend, where the legislature enacts a general law upon a given subject and repeals an existing, general law, of like character upon the same subject, that it was the intention of the legislature, by the repeal, to deprive parties who acquired just rights or interests under the old law, of all remedy, or to extinguish their rights or interests, unless such intention is manifest. But courts may properly, in such cases, rather than the parties should be left without remedy, intend that the proceedings or remedy provided by the new law, as far as practicable, was intended by the legislature to be applied to rights and interests acquired under the old law. Wright v. Oakley, 5 Metc. (Mass.) 406; Steamship Co. v. Jolliffe, 2 Wall. (Sup. Ct. U. S.) 458; *Hassler's Lessee v. King, 9 Gratt. 115.*"

to be made in the manner such acts were usually authenticated by him.

2d. **Same—Same—Evidence of Nonresidence—Case at Bar.**—That the acknowledgment of the deed by the grantors before the mayor of New York, and his certificate thereof, afford sufficient evidence that for the time being the grantors dwelt in that city, and were, when they acknowledged the deed, nonresidents of Virginia, in the sense in which the term is used in the act of October 1785 for regulating conveyances.

3d. **Same—Same—Case at Bar.**—That the acknowledgment and certification of the deed being intended to be made in conformity with the act of October 1785, though made a short time before that act went into operation, it was properly authenticated to be admitted to record under that act, if presented for record within the time prescribed thereby.

4th. **Same—Same—Admitting to Record—Case at Bar.**—That having been properly authenticated for record at the time of its execution, it was properly admitted to record in March 1833 in the clerk's office of the county court of Jackson, upon said authentication; and was from that time valid against creditors and subsequent purchasers as a recorded deed.

5th. **Evidence—Deeds Authenticated According to Law—Admissibility.**—That the original deed having been authenticated for record in the manner then prescribed by law, was admissible as evidence without further proof of its due execution, though it had not been duly recorded.

This was an action of ejectment in the Circuit court of Jackson county, by Hassler's lessee against King. On the trial the plaintiff offered in evidence a deed
116 *bearing date the 25th day of November 1786, "between Savary De Valcoulon of Richmond, in the state of Virginia, and Albert Gallatin of Monongalia county, in the said state, of the first part, and Nicholas Dubery of the city of New York, of the second part, purporting to convey the land in controversy in the action; to which deed was annexed a certificate, bearing the same date with the deed, under the hand and official seal of the mayor of New York, of the acknowledgment of the deed by the grantors before him; and to which deed and certificate was annexed a certificate of the clerk of the County court of Jackson (in which county the land is situate), of their recordation in his office on the 7th day of March 1833. And the plaintiff offered no other evidence of the execution and acknowledgment of the deed. The defendant objected to the admission of the deed in evidence; the court sustained the objection, and the plaintiff excepted. The defendant obtained a verdict and judgment. The plaintiff moved for a new trial, and exhibited, in support of his motion, an affidavit that he was surprised by the rejection of the deed as evidence; that it had been admitted as evidence on a former trial of the case; that he could prove the execution of the deed, if a new trial were granted him; and that if he were compelled to bring a new suit, it would be barred by the statute of limitations. But the court overruled the motion, and the plaintiff again excepted. The errors assigned in the judgment are, first, in the exclusion of the deed from the jury, and secondly, in the refusal of a new trial.

The plaintiff applied to this court for a supersedeas, which was awarded.

Price, for the appellant.

B. H. Smith, for the appellee.

117 *MONCURE, J., after stating the case, proceeded:

First—Did the court err in excluding the deed from the jury?

By an act which passed in October 1785, and took effect on the first day of January 1787, entitled "an act for regulating conveyances," it was, among other things, provided, that "if the party who shall sign and seal any such writing" (meaning a conveyance of real estate), "reside not in Virginia, the acknowledgment by such party, or the proof by the number of witnesses requisite, of the sealing and delivering of the writing before any court of law, or the mayor, or other chief magistrate of any city, town or corporation of the county in which the party shall dwell, certified by such court, or mayor, or chief magistrate, in the manner such acts are usually authenticated by them, and offered to the proper court to be recorded within 18 months after the sealing and delivering, shall be as effectual as if it had been in the last mentioned court." 12 Hen. Stat. 155. This provision (with an addition not necessary to be noticed) constituted the 5th section of the act passed the 13th of December 1792, also entitled "an act for regulating conveyances," which will be found in 1 Rev. Code of 1803, p. 136-9, and 1 Rev. Code of 1814, p. 218, 223. It remained in force, without any material alteration, until the revisal of 1819; the only alterations being those made by the act passed the 25th of December 1794, changing the word "county" to "country," made (as the act recites) because some of the subdivisions of the United States, as well as of other countries, are not denominated by the term of counties; and extending the period within which the deed might be offered for record, from eighteen months to two years. 1 Rev. Code 1803, p. 327; Id. 1814, p. 462.

By the 7th section of the act passed February 9, 1814, entitled "an act to amend
118 an act entitled an act *for regulating conveyances," which passed the 13th of December 1792, it was enacted "that any conveyance which shall hereafter be recorded after the expiration of the time now allowed by law for recording the same, shall take effect and be valid in law as to creditors and subsequent purchasers, from the time of such recording, and from that time only." Sess. Acts of 1813-14, p. 36.

At the revisal of 1819 an act was passed entitled "an act to reduce into one act the several acts for regulating conveyances, and concerning wrongful alienations." 1 Rev. Code, ch. 99, p. 361. The 5th section of that act embraces, in a modified form,

the provision before quoted from the act of October 1785, constituting the 5th section of the act of 1792 as aforesaid. The effect of the said 5th section of the act of 1819 being to authorize the admission of a deed to record on the certificate of a mayor, &c., only where the party as to whom the deed is certified resides "out of the United States and the territories thereof," instead of "out of Virginia," as in the acts of 1785 and 1792.

The 7th section of the act of Feb. 9, 1814, is substantially embodied in the 12th section of the act of 1819, which provides that "All deeds of trust and mortgages, whensoever they shall be delivered to the clerk to be recorded, and all other conveyances, &c., which shall not be acknowledged, proved, or certified, and delivered to the clerk of the proper court to be recorded, within eight months after the sealing and delivery thereof, shall take effect and be valid as to all subsequent purchasers, &c., from the time when such deed of trust, &c., shall have been so acknowledged, proved or certified, and delivered to the clerk of the proper court to be recorded, and from that time only." 1 Rev. Code 364, § 12.

119 *The only provision contained in the act of 1819 in regard to the authentication for record of deeds of parties residing out of Virginia but in the United States, was the 7th section, which provided that any deed may in like manner be admitted to record upon the certificate under seal of any two justices of the peace for any county or corporation within the United States, or any territory thereof, or within the District of Columbia, &c.

Thus stood the law in regard to the authentication for record of deeds of nonresidents of Virginia in 1833, when the deed in question was admitted to record by the clerk of Jackson county (except the act of Feb. 26, 1828, Sup. Rev. Code, ch. 155, p. 213, which does not affect the case under consideration); and the question now is, whether that deed was legally admitted to record.

The deed was acknowledged by the grantors before the mayor of New York, and certified by him, after the passage of the act of October 1785, and about a month before that act went into effect. It was obviously intended to be acknowledged and certified in pursuance of the provisions of that act. The certificate is full and particular, and being made by the mayor in his official capacity, and under his official seal, should be presumed to be made in the manner such acts are usually authenticated by him. Ewing's heirs v. Savary, 3 Bibb's R. 237. The deed recites that the grantors were of the state of Virginia; but the acknowledgment by them before the mayor of New York, and his certificate thereof, afford sufficient evidence that, for the time being, the grantors dwelt in that city, and were, when they acknowledged the deed, nonresidents of Virginia, in the sense in which the terms were used in the act of 1785. McCulloch v. Myers, 1 Dana's R. 522; and a case referred to in note (i), 1 Statute

120 Law of Kentucky, p. 433, as *having been decided by the Circuit court of the United States for the Kentucky district at its fall term in 1833. See also, Cales v. Miller, 8 Gratt. 6, in which it was decided that the acknowledgment by the grantor of a deed before the mayor of Philadelphia afforded sufficient evidence that said grantor, for the time being, dwelt in that city, and said deed was duly authenticated for record, though it appeared on the face of the deed that he was of the borough of Wilmington in the state of Delaware. I think, therefore, that the deed in question would have been duly admitted to record, if it had been offered to the proper court for that purpose within eighteen months after the sealing and delivering thereof, as provided by the act of 1785. Not having been so offered, it became, after the lapse of that limitation, incapable of being admitted to record on the authentication aforesaid, until the passage of the act of February 9, 1814; when, by the 7th section of that act, before recited, it became, I think, again admissible to record on the said authentication, but to take effect as to creditors and subsequent purchasers only from the time of such recordation. When that act was passed the deed in question was good between the parties, and had been authenticated for record according to the then existing law; but had not been recorded within the time allowed by law, and so was not valid as to creditors and purchasers. It was embraced both by the letter and the spirit of the said 7th section. But though it thus became again admissible to record, it was not, in fact, recorded until after the revisal of 1819; and the question now is, whether its admissibility to record was affected by any alteration then made in the law regulating conveyances.

In the case of Lockbridge v. Carlisle, 2 Leigh 186, it was decided that the 5th section of the act of 13th December 1792 was repealed by the 5th and 7th sections

121 *of the revised statute of 1819, and that deeds executed in Kentucky in 1824 and 1826, acknowledged before a court of that state, and authenticated according to the act of 1792, were not duly registered in this state. The chancellor, from whose decree the appeal in that case was taken, held that the two statutes might well stand together, and that the provision of the statute of 1792 was not repealed by that of the statute of 1819; but his decree was reversed. Brooke, P., in delivering the court's opinion, said: "It is very probable that the legislature, by the provisions of the statute made in 1819 on this subject, intended only to facilitate the acknowledgment of foreign deeds, by extending the authority to take acknowledgments of such deeds to two justices of the peace where the party executing the same resided in any of the United States or the territories thereof, and not to repeal the 5th section of the statute of 1792, which gave the authority to any court of record, mayor or chief magistrate, &c., in every case in which the party

executing such deed did not reside in Virginia. But, as the authority in such case was by the statute of 1819 restricted to the case in which the party executing the deed resided without the United States and the territories thereof, and as also all laws of a general nature not published in the new Code were repealed by the 9th section of the statute providing for the republication of the laws (1 Rev. Code, ch. 1, p. 16), the 5th section of the statute of 1792 and all the subsequent statutes on the subject must be considered as repealed by the statute of 1819." I have referred thus fully to that case, for the purpose of showing the leaning of our courts against constructive repeals, and the grounds on which the 5th and 7th sections of the act of 1819 were considered as being repealed by the 5th section of the act of 1792 in its application to that case.

122 *But the question in this case is not whether, after the revisal of 1819, a deed could be authenticated for record according to the 5th section of the act of 1792; but, whether a deed which, at the time of the said revisal, had been duly authenticated for, and was then admissible to, record, according to the existing law, could be admitted to record on such authentication after that revisal? By the revised act of 1819, the legislature intended "to facilitate the acknowledgment of foreign deeds," and to provide an easy mode of authentication by two justices of the peace where the party executing the same resided anywhere in the United States. There was no reason for retaining the more inconvenient and expensive mode prescribed by the 5th section of the act of 1792 in regard to parties residing out of Virginia but in the United States; and such parties could more easily conform to the provision of the act of 1819 than of that of 1792. The parties in Lockridge v. Carlisle seem not to have been informed of the alteration made by the act of 1819, and therefore conformed to the act of 1792. Had the legislature foreseen that such a case would occur, it would doubtless have retained the provision of the act of 1792, to which there could not have been the least objection, except that it imposed unnecessary trouble and expense on the parties. But not having forseen such a case, and having passed laws inconsistent with the continuance of that provision, the court in the case referred to was compelled to regard the provision as repealed. But none of this reasoning applies to a case like the present, in which the deed had already been acknowledged and certified, and was then admissible to record according to law. It could not have been intended by the legislature, while facilitating the acknowledgment of foreign deeds, to require those who had already conformed to the more troublesome and expensive provision of the

123 existing law, to conform *also to the provision of the new law. There would have been no reason in such a requirement, and it would have been fraught with inconvenience. The death or removal of parties and lapse of time might in many cases render it difficult and even impossible to conform to the new law; and it would have been unjust to require it, after parties had gone to the trouble and expense of having their deeds authenticated for record according to the provision of the existing law. The legislature must have been aware that there were a great many cases in which deeds had been authenticated for record, but were not recorded, and in which no want of diligence could be imputed to the parties, and must have intended that all such deeds might be admitted to record without further authentication. Not to have so intended and provided would have been a flagrant wrong to all such parties. No such wrong was intended to be done, or has in fact been done. These cases are not only in the reason but are also in the letter of the law of 1819. The 7th section of the act of 1814, as already stated, is substantially embodied in the 12th section of the act of 1819; and for the same reasons that have already been assigned to show that the deed in this case could have been duly recorded under the former section, it could have been duly recorded under the latter. It was recorded after the act of 1819, to wit, in 1833; and not having been acknowledged, proved or certified, and delivered to the clerk of the proper court to be recorded within the time after the sealing and delivery thereof prescribed by that act, by the very terms of the act the deed took effect, as to all subsequent purchasers, &c., from the time when it was certified and delivered to the said clerk to be recorded, and from that time only, 1 Rev. Code 364. "Several statutes in pari materia, and relating to the same subject, are to be taken to-

124 gether and compared, in the *construction of them, because they are considered as having one object in view, and as acting upon one system."—"And the rule applies, though some of the statutes may have expired, or are not referred to in the other acts. The object of the rule is to ascertain and carry into effect the intention of the legislature; and it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." 1 Kent. Com. 463. "Statutes are not considered to be repealed by implication, unless the repugnancy between the new provision and a former statute be plain and unavoidable." Id. 466, note b, and cases cited. "A construction, which repeals former statutes or laws by implication and divests long approved remedies, is not to be favored in any case." Id. citing Cowen, J., 3 Hill 472. For a strong case to show that "virtual repeals of statutes are not favored by courts, see Taylor v. Shields' heirs, 5 Litt. p. 295: And I refer to the Kentucky cases more than any other, because they are upon some of the very statutes which are under consideration in this case. See also 1 Kent Com. 455; Dash v. Van Kleeck, 7 John. R. 477; and Whitman v.

Hapgood, 10 Mass. R. 437. Even if my construction of the act of 1819 were more doubtful than it is, I would incline to think that the right of the parties to have the deed in this case recorded on authentication which was legal and complete at the passage of that act, was saved to them by the proviso in the act passed March 12, 1819, for the republication of the laws, providing that the repeal of all acts not published in the Code should not impair any right accrued before the 1st day of January 1820, when the said repeal took effect, but such right might be maintained and asserted in the same manner as if there had been no such repeal. 1 Rev. Code, p. 16, § 9. For the foregoing reasons, I think the 125 deed in *this case was duly recorded, and was therefore admissible in evidence.

I think the deed was admissible in evidence on another ground. By an act passed on the 8th of December 1792, it was declared that a deed, authenticated as this deed was, should be evidence in all the courts of record within this commonwealth as if the same had been proved in the said courts; and this continued to be the law of the land at least down to the revisal of 1849, which was after the trial of this case. The act is published entire as it originally passed, for it was never amended, in 1 Rev. Code 1803, p. 160; 1814, p. 223, and 1819, p. 371. It may be said that this act was passed after the deed in this case was authenticated, and therefore cannot apply to the case. But the deed being authenticated precisely according to the directions of the act, it surely could not have been necessary for the parties to be at the expense and trouble of doing the vain thing of having it reauthenticated precisely in the same way. The legislature was prescribing a rule of evidence: it declared that a paper authenticated in a certain way should be evidence; and this deed was authenticated precisely in that way. The act was remedial, and its application to case coming up to its requisitions at the time of its passage injured nobody, while it saved unnecessary trouble and expense to the parties. The reason of the act applies to the case; and so do its words, which are, that all deeds executed by nonresidents, "if acknowledged," &c., and "certified," &c., "shall be evidence," &c. This deed having been so acknowledged and certified, is therefore expressly made evidence by the act. The fact is, this act, as to deeds requiring recordation, was obviously intended to run on all fours with the act in regard to the authentication of deeds of nonresidents for record. So that whenever a deed of a nonresident was duly authenticated for 126 record, it should be duly *authenticated as evidence in all the courts of record in the commonwealth. The similarity of the language of the two acts and the reason of the thing indicate that such was the legislative intention. The deed in this case having been duly authenticated for record under the act of 1785, was therefore duly authenticated as evidence in all the courts of record by the operation of the act of 1792.

The views I have expressed on the first error assigned in the judgment renders it unnecessary to consider the second; and I therefore forbear to give any opinion upon it. But, for the foregoing reasons, I am for reversing the judgment, setting aside the verdict, awarding a new trial, and directing that upon such new trial the deed, if again offered in evidence, be admitted as a duly recorded deed.

ALLEN and SAMUELS, Js., concurred in Moncure's opinion.

DANIEL and LEE, Js., concurred in reversing the judgment on the last grounds stated in the opinion of Moncure, J.

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127 *Hays v. Northwestern Bank of Virginia.

July Term, 1852, Lewisburg.

1. **Negotiable Notes—Payable Out of State—Effect.***—A note for a sum certain, payable to order, and negotiable and payable at a bank out of the state of Virginia, is a note negotiable at a bank in Virginia, and therefore is placed on the same footing as foreign bills of exchange, with the like remedy for recovery thereof against the maker and endorsers jointly, and with the like effect, except as to damages.
2. **Same—Same—Demand and Notice of Protest—Liability of Maker.**—In such case demand and notice of protest for nonpayment is not necessary to subject the maker of the note.
3. **Judicial Notice—Incorporation of Bank—Public Act.**†—The act incorporating the Northwestern Bank of Virginia is a public act, of which the courts will judicially take notice; and in an action by the bank it is not required to prove its incorporation.

This was an action by the Northwestern Bank of Virginia against P. Hays and others in the Circuit court of Gilmer county. The facts of the case are stated by Judge Lee in his opinion.

Fisher, for the appellant.
Fry, for the appellee.

LEE, J. This is a supersedeas to a judgment of the Circuit court of Gilmer county, on an action of debt, in which the defendant in error was plaintiff, and the plaintiff in error and S. L. Hays, J. F. W. Holt and Ro. Ervin were defendants. The declaration was that of the holder against the

*See the principal case cited in Nichols v. Porter, 2 W. Va. 22.

See generally, monographic *note* on "Bills, Notes and Checks."

†**Judicial Notice—Incorporation of Bank—Public Act.**—That the incorporation of the Northwestern Bank of Virginia is a public act of which the courts take judicial notice, see the principal case cited and approved in the following cases: Hart v. Baltimore, etc., R. R. Co., 6 W. Va. 356; Farmers Bank v. Willis, 7 W. Va. 42; Northwestern Bank v. Machir, 18 W. Va. 271.

drawer and endorsers jointly of a negotiable note. It averred that P. Hays made his note for 1040 dollars, payable to the order of S. L. Hays at six months, negotiable and payable at the Merchants Bank of Baltimore, Maryland. That S. L. Hays endorsed the said note to Holt, he to Ervin and Ervin to plaintiff, with notice of such endorse-
128 ments, *&c., and that said note was duly protested for nonpayment, and notice given thereof, &c. By means whereof and by force of the statute, an action accrued to the plaintiff against the defendants jointly. The defendants appeared and demurred generally to the plaintiff's declaration, and the plaintiff joined in the demurrer. And thereupon, the demurrer being argued, was overruled by the court. The defendants also pleaded nil debent, and issue was joined thereon. At the trial the plaintiff gave in evidence the note of P. Hays for 1040 dollars, dated January 25, 1848, at six months, payable to the order of S. L. Hays, and made negotiable and payable at said Merchants Bank in Baltimore; also the endorsements thereon of the names of S. L. Hays, Holt and Ervin. And this being all the evidence in the cause, the defendants demurred to the same, and the plaintiff joined in the demurrer; and the jury found a verdict, subject to the opinion of the court upon the demurrer to the evidence. And the demurrer being argued, the court rendered judgment in favor of the plaintiff against the defendant, P. Hays, for the sum of 1040 dollars, with interest and costs; and likewise judgment in favor of the other defendants for their costs against the said plaintiff. To this judgment Peregrine Hays obtained a supersedeas.

Two grounds of error are assigned: First, that the court erred in overruling the demurrer to the declaration; and second, that it erred in giving judgment on the demurrant's evidence in favor of the plaintiff against the defendant Peregrine Hays.

Upon the first ground, it is contended that an action of debt, on behalf of the holder against the maker and endorsers jointly of negotiable paper, lies only upon foreign bills of exchange, or such negotiable notes or bills only as are placed by statute on the same footing as foreign bills of exchange, and that the note in this case stood upon the footing of an inland and not a foreign bill of exchange.

129 *The act of February 5, 1817, establishing the Northwestern Bank of Virginia, &c., places all notes or bills negotiable at that bank on the same footing as foreign bills of exchange, with the like remedy for recovery thereof against makers, drawers, acceptors, or endorsers, and with like effect except as to damages. 2 Rev. Code 1819, ch. 201, p. 93. The note in this case was for a sum certain, payable to the order of S. L. Hays at a specified time, and it was expressed on its face to be negotiable and payable at the Merchants Bank of Baltimore, in the state of Maryland; and being within the restrictions and description contained in the act of March 22, 1837 (Sess. Acts 1836-7, § 6, p. 66), it was a note negotiable at the Northwestern Bank and other banks of Virginia, because it was payable at a bank, though that bank was in another state; and thus it was placed on the same footing as a foreign bill of exchange, with the like remedy for recovery thereof against the maker and endorsers jointly, and with the like effect except as to damages.

I am of opinion, therefore, that on the case stated in the declaration, the action could be maintained against the maker and the endorsers of the note jointly, and that the demurrer to the declaration was properly overruled.

Upon the second ground of error assigned it is contended that the evidence offered by the plaintiff was not sufficient to maintain the action against Peregrine Hays, the maker of the note, and that the judgment should have been in his favor on the demurrer to the evidence. The evidence offered by the plaintiff of the demand and protest of the note was ruled out by the court, and the whole evidence given to the jury was the note with the endorsements thereon. For want, therefore, of proof of a demand and protest of the note for nonpayment, the court decided that the endorsers were exonerated, but held it not necessary
130 for *the plaintiff to prove presentation and demand of payment to enable it to recover against the maker. And in this the court did not err. Watkins v. Crouch & Co., 5 Leigh 522. But it is insisted that the evidence in support of the plaintiff's action was insufficient in this, that there was no proof that the plaintiff was an incorporated institution authorized to sue; and the case of Jackson's administratrix v. The Bank of Marietta, 9 Leigh 240, is relied upon in support of the objection. That was an action of assumpsit by a bank alleged to have been incorporated by an act of the legislature of Ohio; the plea was non assumpsit, and there was a demurrer to the plaintiff's evidence filed by the defendant. The court held that proof of the plaintiff's incorporation was necessary to maintain the action; and none having been given, there was judgment for the defendant. But this is an action by a bank incorporated by the legislature of Virginia, and the act for its incorporation is a public act of which the courts will judicially take notice. Stribling v. The Bank of the Valley, 5 Rand. 132. In that case the court ex officio took notice of the act incorporating the Bank of the Valley; and the Northwestern Bank was incorporated by the same act. It was not necessary, therefore, that it should have been specially given in evidence to the jury.

I am of opinion that there is no error in the judgment to the prejudice of the plaintiff in error, and that the same should be affirmed with costs, &c.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

131 *Craig v. Sebrell.

July Term, 1852, Lewisburg.

1. **Appeals—Matter of Discretion.***—The mode in which an exception to an answer shall point out the omission excepted to, is a matter of practice discretionary with the court, and not a subject of appeal.

2. **Same—Same—Case at Bar.**—But if otherwise, the exception being sustained and the defendant having filed another answer, there the subject of the exception properly ended.

3. **Decrees—Recitals—Conclusiveness of.**†—In a suit in which there is an absent defendant, the decree recites that the cause came on as to him upon the bill, &c., and order of publication duly executed. This is conclusive that the order was duly made, published in the newspaper and posted at the front door of the court-house.

4. **Same—Reference to Record in Another Suit—Effect.**—The decree referring to the record of another suit as an exhibit in the cause, makes it a part of the record, though it is not referred to in the bill or answer, nor made an exhibit by an entry on the order book.

5. **Judgments—Lien of—Injunction—Case at Bar.**—A judgment is a lien upon land in the hands of a purchaser, though at the time of the conveyance execution upon the judgment was suspended by an injunction. And the lien exists though the judgment was not docketed, the purchaser having had notice thereof.

The facts of the case are stated by Judge Lee in his opinion.

Fisher, for the appellant.
B. H. Smith, for the appellee.

LEE, J. This is an appeal from a decree of the Circuit court of Mason county, in a cause in which the appellee Sebrell was complainant and the appellant Craig and one Samuel W. Price were defendants.

The bill was filed seeking to subject certain property claimed and held by the defendant Craig to the satisfaction of a judgment recovered by the appellee against the said Price, and which it was al-
132 leged constituted, *at the time of its rendition, a lien upon the said property, Price being at that time the owner thereof.

Price was treated in the bill as an absentee from the commonwealth, and the process against him was returned "not found;" nor did he at any time answer the bill or appear in the cause.

Craig answered the bill, contesting the complainant's right to subject the property in question on various grounds. To his answer the complainant filed an exception for his omission to answer one allegation of the bill alleged to be material, but Craig insisted that the exception was not well taken. The court, however, sustained the exception, and required him to file another answer; which was done.

The cause came on to be heard on the bill, answer, replication and exhibits, the papers in an injunction case of said Price against said Sebrell, decided in the same court at a previous term, and an order of publication returned duly executed; and the court thereupon pronounced a decree maintaining the right of the complainant to charge an interest in the property in question by way

*Appeals—Matter of Discretion.—In Welch v. County Court, 29 W. Va. 70, 1 S. E. Rep. 342, it is said: "When the subject, upon which the inferior court has acted, is one within its absolute or pure discretion, its action cannot be reviewed. See *Craig v. Sebrell, 9 Gratt. 132;* Boggess's Heirs v. Robinson's Heirs, 5 W. Va., syllabus, pt. 3, p. 402, and p. 413; *Ex parte* Yeager, 11 Gratt. 655; French v. Noel, 22 Gratt. 454; Hein v. Smith, 12 W. Va., syllabus, pt. 1, p. 358."

†Same—Decrees—Recitals—Conclusiveness of.—In a suit in which there is an absent defendant, the decree recites that the cause came on as to him upon the bill, etc., and order of publication duly executed, this is conclusive that the order was duly made, published in a newspaper and posted at the front door of the courthouse. For this proposition, see the principal case cited and approved in the following cases: Moore v. Holt, 10 Gratt. 293; Mustard v. Wohlford, 15 Gratt. 344, and *note*; Durrett v. Davis, 24 Gratt. 312; Beattie v. Wilkinson, 36 Fed. Rep. 649; Arnold v. Arnold, 11 W. Va. 456; Scott v. Ludington, 14 W. Va. 392.

But if the decree does not state that the order of publication was "duly executed," objection for want of due publication against the absent defendant may be taken by the other defendants who may be affected by the decree, and this even in the appellate court. McCoy v. McCoy, 9 W. Va. 444, 445, citing the principal case. See the principal case cited in Findley v. Smith, 42 W. Va. 308, 26 S. E. Rep. 373.

Chancery Suits—Decree—Reference to Record of Another Suit—Record.—In Tracey v. Shumate, 22 W. Va. 511, it is said: "It appears on the face of this decree of May 30, 1877, that the court referred to and based its decree in part on the record in this old chancery suit, which record was a record of the same court; and according to the decisions in *Craig v. Sebrell*, 9 Gratt. page 131, and Richardson v. Donehoo, 16 W. Va. page 685, this reference in a decree to the record in another suit in the same court makes the record of the suit referred to a part of the record in the cause, in which the decree making such reference is entered."

See, in accord, citing the principal case, Sturm v. Fleming, 22 W. Va. 415; Richardson v. Donehoo, 16 W. Va. 711; Bias v. Vickers, 27 W. Va. 461.

In Hall v. Hall, 12 W. Va. 15, it is said: "Every matter adjudicated becomes a part of its record, which thenceforth proves itself, without referring to the evidence on which it has been adjudicated. Voorhees v. The Bank of the United States, 10 Peters 449, 471; Cooper v. Reynolds, 10 Wall. 308; *Craig v. Sebrell, 9 Gratt. 131;* Baylor's Lessee v. Dejarnette, 13 Gratt. 172, 173; Fisher v. Bassett, 9 Leigh 119; Smith v. Henning, 10 W. Va. 596, 27 Gratt. 624."

Also, in Kester v. Lyon, 40 W. Va. 166, 20 S. E. Rep. 935, it is said: "In chancery all exhibits with a bill or answer are parts of that bill or answer, and, generally, where one paper refers to another in a manner so as to identify it, that other paper is a part of the paper referring to it. Gunn v. Railroad Co., 37 W. Va. 421, 16 S. E. 628, and citations in opinion; Barb. Ch. Prac. 345; Bias v. Vickers, 27 W. Va. 461, and cases cited; *Craig v. Sebrell, 9 Gratt. 131*; Tracey v. Shumate, 22 W. Va. 476."

of lien, and directing a sale of such interest for satisfaction of his demand if the same should not be paid within thirty days. To this decree Craig obtained a supersedeas from this court.

The ground of objection taken and relied upon by the appellant is, that the court erred in sustaining the exception to his answer, because, as he alleges, the exception was not well taken, in that it failed to give the page of the bill on which the allegation omitted to be answered was to be found. This was purely a matter of practice within the discretionary control of the court; and a departure from what may have been the previous course of the court upon that subject would certainly furnish no ground for reversing the decree. Besides, the party submitted to the order of the court requiring him to file a better answer, and
133 *did file another accordingly; and there the subject of the exception properly ended.

The next objection is, that the court erred in hearing the cause at the time it rendered its decree, because, as it is alleged, Price had not been brought before the court either by an answer, or subpœna served, or order of publication duly executed.

It is certainly correct that no decree should be rendered affecting the interest of an absent defendant, unless it appear (if he be not otherwise brought before the court), that he has been regularly proceeded against by order of publication duly published in a newspaper and posted at the front door of the court-house. Hadfield v. Jameson, 2 Munf. 53. And it would seem that the objection, for want of due publication against the absent defendant, may be taken by other defendants who may be affected by the decree against him; and if made in the appellate court, will prove fatal, though the absent defendant were not a party in the appeal. Hunter's ex'ors v. Spotswood, 1 Wash. 145; Gibson v. White, 3 Munf. 94. In many cases the affidavit of nonresidence, the award of the order of publication, and the proof of its due execution, appear as part of the record, and in this way the appellate court can readily see that due publication has been made. But this is not the only mode in which it may be made to appear to the appellate court. It has been held to be sufficient where the decree states that publication had been duly made; and 1 Wash. and 3 Munf. ubi supra. In the case of Hunter v. Spotswood, supra, the decree was reversed and the cause remanded, because the fact of publication nowhere appeared in the record: and the chancellor having amended his decree by stating that evidence of publication was before him, the cause went back to the court of Appeals, and the decree was there affirmed. In this case Price was treated as an absent defendant in the bill, and the subpœna against him was returned not found; and the chancellor states in
134 his decree that the cause *was heard on the bill, &c., and the order of publication returned duly executed. Thus it must be inferred that the manner of proceeding against the nonresident Price was in the mind of the chancellor, and the subject of his consideration at the time he pronounced his decree; and that decree must be regarded as solemnly affirming that there was an order of publication duly taken against Price, and that it was duly published and posted as the law directs; otherwise, it could in no sense be said to have been duly executed; and the verity of the record upon this point is not to be called into question by any averment or proof to the contrary. Calwells v. Shields, &c., 2 Rob. R. 305. I am of opinion that the objection made upon this ground cannot be maintained.

The next ground of error assigned is, that the court erred in looking into the papers of the injunction case of Price v. Sebrell, upon the hearing of this cause. It does not distinctly appear whether the papers at large of that case, or only certain abstracts of judgments and a copy of an injunction bond, taken from that case, were read on the hearing of this cause; nor is it material how this was. I cannot perceive how the reading of all or any of the papers of that cause did or could prejudice the defendants on the hearing of this, excepting that it disclosed the fact that the defendant Craig was the surety of Price in the injunction bond given by him for the purpose of enjoining proceedings under this very judgment, and thus maintains the allegation of the bill of notice on the part of Craig of the complainant's judgment when he subsequently took his deed of trust: and to ascertain this, the injunction case might properly have been looked into. But in truth the principal if not the only influence of the injunction cause was beneficial to the defendants; because from it the amount of the complainant's demand in this case was considerably reduced; and the record also verifies a fact, which seems to have
135 been relied *upon by Craig at the hearing of the cause, and which no otherwise appeared, that he had taken his deed of trust pending the injunction, and whilst execution upon the judgment was suspended. The objection that this injunction case should not have been looked into, because it had not been made part of this case by the bill or answer, nor made an exhibit by any entry on the order book, is sufficiently answered by the decree, which itself makes it an exhibit in this cause.

The last objection taken is, that the court erred in allowing the lien of the appellee's judgment; and it is added, "it will be perceived that Price was but a security." I perceive no reason why this judgment should not have been held to be a lien upon the land of Price, which he subsequently conveyed. That Price was but a surety in the original debt, that there was a considerable lapse of time after the judgment before the conveyance, and the fact that at the time it was executed execution was suspended by the injunction, though relied upon by the defendant Craig in his defence, constituted no valid objection.

Craig, in his answer, does not deny the allegation of the bill that he had full notice of the judgment when he took his deed of trust; and it appears he was himself Price's security in the injunction to this very judgment; so that the lien of the judgment was unaffected as against Craig, even if never docketed in the County court; and no reason appears why it should not have been enforced in the manner directed by the decree against the property in the hands of Craig.

I am of opinion, therefore, that there is no error in the decree of which the appellant can complain, and that the same should be affirmed with costs to the appellee.

The other judges concurred in the opinion of Lee, J.

Decree affirmed.

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136 *Reed v. Cline's Heirs.

July Term, 1852, Lewisburg.

1. **Issue Out of Chancery—When Improper.***—In a suit in equity, if there be no conflict between different portions of the evidence, no ambiguity or uncertainty in it, but a simple failure to prove material facts, it is improper to direct an issue.

2. **Same—Decree Directing—When Appealable.**†—There may be an appeal from a decree directing an issue, where the decree impliedly involves a settlement of the principles of the cause.

The case is stated by Judge Samuels in his opinion.

Price, for the appellant.
There was no counsel for the appellee.

SAMUELS, J. Abraham Cline filed a bill in chancery in the Circuit Superior court of law and chancery for Wood county, against Parkinson Reed and others, praying for the specific execution of a contract for the sale of fifty acres of land. The bill alleged that one Uriah Ingraham, whilst he and one David Holden held an equitable title to a larger tract, of which this fifty acres was part, sold to one Charles Thompson that quantity, and gave him a bond with condition for the conveyance of title; that Thompson assigned this bond to one French; that French assigned it to complainant Cline; that these assignments were for valuable considerations; that Thompson, French and Cline had each paid the price he contracted to pay; that the bond was lost, and therefore not produced; that the defendant Reed, and those under whom he derived title, had notice of the equity asserted by complainant. Cline having died, the suit was revived by his heirs. Parkinson Reed, who is invested with the 137 legal *title, derived through several successive conveyances, answered the bill, putting in issue the material facts on which complainants rest their claim for relief; relying on the statute of limitations, and insisting that the staleness of complainants' demand should defeat his claim for the relief prayed. The cause, having remained in the court near seven years, was brought to a hearing on the matters thus in issue between the parties. The evidence adduced by complainants did not prove the execution of the bond, or its terms, or the performance of those terms; the loss was not proved, nor that French or Cline had made any contract whatever in regard to it. The proof was defective to show at what time Thompson made his contract, whatever it was, with Ingraham; it is probable, however, that it was more than twenty years before filing this bill.

On the hearing, the court directed issues to be made up and tried on the common law side of the court by a jury, to ascertain whether such title bond, as is set out and alleged in the bill, was ever executed; and whether it was assigned and transferred to the ancestor of the plaintiff, as alleged; whether it was lost or destroyed, and if so, what were its contents, and whether Parkinson Reed had notice thereof before his purchase and the payment of the purchase money. From the decree directing these issues, an appeal is taken to this court.

The courts of chancery jurisdiction have a legal discretion on the propriety of directing issues: their action in regard thereto may be reviewed by an appellate tribunal. Stanard v. Graves, 2 Call 310. If there be no conflict between different portions of the evidence, no ambiguity or uncertainty in it, but a simple failure to prove material facts, it is improper to direct an issue. Pryor v. Adams, 1 Call 332, and other cases in this court. If the Circuit court had observed this rule of practice, well 138 established by the decisions of *this court, the issues would not have been directed, but the bill would have been dismissed.

It is suggested, however, that as the de-

*Issue Out of Chancery—When Improper.—If there be no conflict between different portions of the evidence, no ambiguity or uncertainty in it, but a simple failure to prove material facts, it is improper to direct an issue. Rohrer v. Travers, 11 W. Va. 158, 154, citing the principal case and Pryor v. Adams, 1 Call 332. See, in accord, the principal case also cited in Noble v. Davies (Va.), 4 S. E. Rep. 211; Wise v. Lamb, 9 Gratt. 307. See also, monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

Same—Question of Sound Judicial Discretion.—See principal case cited in Beverley v. Walden, 20 Gratt. 147, 154, and *foot-note*; Miller v. Wills, 95 Va. 351, 28 S. E. Rep. 337.

†**Same—Decree Directing—When Appealable.**—Where a decree directing an issue out of chancery involves—though by implication—a settlement of the principles of the cause, there may be an appeal from such decree. See principal case cited as authority for this proposition in Wise v. Lamb, 9 Gratt. 309; Elder v. Harris, 75 Va. 71, 78; Carter v. Carter, 82 Va. 686; Alexander v. Byrd, 85 Va. 696, 8 S. E. Rep. 577; Wood v. Harmison, 41 W. Va. 381, 23 S. E. Rep. 562; *foot-note* to Garrett v. Bradford, 28 Gratt. 609. See also, monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

cree of the Circuit court is interlocutory merely, as it does not direct the payment of money, or the change of title or possession of property, as it does not settle the principles of the case, the appeal was prematurely taken to this court. The decree directing the issues must be understood as settling the principles of the cause to this extent; if the jury should find the issues favorably to complainants, they should have the relief prayed for, otherwise it would be an idle waste of time and cost to try the issues at all. Regarding the decree of the Circuit court in this light, and holding that it settles the principles of the case erroneously in deciding that the statute of limitations and the staleness of the demand are not sufficient defences against the complainant's demand, I am of opinion that this court may take cognizance of the appeal.

I am of opinion to reverse the decree and dismiss the bill with costs.

The other judges concurred in the opinion of Samuels, J.

Decree reversed.

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139 *Willard v. Overseers of the Poor of Wood County.

July Term, 1852, Lewisburg.

1. **Putative Father*—Liability—Case at Bar.**—The County court makes an order against the putative father of a bastard child, that he shall pay to the overseers of the poor twenty dollars a year for seven years. Though the overseers of the poor may never have paid anything for the support of the child, they are entitled to recover these annual sums from the putative father.

2. **Courts of Appeal—Practice—Case at Bar.**—In such a case, the County court having decided in favor of the putative father, and the overseers of the poor having spread the facts upon the record by an exception, and taken an appeal to the Circuit court, that court, upon reversing the judgment of the County court, should not send the cause back for a new trial, but should render a judgment in favor of the overseers of the poor for the amount appearing to be due, but without interest.

The case is stated in the opinion of the court.

There was no counsel for the appellant.
Fry, for the appellees.

SAMUELS, J., delivered the opinion of the court.

The plaintiff in error, as security, was bound, jointly and severally, with his principal in a recognizance taken before the County court of Wood county, with condition that the principal should pay the sum of twenty dollars annually for seven years to the overseers of the poor of Wood county, for the support of a bastard child, of which the principal was adjudged to be the father. Five of these installments having fallen due, and being in arrear, the overseers, under the statute 2 Rev. Code, p. 273, § 31, gave notice to Willard alone of a mo-
140 tion *to be made in the County court of Wood county for the installments thus in arrear, with interest. After some delay the cause was tried before the County court, which overruled the motion, and gave Willard a judgment for his costs.

A bill of exceptions was taken by the overseers of the poor to the decision of the court: it sets forth the facts on which the County court acted. The facts, on the part of the plaintiff below, consisted of the notice above stated, and its service; the record of the County court, in the case in which the principal was adjudged to be the father of the bastard child, and the recognizance; the fact that the parties making the motion were the overseers of the poor of Wood county, and that the motion was made by their authority. After stating the facts, shewn on behalf of the plaintiffs below, the bill of exceptions states: "This being all the evidence offered by the plaintiff, the defendant then offered J. T., who proved that A. S. asked the witness to use his name, which was sanctioned, he recognizing said S. as acting attorney for the overseers of poor; does not know that any money has ever been paid by the overseers of the poor."

The cause was carried by writ of supersedeas to the Circuit Superior court of law and chancery for Wood county, which reversed the judgment of the County court, and remanded the cause for a new trial. The cause is brought here by a writ of supersedeas to this judgment of the Circuit court.

It is objected by the plaintiff in error that the bill of exceptions is defective, in omitting to state that the facts therein set forth, as proven by Willard, were all the facts proven by him, and that, therefore, this court cannot determine whether the judgment of the County court was right upon the facts before it. This court has frequently decided that a bill of exceptions to the decision of a court, rendering a judgment, should set forth the facts appearing on the trial: this is neces-
141 sary *to enable an appellate tribunal to determine whether the court below decided the law correctly on the facts of the case. Bennet v. Hardaway, 6 Munf. 125; Carrington v. Bennett, 1 Leigh 340; Ewing v. Ewing, 2 Leigh 337. The bill of exceptions in this case, after stating the facts proven on the part of the plaintiffs, says the defendant then offered J. T., who proved the facts set forth in the bill of exceptions, from which it must be inferred that he proved nothing else. Holding, therefore, that this court has all the facts before it, it seems that the county court erred in overruling the motion; although the overseers may never have paid anything for the support of the child, yet the child was chargeable to the county, and the plaintiff in error was bound to pay the amount secured by the recognizance in relief of the county.

*See monographic *note* on "Parent and Child" appended to Armstrong v. Stone, 9 Gratt. 102.

I am therefore of opinion there is no error in so much of the judgment of the Circuit Superior court of law and chancery for Wood county as reverses the judgment of the County court with costs. But I am further of opinion that there is error in so much thereof as remands the cause to the County court for a new trial. The court should have proceeded to render a judgment for one hundred dollars, the amount in arrear under the recognizance, with the costs expended in the County court: no interest should be allowed, for the reasons given by Judge Carr, in Jacobs v. Hill, 2 Leigh 393, 400.

The judgment of the Circuit court should be affirmed, so far as it reverses that of the County court with costs; but so far as it remands the cause to the County court for a new trial, it should be reversed; and this court, proceeding to give such judgment as the court below should have given, should render judgment in favor of defendants in error for 100 dollars, and the costs of the County court; and also the costs in this court, as being the parties substantially prevailing.

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142 *Cook, Sheriff, & als. v. Hays.

July Term, 1852, Lewisburg.

1. **County Levy—Orders of Court—Collateral Questioning*—Case at Bar.**—A County court having laid the county levy, and directed the sheriff to pay certain claims upon the county out of it, and the sheriff having received the commissioner's book and proceeded to collect the levy as far as it could be collected, and returned a list of insolvents; upon a motion by one of the creditors of the county, whose claim was directed to be paid out of the levy, against the sheriff and his sureties to recover the amount, it is not competent for the defendants to object that the County court was not legally constituted to be authorized to lay the levy when it was done; nor can they object that the commissioner's book was irregularly made out and not properly authenticated.

2. **Same—Amount Collected Not Sufficient to Pay Claims—Presumption—Case at Bar.**—The amount collected by the sheriff not being sufficient to pay all the claims directed to be paid out of it, in the absence of proof that the sheriff has paid the claims other than that of the plaintiff, the law will not presume that he had paid them.

3. **Same—Same—Demand upon Sheriff—Waivert—Case at Bar.**—In such case a demand upon the sheriff is necessary to sustain a motion against a sheriff and his sureties. But no objection for want of a demand having been made in the court below, and the notice averring the demand, and the judgment giving a credit for a part of the debt as paid on the day it was demandable, this is sufficient proof of a demand.

See the opinion of Samuels, J., for a statement of the case.

Fisher, for the appellant.
Price, for the appellee.

SAMUELS, J. The County court of Gilmer, at its June term 1847, laid a county levy of 2 dollars 50 cents on each of five hundred and seventeen titheables, and directed the plaintiff in error, Cook, who was sheriff, to collect that levy and pay the 143 creditors *of the county, of whom the defendant in error was one. His debt amounted to 440 dollars. On the 9th of February 1848, the defendant in error, proceeding under the statute, Supplement Rev. Code, p. 194, § 3, caused a notice to be served on the plaintiffs in error, informing them that at the next Circuit Superior court of law and chancery for Gilmer county, he would move said court for judgment against them for his debt of 440 dollars aforesaid, with interest from the 1st of November 1847, when the notice alleged the same was lawfully demanded, until paid, and the costs; and moreover, for the default of the sheriff, that judgment would be asked against him for damages not exceeding the rate of fifteen per cent. per annum.

On the return of the notice the parties appeared. The defendants in error resisted a recovery, by alleging that the County court of Gilmer had not been duly convened at the June term 1847, to lay the levy; that it was not then properly constituted to perform that duty. They objected to the property book returned by the commissioner of the revenue, as evidence, because it was not properly authenticated, and that it was not proper in form or in substance. They insisted and showed that after deducting one hundred and forty-four delinquent titheables, there did not remain enough of those who were solvent to pay the amount which the sheriff was directed to pay out. It appeared on the trial that the sheriff had been furnished with a copy of the property book returned by the commissioner of the revenue, such as it was, and that he had collected the levy so far as it could be collected. On all this it seems to me that the action of the County court, in laying the levy, cannot be assailed in this collateral way. The court had authority to act on the subject, and if their action be 144 irregular *or even erroneous, it remains in force until set aside by an appropriate proceeding. Nor can the sheriff object on account of irregularity or want of

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***Orders of Court—Collateral Questioning.**—For the proposition that, where a court has jurisdiction of the subject, its orders cannot be attacked in a collateral proceeding, see the principal case cited and followed in Shelton v. Jones, 26 Gratt. 898, and *note*: Ballard v. Thomas, 19 Gratt. 22, and *note*.

†**Appellate Practice—Failure to Object to Evidence in Lower Court—Waiver.**—In Murdock v. Ins. Co., 38 W. Va. 415, 10 S. E. Rep. 779, it is said: "No objection was made or exception taken to the introduction of evidence that Hare was the owner of the absolute property in the barge. Had this objection been made in the trial court, it could have been remedied under our statute of amendment. Not having been there made, it is too late to raise it for the first time in this court. Harrison v. Bank, 6 W. Va. 1; *Cook v. Hays, 9 Gratt. 142.*" See, in accord, citing the principal case: Ballard v. Thomas, 19 Gratt. 26; Simpson v. Edmiston, 23 W. Va. 681.

authentication in the commissioner's book. He received a copy, which must have been intelligible, for he collected the levy by its assistance. The sheriff and his securities should not be exempt from liability for so much of the levy as was collected, by showing that the debts of the county ordered to be paid were greater in amount than the fund levied. The plaintiffs in error offered no proof whatever of any payment to any county creditor. Their counsel here insisted, however, that as the sheriff was a public officer, charged with the duty of paying the levy, it should be presumed he had so paid it; and thus it was shown that there was enough left to pay only a small portion of Hays' debt. If this argument be good against Hays, it would be good against each and all of the creditors. Thus every one in his turn, when proceeding by notice and motion, would be met by the presumption that all others had been paid, and thus nothing was left for him. The result would be complete exemption from all obligation to pay, which is absurd.

It is objected here, that the record shows no proof of a demand by Hays. If this objection be well founded, the judgment of the Circuit court should be reversed. I think, however, there is enough in the record to show that the objection should not prevail. The controversy in the court below seems to have turned upon subjects other than the absence of a demand: the question whether there was such demand is made for the first time here. It would be attended with great inconvenience and injustice to allow the plaintiffs in error, after making defence upon one ground in the court below, to surprise the defendant in error by making another defence here. There 145 is *enough, however, in the record to show that the demand was made: the notice asserts the making of a demand, and the judgment gives credit for a portion of the debt as paid the very day it was demandable. Holding this as sufficient proof of a demand, I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

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146 *Hannon & als. v. Hannah.

July Term, 1852, Lewisburg.

Partition—Evidence—Deed—Unrecorded Where Land Lies—Case at Bar.—A conveyed lands in the western part of the state to S, by a deed dated 13th December 1814, which was recorded the 25th January 1815, in the county of Hanover, where the grantor lived, but not in the county where the lands lie. This deed recites that A is the heir at law of his son, to whom the lands were patented. S, by deed recorded in Kanawha, conveyed to J W and W two-thirds of all the lands, wherever the same might be found, conveyed by A to S, by deed dated 13th December 1814, and recorded in Hanover county court 25th January 1815. This deed refers to and recites the provisions of the deed from A to S. In September 1824, J W conveyed to P an undivided third part of a tract of 3080 acres of land in Mason county, which his deed set forth "was deeded to J W by S, and is of record in the clerk's office of Kanawha county." This deed was recorded in Mason county. This third part vested in the heirs of P, and his alienees, H and B. In 1845, W conveyed his third part of this land in Mason to H, who filed a bill for partition against the heirs of S, and the heirs and alienees of P. An office copy of the deed from A to S was filed by the plaintiff and was excepted to by the defendants, the heirs and alienees of P: and B claimed part of the land under a patent to himself issued after the institution of this suit. HELD:

1st. **Same—Same—Same—Same—Same.**—That the heirs and alienees of P, who claim to have entered into the land and to hold under the deed from A to S, cannot object to its validity for want of registry in the county of Mason, the subsequent title papers having referred to it as recorded in the county of Hanover.

2d. **Same—Both Parties Claiming under Same Third Person—Effect.***—Where both parties claim under the same third person, it is sufficient to prove the derivation of title from him, without proving his title.

3d. **Deeds—Recitals—Evidence against Whom.**†—The recitals in the deeds subsequent to the deed objected to, direct attention to that deed. These recitals are evidence against parties and privies in blood, in estate and law, and an office copy from the place described as the place of record is good evidence in controversies with them.

4th. **Patented Land—Unforfeited—Effect of Junior Patent.**‡—As B has shewn no forfeiture of the land or transfer of a forfeited title to him, and as the commonwealth had previously granted the land to A, the land was not waste and unappropriated, and nothing passed by the junior 147 grant to B; and as *the patent issued after the institution of this suit, there could be no adverse possession under it.

***Ejectment—Both Parties Claiming under the Same Third Person—Effect.**—In Laidley v. Cent. Land Co., 30 W. Va. 509, 4 S. E. Rep. 707, it is said: "It is a well-settled rule in actions of ejectment that, where both the plaintiff and defendant claim under the same third person, it is *prima facie* sufficient for the plaintiff to prove such common derivation of title, without proving that such third person had title. 2 Greenl. Ev. § 307; *Hannon v. Hannah, 9 Gratt. 146;* Bolling v. Teel, 76 Va. 487; 2 Minor Inst. 869; Newlin v. Osborne, 3 Jones (N. Car.) 164; Wortham v. Cherry, 3 Head 468."

†**Deeds—Recitals—Evidence against Whom.**—See principal case cited in Coal R. Nav. Co. v. Webb, 8 W. Va. 438. See also, monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564.

‡**Patented Land—Unforfeited—Effect of Junior Patent.**—In Carter v. Ramey, 15 Gratt. 348, it is said: "In this case it is agreed that the land embraced by the caveatee's survey lies wholly within the boundaries of a tract of four thousand acres granted to one Richard Smith by patent bearing date 21st of February 1788, and that this four thousand acre tract had never been forfeited to the commonwealth under the revenue laws or otherwise. Thus, it was not liable to entry, either as waste and unappropriated,

5th. Tenants in Common—Conveyance by One Tenant—Effect.—The payment of taxes on an undivided third, or a conveyance of a portion by metes and bounds, not followed by actual entry and possession, does not constitute an actual ouster by one tenant in common of his cotenant.

This was a bill filed in the Circuit court of Mason county, by Samuel Hannah against John Hannon and others, to have partition of a tract of land of three thousand and eighty acres. There was a decree in accordance with the prayer of the bill. Whereupon the defendants applied to this court for an appeal, which was allowed. The facts are stated in the opinion of the court.

Fisher, for the appellants.
Fry and B. H. Smith, for the appellee.

ALLEN, J., delivered the opinion of the court.

This is an appeal from a decree of the Circuit court of Mason, making partition of a tract of land. The petition merely alleges, that the court erred in making partition, instead of dismissing the bill with costs; and there is no assignment of the particular errors complained of in the petition, nor has there been any such assignment at the bar. The court is thus left to grope its way in the dark, and to search through the whole record, to ascertain whether there is any error of which the appellants can complain. The bill was filed by the appellee, to obtain partition of a tract of 3080 acres situate in Mason county, of which the appellee claimed to be entitled to one-third. The land it seems was patented to William Austin, by patent bearing date the 22d May 1798. On the 13th December 1814, a certain John Austin, describing himself in an office copy of a deed, made an exhibit as the father and heir of his son William Austin, con-
148 veyed to a certain Mosby *Shepherd of Henrico all lands to which he was entitled as heir of William Austin. This deed seems to have been proved and recorded in the county of Hanover, where the grantor resided on the 25th January 1815, but does not appear to have been ever admitted to record in the county where the lands, the subject of this controversy, were situate.

Mosby Shepherd, by a deed dated the 15th February 1817, and recorded in Kanawha county 1st May 1817, conveyed to John Wilson of Kanawha county, and Jesse Winn of Hanover, two-thirds of all the lands, wherever the same might be found, conveyed by John Austin to said Shepherd, by deed dated the 13th December 1814, and admitted to record in the court of Hanover the 25th January 1815.

On the 3d of September 1824, John Wilson and wife conveyed to Luke Prior of Mason county an undivided third part of a tract of 3080 acres situate in Mason county, which undivided third part as aforesaid the deed sets forth "was deeded to John Wilson by Mosby Shepherd, and is of record in the clerk's office of Kanawha county. This deed was duly certified and recorded in Mason county on the 6th of March 1826.

On the 19th October 1827, Prior and wife conveyed to John Hannon, one of the appellants, 500 acres by metes and bounds, part of a survey granted to William Austin for 3080 acres, deeded to Prior by John Wilson, attorney for said Austin. This deed was admitted to record on the 26th October 1843.

On the 18th August 1823, Prior, as assignee of John Wilson, attorney for William Austin, conveyed to Matthew D. Brown one hundred acres by metes and bounds, which it appears was situate at the upper end of the 3080 acre tract.

By these conveyances, the one-third of the 3080 acres claimed by John Wilson,
149 under the conveyance *of Mosby Shepherd to him and Jesse Winn, was transferred to and vested in the heirs of Luke Prior, who has departed this life, and his alienees, Hannon and Brown.

On the 28th November 1845, Jesse Winn conveyed to the appellee his undivided third part of the 3080 acres, of which he claimed to be seized in fee by virtue of the deed of Mosby Shepherd to him and John Wilson, dated the 15th February 1817.

The appellee thus claiming one undivided third part of the tract, filed his bill for a partition, making the unknown heirs of Mosby Shepherd the owners of the undivided third part not conveyed by their ancestor, and the appellants as alienees of the one-third part conveyed by John Wilson to Prior, defendants.

It seems from an endorsement on the copy of the deed from John Austin to Mosby Shepherd, filed as an exhibit, that the defendants in the court below objected to an office copy being read as evidence, as it did not appear that the deed had been recorded in the General court, or in the county where the land was situate.

The deed from John Wilson to Luke Prior for an undivided third part of the 3080 acres, recites that the same was deeded to John Wilson by Mosby Shepherd, by a deed of record in Kanawha county; and that deed refers to and recites the provisions of the deed from John Austin to Shepherd.

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or as forfeited land, and the entry of the caveator so far as it embraced the land covered by the survey of the caveatee, being wholly unauthorized by law, was simply void and could confer no equity whatever. And a grant founded upon such void entry would pass nothing, there being indeed nothing in the commonwealth upon which the grant could operate. Whittington v. Christian, 2 Rand. 353; Hannon v. Hannah, 9 Gratt. 146; Levasser v. Washburn, 11 Gratt. 572; Atkins, etc., v. Lewis, etc., 14 Gratt. 30." See also, the principal case cited in Trotter v. Newton, 30 Gratt. 582; *foot-note* to Levasser v. Washburn, 11 Gratt. 572.

§Tenants in Common—Conveyance of Specific Portion of Property by One Tenant—Effect.—See principal case cited in *foot-note* to Cox v. McMullin, 14 Gratt. 82.

Adverse Possession.—See principal case cited in *foot-note* to Caperton v. Gregory, 11 Gratt. 505.

The appellants claim under Prior as heirs or alienees; Hannon files the exhibit as part of his evidence of title. In the deed to Brown, Prior conveys as assignee of Wilson, attorney for William Austin, and in his deed to Hannon recites that the land was deeded to Prior by John Wilson, attorney for said Austin. It thus appears that the deed from John Austin to Mosby Shepherd is the common source of title to both parties. And the deed to Prior, under whom they all claim, refers to and recites the terms of the deed to John Wilson, 150 which describes the *deed objected to by its date and place of record. It is not therefore competent for these appellants, who claim to have entered into the land and to hold under this deed, to object to its validity for want of registry, the subsequent title papers having referred to it as being recorded in the county of Hanover. Where both parties claim under the same third person, it is sufficient to prove the derivation of title from him without proving his title. 2 Greenl. Evi., § 307. The recitals in the deeds subsequent to the deed objected to, direct attention to that deed: it is referred to in the deed of Shepherd to Wilson and Winn, by its terms, its date and place of record. These recitals are evidence against parties and privies in blood, in estate and law, and an office copy from the place described as the place of record is good evidence in controversies with them. Jackson v. Parkhurst, 9 Wend. R. 209; 4 Phil. Evi. 453, note 251; (Cowen & Hill's notes.)

The answers of all the appellants allege that the interests of the other tenants in common have been forfeited to the commonwealth either for nonentry on the books of the commissioner of the revenue, or for nonpayment of the taxes. Of these allegations no proof whatever is adduced, and they may be dismissed from further consideration.

The tract, sold and conveyed to the appellant Brown by metes and bounds, has been assigned to him by the partition made by the commissioner and the final decree. As respects the land sold him by Prior as part of the 3080 acre tract, he gets by the decree all that he claimed or was entitled to. In the first answer filed by him he alleged he had a claim to about 350 acres, which included the 100 acres purchased of Prior, being part of a tract that he had entered, but declined presenting his claim to the junior entry in this suit. In his amended answer, however, he does assert his claim to the 100 acres claimed 151 under his purchase from *Prior as part of the large survey, and to so much of the tract of 3080 acres as was embraced in a patent to him for 590 acres, dated the 30th June 1847. His title, therefore, under this junior grant is directly in issue, and must be passed upon in order to a partition of the whole tract.

As he entered upon the tract under and by virtue of the common title, claiming under one of the tenants in common, he was a necessary party in a suit for partition; and any other claim which he may have acquired to the common subject must be disposed of in order to a partition of the whole subject. His patent and the survey on which it was founded bear date after the bill was filed in this case. His answers admit that the 100 acres purchased of Prior was part of the 3080 acre tract, and that the residue of the land claimed under his recent patent was within the bounds of the larger tract. He has shown no forfeiture or transfer of a forfeited title to him; and as the commonwealth had, according to his own admission, previously granted the land to Austin, the land was not waste and unappropriated, and nothing passed to him by the junior grant so far as it embraced land included in the boundaries of the previous grant. As the patent was issued after the institution of this suit, there could be no adverse possession under it. He has, therefore, failed to establish any claim to more of the land than the portion he holds under the deed from Prior, confirmed to him by the decree; and as this is all the decree did allow to him, the additional claim set up under his junior grant of the 30th of June 1847, is in effect disaffirmed; and in this there is no error in the decree.

The appellants, the heirs of Prior, rely on the alleged forfeiture to the commonwealth, but of which no proof is adduced. They furthermore insist that their ancestor, in virtue of his purchase from John Wilson of one undivided third, entered and 152 took actual possession of *a portion of the tract at the lower part thereof, and that he and those claiming under him have held and claimed to hold possession of the lower end of the tract, and have exercised acts of ownership over the same ever since. The evidence on this subject is very vague and unsatisfactory: it is proved that about twenty or twenty-two years before the bill was filed, a man by the name of Curry, who stated he had purchased some of the land from Prior, commenced building a cabin on a portion of the tract, afterwards sold and conveyed by Prior to Hannon, but did not finish it because Prior had sold the same land to Hannon. Between the years 1833-5, David McCoy, supposing the land to be vacant, finished the cabin and lived in it for about six months, when the cabin was burned down. He did not enter under any of the appellants and held no tenancy under any contract with Hannon; but being informed that the land belonged to Hannon, intended to apply for a lease, if the cabin had not been burned. From that period there is no evidence of any actual occupation of any part of the land by Pryor or those claiming under him at the lower part of the tract, until George Prior entered upon a portion of the tract about the year 1844, two years before this bill was filed. This evidence does not establish an actual occupancy and possession in any of the appellants or those under whom they claim, prior to the entry of George Prior, shortly

before this suit was instituted. It does not clearly appear that Curry entered under Prior at all, and even if he did, his acts amounted to nothing more than an entry. The subsequent brief possession of McCoy was not held under any of the parties interested in the lands, and was soon abandoned. Such evidence of adverse possession would not avail as against a stranger, and as between tenants in common does not establish anything like that actual ouster and adverse holding which is necessary to con-
153 stitute *an exclusive possession in one tenant in common as against his cotenants; nor would the payment of taxes on an undivided third or a conveyance of a portion by metes and bounds, not followed by actual entry and possession, amount to such an ouster. Where two persons claim by the same title, there shall be no adverse possession so as to toll an entry of one, but the entry of the other shall at all times be lawful. Coke Lit. 242 a; Fairclaim v. Shackleton, 4 Burr. R. 2604; Hall v. Mathias, 4 Watts & Serg. 331; Purcell v. Wilson, 4 Gratt. 16.

The appellant Hannon also sets up an adverse claim to one hundred acres of land under a patent to John Sibrell, dated the 13th July 1830. The patent and a deed from David Wallace and wife to the appellant Hannon are filed; but there is no evidence to show where the land is situate or that possession has ever been taken of it, or to connect Wallace with the patentee. If it is within the bounds of the 3080 acre tract, the patent conferred no title, as the lands had already been granted.

No attempt was made to prove that the partition was unequal. The interests and convenience of the appellants were consulted so far as could be done with a due regard to the rights of their cotenants. I think the decree should be affirmed.

Decree affirmed.

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154 *Roach v. Dickinsons.

July Term, 1852, Lewisburg.

Sale of Land—Covenants—Dependent—Averments*—Case at Bar.—A covenant for the sale of land, houses, mills, &c., dated the 3d of May 1845, provides that the vendor shall give possession of one house and the mill, &c., on the execution of the covenant; and that possession of the residue of the said land and property is to be given on the first day of November next. In consideration whereof, the parties of the second part covenant to pay $1700 as follows: $300 to be paid when the said one house, &c. is given as aforesaid, and $1400, the residue thereof, on the 1st of June 1846: "And on the completion of said payments, the said party of the first part further agrees to execute and deliver to the parties of the second part, their heirs or assigns, a deed of conveyance in fee simple for all the above described lands, property and appurtenances, with covenants of general warranty, and relinquishment of dower." HELD: That the covenant to pay the $1400 and the covenant to convey are dependent covenants; and in an action by the vendor to recover the money, he must aver either that he had executed, or that he had tendered, the deed: And the averment that he was ready and willing to execute and deliver it is not sufficient.

This is an action of covenant brought by Jesse C. Roach against J. G. and R. W. Dickinson in the Circuit Superior court of Wood county, upon an agreement under seal, dated 3d of May 1845, which, so far as it is necessary to recite it, is in substance as follows: "The said Roach, in consideration of the covenants and agreements hereinafter mentioned to be observed and kept by the parties of the second part, has bargained and sold, to the said parties of the second part, a certain lot or parcel of land in Wood county;" (which is set out by metes and bounds, and described as part of a tract of two hundred acres,) "also a certain other lot or parcel of land agreed to be conveyed to him (Roach) by Arthur Cain, supposed to contain seven acres; which said two parcels of land and
155 premises *include the mill and mill site, water rights and privileges now used and occupied by said party of the first part, and are agreed to be sold and conveyed to the parties of the second part, together with the mill gearing and machinery, possession of one house, and the mill yard and appurtenances to be given to the said parties of the second part, on the sealing and delivery of these presents and possession of the residue of said lands and property, to be given on the first day of November next." —"In consideration whereof, the said parties of the second part covenant and agree to pay to the said party of the first part the sum of one thousand seven hundred dollars, to be paid as follows: That is to say, three hundred dollars, part thereof, to be paid whenever possession of the said one house, mill, mill yard and appurtenances is given as aforesaid, and one thousand four hundred dollars, the residue thereof, on the first day of June in the year 1846; and, on the completion of the said payments, the

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*Sale of Land—Covenants—Dependent—Averments.—In the principal case there was a covenant on the part of the vendee to pay $1,400 at a certain time, the residue of the purchase money on a certain tract of land, and the vendor upon the payment of such sum covenanted to give the vendee a deed of conveyance of the land: and it was held that these covenants were dependent and in an action by the vendor to recover the money, he must aver either that he has executed, or that he has tendered the deed; and the averment that he is ready and willing to execute and deliver it is not sufficient. See upon this subject, citing and approving the principal case, the following cases: Ayres v. Robins, 30 Gratt. 116; B. & O. Ry. Co. v. McCullough, 12 Gratt. 595; Metropolitan Life Ins. Co. v. Rutherford, 95 Va. 779, 30 S. E. Rep. 383; Snodgrass v. Wolf, 11 W. Va. 165; Kern v. Zeigler, 13 W. Va. 716; Schwarzbach v. Protective Union, 25 W. Va. 649; Barrett v. McAllister, 33 W. Va. 750, 11 S. E. Rep. 224; Watson v. Coast, 35 W. Va. 473, 14 S. E. Rep. 252; Jones v. Singer Mfg. Co., 38 W. Va. 149, 18 S. E. Rep. 478.

said party of the first part further agrees to execute and deliver to the parties of the second part, their heirs or assigns, a deed of conveyance in fee simple for all the above described lands, property and appurtenances, with covenants of general warranty and relinquishment of dower."

The declaration, after reciting the agreement, avers that the plaintiff, pursuant to his covenants, delivered to the defendants full possession of all the property sold, to wit: Possession of the said one house and the mill, mill yard and appurtenances, on the 5th day of May 1845, (two days after the date of the agreement,) and possession of the residue of the lands, premises and property agreed to be conveyed, on the 1st day of November 1845; and assigns as a breach that the defendants did not pay the sum of one thousand four hundred dollars on the 1st day of June 1846, nor since. The declaration further avers, "that on the
156 completion *of the payment of the said purchase money for the said lands, property and appurtenances to him, by the said defendants, pursuant to their said covenants and agreements, he the said plaintiff is ready and willing, and that he was ready and willing on the said first day of June in the year 1846, and hath ever since been ready and willing, to execute and deliver to the said defendants a deed of conveyance in fee simple for all the lands, property and appurtenances described in said agreement, with covenants of general warranty and relinquishment of dower, pursuant to his said covenants and agreements.

The defendants demurred generally to the declaration and each assignment of breaches, and the court sustained the demurrer on the ground that it was not sufficiently averred in the declaration that the plaintiff had made or tendered a conveyance to the defendants according to the terms of the covenant.

Roach applied to this court for a supersedeas to the judgment, which was awarded.

Fry, for the appellant.

There was no counsel for the appellees.

DANIEL, J., after stating the case, proceeded:

Was the demurrer properly sustained? This depends on the question whether, by the terms of the agreement, the plaintiff was bound to make or tender a deed for the property as a prerequisite to his right to demand the last payment of the purchase money. If he was, the rule is well settled that he was bound to aver explicitly in the declaration, either that he had executed or had tendered the deed; and the averment that he was ready and willing to execute and deliver it, is not sufficient.

There is perhaps no branch of the law in which is to be found a larger number
157 of decisions or a greater *apparent conflict of authorities than that in which the effort has been made to define the dependence and independence of covenants, and to designate the class to which any given case in dispute is to be referred. The great effort, however, in the more recent decisions, has been to discard, as far as possible, all rules of construction founded on nice and artificial reasoning, and to make the meaning and intention of the parties, collected from all the parts of the instrument rather than from a few technical expressions, the guide in determining the character and force of their respective undertakings.

Still, some general rules must necessarily be adopted as aids in arriving at this meaning and intention; and when by a train of precedents certain expressions have received a well known construction, parties may be fairly supposed to have used them in the sense thus given to them, unless a contrary purpose is plainly indicated by other parts of the instrument.

I think that the court below has most probably effectuated the true meaning of the parties, by the construction it has given to their agreement, and that in doing so it has not been found necessary to run counter to any well established precedent.

The cases cited by the appellant, which seem at first view most strongly to favor a contrary construction, are those of Pordage v. Cole, 1 Saund. R. 319, and Northrup v. Northrup, 6 Cow. R. 296. In the former case, it is to be observed, however, that whilst a day certain was by the agreement of the parties appointed for the payment of the purchase money, no day was fixed for the conveyance of the lands; and it cannot therefore be justly regarded as establishing anything further than that, where the vendee expressly covenants to pay the purchase money on a given day, no time being fixed for the conveyance, he ought to be held as relying on his remedy and not
158 as intending *to make the conveyance a condition precedent to the payment of the purchase money.

The second case does, on a cursory examination, seem to be more in point. In that case the defendant covenanted to pay certain rent due and in arrear to one D. Tomlinson, on a certain farm, and all which should become due on the 25th March 1825; the whole to be paid on that day; and the plaintiff covenanted, that on the defendant's so paying the rent, he, the plaintiff, would give up and discharge a certain bond and mortgage. To an action brought for not paying the rent at the day, the defendant pleaded that the plaintiff did not, on the 25th March 1825, give up and discharge the bond and mortgage, nor tender, nor offer to do so on that day, or before or since. There was a general demurrer to the plea and joinder. Savage, C. J., in delivering the opinion of the court, said: "The plea is bad. The payment of the money to Tomlinson on the day specified is clearly a condition precedent. The performance by the plaintiff of his part of the agreement is not necessarily simultaneous, but was naturally to be subsequent. A general averment of his readiness to perform is all that can be necessary or proper. To aver

a tender was certainly not necessary." In the case of Slocum v. Despard, 8 Wend. R. 615, this case (Northrup v. Northrup) came under review, and was made the precedent for ruling that; and the grounds upon which it was decided were there more fully considered and explained. In the case of Slocum v. Despard, the defendant covenanted, by the first Monday of May 1828, to pay two certain notes made by the plaintiffs to H. Baldwin, bearing date 18th July 1827; the one payable in three and the other in six months after date; and also to pay other sums to the plaintiff at certain specified times. And the plaintiffs, upon the payment of the said two notes (due by the plaintiffs to Baldwin) agreed to
159 assign to *the defendant two certificates of the surveyor general for two certain lots specified in the agreement. In their declaration on the agreement, the plaintiffs, among other things, averred that though they had always been ready and willing to perform on their part, the defendants did not at the time specified, or at any other time, pay the notes payable to Baldwin. One of the questions to be decided was, whether the covenant of the defendant in respect to the payment of the two notes to Baldwin, and that of the plaintiffs in respect to the assignment of the certificates, were dependent or independent covenants; and consequently, whether the plaintiffs were bound to aver performance or an offer to perform before they could recover from the defendants. Sutherland, Judge, delivering the opinion of the court, said, that if the payment of the notes and the assignment of the certificates were to take place at the same time, the covenants were dependent, and neither party could recover without averring performance on his part. He cited the case of Northrup v. Northrup, however, to show that the covenants were independent. After stating that case, and reciting the opinion of the chief justice, he proceeded to say, that the conclusion of the chief justice that the performance by the plaintiff of his part of the agreement was naturally to be subsequent to the performance of the defendant, must have rested principally upon the circumstance, that the payment to be made by the defendant was to be made to a third person, and not to the plaintiff himself, and that he was of course bound to produce evidence of it, which presupposed the act to have been done before the plaintiff was bound to perform.

He then proceeded to state that the same circumstance existed in the case under decision, but admitted that independently of that circumstance, neither case
160 *could be distinguished from many others in which the covenants had been held to be dependent.

The same views governed the decision of the court in the case of Johnson v. Wygant, 11 Wend. R. 48. In that case the defendant covenanted for the purchase of a tract of land at 155 dollars, in three equal annual installments, with interest annually on the whole sum till paid; and the covenant proceeds, "and upon the payment thereof I am to receive from the said Johnson a good warrantee deed of said land." The same judge (Sutherland) again delivered the opinion of the court, citing the case of Green v. Reynolds, 2 Johns. R. 207; Jones v. Gardner, 10 Johns. R. 266; Gazley v. Price, 16 Johns. R. 267; and Parker v. Parmele, 20 Johns. R. 130. He said it was well settled by these and other cases, that such covenants were dependent, and that neither party could recover against the other without averring a tender of performance on his part; that a mere readiness to perform was not sufficient; that if the vendor sues he must aver the tender of such a deed as by the terms of the contract he was to give; and if the action is brought by the vendee against the vendor for not conveying, he must aver a tender of the consideration money before suit brought; and he again repeated, that the feature by which each of the cases of Northrup v. Northrup and Slocum v. Despard was to be distinguished was, that in each the money was to be paid to a third person and not to the vendor; and that the vendee was of course bound to produce evidence of the payment having been made before the vendor was bound to convey. That circumstance he said was held in those cases as indicating the understanding of the parties that the payment was to be first made, and constituted the only ground for the decision then made that a general averment of readiness to perform by the vendor was sufficient to maintain his action.

161 *The same doctrine was maintained by the Supreme court of Pennsylvania in the case of Adams v. Williams, decided in 1841. 2 Watts & Serg. 227. That was an action of covenant upon an article of agreement for the sale of a tract of land for the consideration of 812 dollars 50 cents, payable in six annual installments; and the agreement concluded, "the said party of the first part (the plaintiff) doth covenant, &c., with the said party of the second part, that upon his paying the said sum and sums of money in manner aforesaid, the said party of the first part will grant, convey," &c. In a very brief opinion, Rogers, J., said: "In a contract where money is payable in installments, and it is agreed that a deed shall be given when, on or upon payment of the whole amount of the purchase money, it is the fair import of the terms that the delivery of the deed is precedent to the payment of the money. The ancient cases went on subtle grounds, but it is now settled that whether covenants be dependent or independent is a question of intention." The court were unanimous in the opinion that the covenants were dependent, and in overruling the judgment of the court below, which had decided that proof of a tender of a conveyance by the plaintiff to the defendant before suit brought was not essential to the plaintiff's right to recover.

A like construction was given to similar

covenants in the case of Peques v. Mosby, 7 Smeades & Marsh. 340, decided by the High court of errors of Mississippi in 1846. In that case the defendant had purchased a tract of land to be paid for in installments, for which he had executed his notes, and the plaintiff had given a title bond, the condition of which was as follows: "Now if I shall make or cause to be made to the said Mosby a good and lawful deed of conveyance to the said half section of land, when the last note becomes due and is paid, then this obligation to be null and
162 void." Justice *Clayton, delivering the opinion of the court, said, that courts will construe covenants to be dependent, unless a contrary intention clearly appears, and that the defendant could not be forced to pay out his money without getting that for which he stipulated. The same principles prevailed in the case of Robertson v. Robertson, 3 Rand. 68, decided by this court. In that case the suit was brought by the vendee of a tract of land against the vendor for a breach of covenant in failing to convey. By the terms of the covenant, the vendee was to tender four bonds on the 25th December 1800, with good security, each for 450 pounds, payable in one, two, three and four years respectively, and the vendor was to deliver possession also on the 25th December 1800, and was to make a full and complete legal title "whenever the said J. A. Robertson (the vendee) tenders the said four bonds with sufficient security," &c. The declaration averred that the plaintiff tendered the bonds on the fourth day of March 1801. The declaration was held by the court to be defective. Judge Green said, "It does not allege a performance by the plaintiff at the appointed time, or that the defendant had consented to postpone the performance to a later day." But the remarks immediately preceding are more particularly applicable to the question before us, to wit: "The covenants being to be performed on both sides at the same time, were therefore dependent on each other, and neither party could insist upon the others performing his part of the covenants, unless he himself performed or offered to perform his covenants at the appointed time.

The case of Bailey v. Clay, 4 Rand. 346, cited by the counsel of the plaintiff in error, it seems to me, has no application. In that case, whilst a day was appointed by the terms of the contract for the payment of the purchase money, no day was appointed for the conveyance of the land, and the
163 court, I think, properly *held that in order to recover the purchase money there was no necessity on the part of the plaintiff to allege or prove a conveyance or tender. Judge Green, who delivered the opinion, said that whilst a general undertaking to pay money without specifying the time of payment, obliges the party to pay immediately, an undertaking to do any collateral act, as to convey lands, entitles the party to perform it at any time during his life, unless hastened by the request of the other party. Nor is there anything in the case of Lewis v. Weldon, 3 Rand. 71, as I conceive, at all in conflict with the decisions which I have cited. In that case, which was the sale of a crop of wheat, the whole of which was by the terms of the contract to be delivered at a day which was some months before the day fixed for the payment of the price, the court held that though the covenants were dependent, and though the plaintiff had failed to deliver the whole of his crop as stipulated, still he might maintain his action for so much as he had delivered. That in dependent covenants, when the plaintiff has performed a part for which he can have no other remedy than by an action on the covenant, an action may be maintained in the same manner as if the covenants were independent. Judge Coalter, who delivered the opinion of the court, expressly disclaimed any purpose to question at all the correctness of the decision in Glazebrook v. Woodrow, 8 T. R. 366, in which it was decided that though the plaintiff had partly performed his covenants by delivering the possession of the house sold, he could not recover without alleging and proving that he had conveyed it or tendered to convey it, the day fixed for the payment of the money and the conveyance being the same. He said that it was properly held in that case that the plaintiff could not recover without averring a performance in respect to the conveyance, that being the great consideration, without which, the defendant was not to be forced to part with his money.

164 *It is true, that in the case of Terry v. Duntze, 2 H. Bl. 389, it was asserted as a rule in the construction of covenants, that if any money is to be paid before the thing is done, the covenants are mutual and independent. This rule was made the foundation of the decision by the Supreme court of Kentucky in the case of Mason v. Chambers, 4 Litt. R. 253, in which the court held, in an action on a covenant for the sale of land, to be paid for by two installments, one of which was to fall due at a day prior to the day appointed for the conveyance, and the second on the last named day, that the covenants were independent; and that it was not necessary to aver a tender of the conveyance in order to recover the last installment. It was there said that the defendant, by consenting to part with a portion of the purchase money before he was to receive a conveyance, thereby evinced the intention to leave in favor of the other side, a condition precedent, and to abandon the benefits of a covenant requiring simultaneous acts. It must also be conceded, that in the case of Gardener v. Corson, 15 Mass. R. 500, the Supreme court of Massachusetts do seem in terms to admit that the rule, as laid down in Terry v. Duntze, was a convenient and proper one to be followed in the construction of covenants exactly similar to those to which it was applied in that case: Yet they at the same time exhibited a strong dispo-

sition, I think, to narrow the application of the rule, and were astute in the reasoning by which they withdrew the case before them from without its operation. In that case Corson, who was at the time in the possession of a tract of land, contracted for its purchase at the price of 920 dollars, to be paid in four years; and also agreed to pay the interest annually. And the vendor on his part, covenanted to execute a deed, "upon Corson's paying the above mentioned sums at the time or times above named." The broad terms of the
165 rule, announced *in Terry v. Duntze, would seem to cover such a case, and to make the covenants independent, inasmuch as there was a clear stipulation on the part of the vendee to pay a portion of the consideration, to wit, the annual interest for the first three years, at dates antecedent to that fixed for the conveyance. Yet the court, whilst they in terms recognized the rule as before stated, construed the covenants for the payment of the 920 dollars, with the last year's interest, and the covenant for the execution of the conveyance to be dependent. They held the annual interest which Corson was to pay, to be by way of rent. They said that, as he was in possession of the land, he was in the enjoyment of the consideration for which this interest or rent was to be paid, and that by paying it he did not part with any substantial part of the price to be paid for the land.

To the list of cases sustaining the construction given by the circuit court to the covenants in the agreement under consideration may be added that of Bean v. Atwater, 4 Conn. R. 3. In that case the contract was for the sale of a tract of land to be paid for in several installments, the first and second of which were to be paid at dates prior to the 17th June 1817, the third on that day, when the deed was also to be made, and the balance at certain days thereafter. A majority of the court held that no action could be maintained for the third installment without averring the execution or tender of the deed. The propriety of the rule propounded in the case of Terry v. Duntze was examined, and shown to rest on no well established precedent. It was, I think, conclusively shown that the cases relied on as establishing it furnished no sanction for the rule; that those cases merely decided that when the entire consideration was payable at a time prefixed, which must or might precede the consideration on the other side, there might be a recovery without performance;
166 *and the judges delivering the opinion of the majority of the court proceeded to demonstrate, that when only a portion of the money was to be paid, before the conveyance of the land, and the balance at the same time or afterwards, there is no exhibition of an intent that the whole consideration might be demanded, before performance or tender on the other side, but of the contrary.

Upon the whole, whilst it cannot be denied that there is some conflict of precedents on the question, I am satisfied that the weight of authority and reason is on the side of the judgment rendered by the Circuit court; and I am for affirming it.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

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167 *McGuire & als. v. Pierce, Assignee, &c.

July Term, 1852, Lewisburg.

(Absent LEE, J.*)

1. **Bonds—Prison Bounds Bond—Joint Execution.**†—There is a joint judgment and execution against two, who have been arrested and committed to prison. They may jointly execute a prison bounds bond.
2. **Same—Same—Breach of—Case at Bar.**—It is no defence to an action on a prison bounds bond, that the prisoner, after a departure, voluntarily returned to the rules, and there remained, &c.; or that he voluntarily returned to the jail, &c.; or that the jailor made fresh pursuit after the prisoner, and recaptured him and recommitted him to jail; or that the prisoner accidentally walked sixteen feet beyond the limits of the prison bounds, which were bounded on an imaginary line, and thereupon immediately returned, &c.
3. **Same—Same—Assignment—Sufficiency.**‡—An endorsement of the name of the sheriff on the bond before action brought, is a sufficient assignment thereof; and the action may be maintained by the creditor as assignee, without writing out the assignment; or the assignment may be written out in the progress of the trial after the jury is sworn.
4. **Prison Bounds—Recordation in Order Book—Statute.**—The boundaries of the prison rules being recorded in the order book of the County court, in the order of the court establishing them, is a sufficient compliance with the statute requiring said boundaries to be recorded.
5. **Prison Bounds Bond—Action on—Measure of Damages.**—The measure of damages in an action upon a prison bounds bond is the debt, interest and costs.
6. **Commissioners—Depositions—Statute.**—A commissioner appointed by a Circuit court to take depositions had authority, under the acts of 1831, Supp. Rev. Code, p. 165, § 80, and 1834, Sess. Acts, p. 75, ch. 62, § 2, to take depositions in a common law cause.

This was an action of debt on a prison bounds bond, brought by Thomas Pierce, assignee of Benjamin Webb, sheriff of Wood county, against Edward D. and John S. McGuire and their sureties in the bond. The condition of the bond, after re-
168 citing that *the said McGuires, partners trading under the firm of E. D. & J. S. McGuire, had been taken in execu-

*He had decided the cause in the court below.

†See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

‡See monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

tion by the said sheriff under a ca. sa. issued from the clerk's office of said county, at the suit of said Pierce, and had taken the benefit of the prison rules, is in the terms prescribed by law: that is, that the said McGuires should not depart and go out of the rules or bounds of the prison, and should render their bodies to prison in satisfaction of the said execution, at or before the expiration of one year from the date of the said bond. The declaration assigns, as a breach of the condition, that the said John S. McGuire did depart and go out of the rules or bounds of the said prison after the execution of the said bond, and before the expiration of one year from the date thereof; avers that, after the said bond was so forfeited, the said sheriff, by an endorsement thereon, assigned the same to the said Pierce, and contains the general breach of nonpayment of the penalty of the bond. The defendants craved oyer of the bond, demurred generally to the declaration, and the plaintiff joined in the demurrer; which, however, was overruled by the court.

The defendants also pleaded performance of the said condition; to which the plaintiff replied generally, and issue was thereon joined. The defendants also tendered to the court eight pleas in writing, to the filing of which the plaintiff objected. The court permitted four of the said pleas, numbered 1, 6, 7 and 8, to be filed, to which the plaintiff replied generally, and issues were thereon joined: but these four pleas are not in the record, and it does not appear what they are. The other four of the said pleas, numbered 2, 3, 4 and 5, were rejected by the court; and the defendants excepted. These four rejected pleas all admit that the defendant John S. McGuire did depart from the prison rules as charged in the declaration; but they propose to justify or excuse such departure in different forms, 169 *as follows: No. 2 avers that after such departure the said John S. McGuire voluntarily returned within the rules, and therein continually remained until he was therefrom discharged by due course of law. No. 3 avers that he voluntarily returned into the jail of said county, (instead of the rules as in No. 2,) and was therein confined until discharged by due course of law. No. 4 avers that the jailor made fresh pursuit of the said John S. McGuire, recaptured him, and recommitted him to jail, and kept him there confined until he was discharged by due course of law. No. 5 avers that said McGuire accidentally walked sixteen feet beyond the limits of the prison bounds, which were bounded on an imaginary line, and thereupon immediately returned; and from that time until he was discharged by due course of law kept within the said limits; and that this is the supposed escape alluded to in the declaration.

On the trial of the issue the plaintiff offered in evidence the said bond, with an endorsement thereon in these words: "Benjamin Webb, sheriff of Wood county, by James Cook, deputy sheriff of Wood county." To the giving of the said endorsement in evidence the defendants objected, because it was no legal assignment. Whereupon the plaintiff asked for leave to write an assignment above said signature, which the court permitted to be done, and which was done, at the bar, in these words: "I assign the within bond to Thomas Pierce," &c. And it was proved that said Cook who made said endorsement was, at the time of making it, a deputy of Benjamin Webb, sheriff of Wood county. And the said bond, with the assignment so filled up, being offered in evidence, the defendants objected thereto, on the ground that the assignment ought to have preceded the suit; and also because it was variant from the assignment set out in the declaration, being without date. But the court 170 overruled *the objection, it appearing that the endorsement was made before the commencement of the suit, and the defendants again excepted. The plaintiff then offered in evidence a certified copy of the order of Wood County court, laying out the prison bounds of said county by specific metes and bounds and landmarks; but showed no copy or original record of said bounds other than as the same remains upon the order book of said county, the said order never having been otherwise recorded than by its entry on the order book. The defendants objected to the copy of said order as evidence, because it had not been recorded; but the court overruled the objection, and the defendants again excepted. The plaintiff then offered in evidence a deposition taken before A. Samuels, Esq., a commissioner of the Superior court of chancery for Wood county to take depositions; to the reading of which the defendants objected, on the ground alone of the want of authority of a commissioner in chancery to take the said deposition. But it was further proved that the said deposition was taken in the presence of the counsel of both plaintiff and defendants, and by consent to be read in chief; and the court overruled the objection; and the defendants again excepted. The plaintiff then proved that the said McGuire broke the prison bounds, but for a short time, and immediately returned into them, and remained there until he took the oath of insolvency on the said execution on the 29th of November 1841; that he was insolvent before he broke the said bounds, and no change in his circumstances took place between the time he broke the bounds and the time he took the oath of insolvency as aforesaid, and that the suit was brought on the 9th of December 1841. And the defendants moved the court to instruct the jury that if they were satisfied from the evidence before them that the said McGuire was in as good circumstances at the time he 171 swore out of prison as he *was when he broke the bounds, and that the plaintiff's means of collecting his debt was not lessened by such breaking, then the true measure of damages would be the damage the plaintiff had actually sustained by such breaking of the bounds; which in-

struction the court refused to give; but instructed the jury, that if the plaintiff was entitled to recover at all, the true measure of damages was the whole of the debt, interest and costs of the suit in which he was arrested and imprisoned; and the defendants again excepted. Verdict and judgment were thereupon rendered in favor of the plaintiff according to the said instruction of the court. And the defendants obtained a supersedeas from this court.

Fisher, for the appellant.

There was no counsel for the appellee.

MONCURE, J., after stating the case, proceeded:

Several errors are assigned by the plaintiffs in error, in the proceedings and judgment, which I will proceed to notice in the order in which they are assigned.

The first is, that "the court erred in overruling the demurrer to the declaration; because a joint bond cannot by law be taken, as each judgment debtor ought to enter into a separate bond with security." I can see no reason and know of no authority why joint debtors, against whom judgment has been obtained and execution issued jointly, and who have been jointly arrested and committed to prison, may not jointly enter into a prison bounds bond. Indeed, the statute authorizing the bond to be given, plainly contemplates such a case, for its language is, "If any person or persons, taken or charged in execution, shall enter into bond, &c., that he, she or they shall not depart or go out of the rules or bounds of the prison," &c.

172 *The second error is, that "the court erred in rejecting the pleas numbered 2, 3, 4 and 5."

In support of this assignment of error, the counsel for the plaintiffs in error cited and relied on several cases in the New York reports; which, with some other cases, and the course of legislation in that state in regard to escapes, it may be proper to notice somewhat in detail. When those cases were decided, the common law on the subject of escapes was the law of New York, except in some respects in which it had been altered by statute. Formerly it would seem that persons in custody on civil process in that state, had no right to go at large within the limits of the prison, without the permission of the sheriff, though they might do so with such permission. But by an act passed in 1801, (which appears to have been but a re-enactment of a law which was passed in 1793,) it was made the duty of sheriffs to permit all prisoners in custody on civil process to go at large within the limits, on their giving bond with security to keep the same; and the sheriff was authorized, in case he should discover the security to be insufficient, to confine the prisoner until other sufficient security was offered. 4 John. 49; 10 John. 577. After the passage of this act, it was decided that a sheriff might still permit a prisoner in execution to go within the liberties of the prison without taking security; and if the prisoner, without his knowledge, went beyond the limits, but returned again before suit brought, he was not liable for an escape: the limits of the liberties of the prison being considered as an extension of the walls of the prison, and a return within the limits of the same as a return within the prison; and where no bond or security is taken by the sheriff, his right of recaption remaining in full force; and a voluntary return before suit brought being equivalent to a recaption, which will purge a negligent escape. Peters v.

173 *Henry, 6 John. R. 121, decided in 1810. In the case of Tillman v. Lansing, 4 John. R. 45, decided in 1809, it was held that where a prisoner in execution, on giving security to the sheriff, was allowed the liberties of the prison, and went beyond the limits and returned again, the sheriff had no power to restrain him; and that though this was neither a voluntary nor negligent escape, yet it was such an escape under the statute of 1801, as could not be purged by a voluntary return before suit brought, and rendered the sheriff liable in the first instance; and that he must resort to the security for his indemnity, as the bond was not made assignable. The court was of opinion that the sheriff, after having taken security, had no right to restrain the prisoner, should he see him at large, his remedy being upon the bond; and that it was a breach of the condition of the bond for the prisoner to go beyond the limits, and could be no defence to him that he returned before suit brought against the sheriff. In the case of Bissell v. Kip, 5 John. R. 88, in 1809, it was decided that where a defendant in execution and admitted to the liberties of the prison, walked beyond the limits knowingly and voluntarily, on the pretence of avoiding a bank of snow which obstructed his usual walk, it was an escape for which the sheriff was liable; and that where the limits were not defined by visible marks or boundaries, and the prisoner went beyond them into a building which was supposed to be within the limits, staid an hour and returned, it was an escape for which the sheriff was liable.

In the case of Ballou v. Kip, 7 John. R. 175, in 1810, where the limits of the prison liberties were marked by no visible monuments, and the survey of them was vague and uncertain, and a prisoner, who had given bond to the sheriff for the liberties, without intending to go beyond them, went into a house within the reputed limits, but which proved not to be in the actual

174 limits, and returned *before suit brought, it was held that this, being an inadvertent and involuntary escape, and a return before suit brought, the sheriff was not liable. The case was distinguished from that of Tillman v. Lansing, which was considered as applying only to an escape voluntarily and knowingly made. By an act passed in 1809, prison bounds bonds were made assignable to the plaintiff in the execution, who was authorized to sue as assignee of the sheriff; and by an

act passed in 1810, it was declared "that nothing contained in the acts of 1801 or 1809 aforesaid, shall be so construed as to prevent any sheriff, in cases of escapes, from availing himself, as at common law, of a defence arising from a recaption on fresh pursuit, and a returning of the prisoner within the custody of such officer before an action shall be commenced for the escape." In the case of Mandell v. Barry, 9 John. R. 234, in 1812, it was decided that the said act of 1810 was intended only for the relief of the officer when sued for an escape; and that therefore when an action was brought by the assignee of the bond against the original debtor and his sureties, a voluntary return after a voluntary escape, and before suit brought, was not a defence; and the assignee might recover the amount of the debt in the original suit, though no suit had been brought against the sheriff for the escape. The court said the act "was made to relieve the officer, who may be an innocent party, and not the original debtor, who bound himself to remain a true and faithful prisoner, and that he would in no wise escape. If he has willfully departed from the liberties, he has broken his engagement, and forfeited all just title to indulgence. The persons who became his sureties, (and who were probably indemnified by him,) must and ought to be equally responsible with the debtor, or otherwise the guard hereby intended against fraud, would be illusory and of no
175 effect." "The fact *of how long the prisoner continued without the liberties, or to what distance he escaped, never can be material, when it is once ascertained that the escape was voluntary and intentional." This decision of the Supreme court of New York was reversed by the Court of errors in Barry v. Mandell, 10 John. R. 562; in which it was held that the statutes relative to prison liberties had not altered the common law as to the liability of sheriffs for escapes, nor taken away their common law rights as to a fresh pursuit and recaption; and if a prisoner goes beyond the liberties without the privity of the sheriff, to an action against him for an escape, he may plead recaption or voluntary return before suit brought, as he might do in an action for a negligent escape at common law; and this was the true construction of those statutes before the passage of the said act of 1810. The bonds given to sheriffs for the liberties are for his indemnity only, and neither the sheriff nor his assignee can recover on such bond without showing he is injured; and to an action on such bond by the sheriff or his assignee, it is a good plea in bar that the prisoner voluntarily returned before suit brought. But that, even if this were not so before the act of 1810, yet that act is so far a virtual repeal of the provisions of former acts; for the recaption, on fresh pursuit, or voluntary return before action brought, being a good defence to the sheriff in an action against him for the escape, it is equally a good defence to the prisoner and his security in a suit against them by the sheriff or his assignee on the bond.

Thus stands the law of New York on all the cases referred to; and there can be no doubt but that the pleas rejected in this case, or some of them, would present good defences to the action, if the decision of the Court of errors, in the case last cited, were a binding authority and a correct
176 exposition of the law *of this state.

If the statutes of Virginia on the subject of escapes were like the statutes of New York, which came under consideration in those cases, none of those cases being binding authorities with us, we might have to determine the relative respect which would be due to the decisions of the Supreme court (in which all of them but the last was decided) and the Court of errors of that state, in which case it would be remembered that some of the judges of the former were among the most profound that this country has ever produced. But it is enough to say that the statutes of the two states on the subject are entirely different; and that the cases in that state all concede, and those of them which would warrant the admission of any of the pleas which were rejected in this case are founded on the concession, that the prison bounds bond there was, when those cases were decided, a bond of indemnity to the sheriff. And it being settled that the giving of the bond did not affect his common law rights and liabilities, it followed, as a necessary consequence, that any plea which would be a good defence to an action against him for an escape, would be a good defence to an action on the bond, whether in the name of him or his assignee. In this state the prison bounds bond is not a bond of indemnity to the sheriff, and is, in effect, a very different instrument from the like bond in New York. There, the sheriff was responsible, if the security in the bond became insufficient after it was given, though good at that time; and therefore the sheriff had a right to require additional security if that first given became insufficient. Indeed, though the bond was assignable to the execution creditor, he was not bound to accept the assignment, but might, at his election, sue the sheriff for an escape, or sue on the bond as assignee of the sheriff. Here the sheriff has no power to prevent the escape of a debtor, who has taken
177 the benefit of *the prison bounds.

Lyle v. Stephenson, 6 Call 54; but it is the duty of the sheriff, when a person in execution escapes from the prison bounds, immediately to obtain an escape warrant, and give notice thereof to the execution creditor, and assign to him the bounds bond, which he is obliged to receive; and the sheriff is then free from all liability, unless the security in the bond was insufficient at the time it was taken. The creditor may, at his election, proceed to retake the debtor if he can, or sue upon the bond for the recovery of his debt." If the debtor be retaken and committed to jail, his securities are discharged from their bond. It

is perfectly obvious therefore that the bounds bond here is not a mere bond of indemnity to the sheriff, but when it is assigned to the execution creditor, becomes an effectual security for the debt; and that none of the pleas which were rejected in this case, would be good pleas in bar of an action on such bond. It would be a good plea in bar of such an action, that the debtor was retaken and committed to jail under the escape warrant by, or at the instance of, the creditor; because the statute declares that the securities in that case shall be discharged. And it might also be a good plea in bar of such an action, that the debtor, after breaking the bounds, voluntarily returned to jail, and was therein confined with the approbation of the creditor, and with a knowledge on his part of the escape. This would seem to be the same defence in effect with that which the statute gives. But none of the rejected pleas are equivalent to either of these.

In the case of Crump v. Bennett, 2 Litt. R. 209, it was held that if a debtor committed to the prison rules depart thence, however innocently, from ignorance of the real boundaries, however short the distance and sudden his return, his bond is forfeited. That case was decided in 1822, and is entitled to great weight, because *the statute law of Kentucky on the subject was then identical with our own. Some of the observations of the court in the case are very striking and appropriate. "The prison rules," they said, "are for the benefit of the debtor, and he is bound to take notice of and ascertain them if practicable, and must break them at his peril; and it does not lie well in his mouth to say, that without the consent or concurrence of the plaintiff in the execution, he had taken the rules, and yet was ignorant of them, and therefore had a right to go where he pleased. Besides, a departure without the rules, however small, is a breach of the letter of the bond. If the true line is departed from, it will soon become a puzzling question, how far he may progress without danger. If he can plead ignorance and want of intention, the extent of his knowledge and the quo animo with which he transgressed will soon become difficult questions for courts and juries, when the rule adopted by the court below is more certain and definite, and cannot be ramified into niceties, or embarrassed with numerous exceptions."

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The third error assigned is, that "the court erred in permitting the prison bounds bond to be assigned upon the trial of the cause after the jury were sworn, as the assignment of the instrument is an essential part of the plaintiff's case, to enable him to institute and maintain the action."

If an obligee of a bond or payee of a note endorse his name in blank thereon, and deliver it to another person for the purpose of assigning or endorsing it to him, the blank endorsement imports an authority to any bona fide holder to write over the same a full assignment or endorsement to him, and in fact, without being filled up, may be regarded, for all purposes of pleading and evidence, as a full assignment or endorsement. Courts will consider that as done which may be done, and will not even require the formality of *writing out a full assignment or endorsement at the time of the trial. This is the uniform practice in regard to ordinary bonds and notes, and is convenient and legal. There is no difference between a prison bounds bond and an ordinary bond, in this respect. The law directs the sheriff to assign and deliver the bounds bond to the execution creditor, and obliges the latter to receive it. The bond in this case was delivered to the creditor with the sheriff's name endorsed thereon in blank by his deputy, and was received by the creditor before the commencement of the suit. The assignment to the creditor was then complete, and there was no necessity for filling up the assignment at the time of the trial, though of course there was no error in permitting the assignment to be then filled up.

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The fourth error assigned is, that "the court erred in permitting the boundaries of the prison bounds to be given in evidence, without having been recorded as the statute directs."

The statute referred to by the counsel of the plaintiff in error, 1 Rev. Code 1819, p. 251, § 18, requires the marks and bounds of the prison rules, directed to be laid out by the justices of every county and corporation, to be recorded, but does not prescribe the particular book in which they are to be recorded. The marks and bounds in this case were entered only on the order book of Wood county court, but having been entered therein as part of one of the regular orders of the court, and the order book being certainly a record book, they were recorded within the meaning of the statute.

The fifth error is, that "the court erred in admitting the deposition taken before A. Samuels, Esq. to be read, inasmuch as a commissioner in chancery has no authority to take a deposition in a law cause."

It perhaps would be a sufficient answer to this objection to say that the said deposition was taken "in *the presence of the counsel of both plaintiff and defendants, and by consent to be read in chief." But a better answer is that when the deposition was taken a commissioner appointed by a Circuit superior court to take depositions (as A. Samuels was) had authority to take a deposition in a law cause; the act of April 1831 providing for the appointment of such commissioners, authorizing them "to take the depositions of witnesses in any cause depending in their courts;" Supp. Rev. Code, p. 165, § 80; and the act of February 1834 declaring "that the depositions of witnesses in suits depending in any court of this commonwealth, may hereafter be taken, &c. by any commissioner appointed by any Circuit superior court, &c. for the taking of depositions." Acts of 1833-4, p. 75, ch. 62, § 2.

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The sixth and last error is, that "the

court erred in instructing the jury that under the circumstances of this case the true measure of damages was the debt and interest; and consequently erred in refusing to give the instruction asked for by the defendants' counsel."

The prison bounds bond in Virginia is, as we have seen, not a mere bond of indemnity to the sheriff, but, when it is assigned to the creditor according to law, becomes a substantial security for the debt: That was evidently contemplated by the statute. The imprisoned debtor having availed himself of the liberties of the prison on the terms prescribed by the statute, and having departed from the said liberties and broken his bond, the creditor has his election to pursue and retake the debtor, or to abandon his execution as having become abortive by the act of the debtor, and resort to an action on the bond "for the recovery of his debt." The amount of the debt seems to be recognized by the very language of the statute as the measure of the recovery on the bond. To depart from that certain standard would be unreason-
181 able and embarrassing. The *opinion of the profession has, I think, universally been in favor of that standard. It has never been affirmed to be the true standard by this court; but that, I think, is only because its propriety has never before been seriously questioned. The subject has, however, come under the consideration of the courts of several of our sister states, whose decisions are entitled to very great respect. In Kentucky, where the law on this subject is, or rather was, similar to or identical with ours, the subject came under consideration in the case of Hubbard v. Harrison, 1 Bibb's R. 550, which was an action brought on a prison bounds bond in the name of the assignee of the sheriff. The defendant in the court below endeavored to maintain, by a plea which the court rejected, and a prayer for an instruction which the court refused to give, that the plaintiff had sustained no damage by the departure of the debtor from the prison bounds. The Court of appeals, in reference to that part of the case, used this strong language: "The third general head embraces the two sham pleas offered by the defendants, and the motion for an instruction to the jury, which embraced the same matter offered in one of those sham pleas. The court below entertained very correct ideas of these matters, and this court might well pass them by without further remark. They will, however, observe, for the information and satisfaction of the attorney who moved them, that by a breach of the condition of the bond by Newhouse, the bond became a security for the debt adjudged against Newhouse in favor of the plaintiff in that action, as also for the interest and costs therein adjudged." I make the above quotation to show how well satisfied the court was in regard to the question under consideration; but it may be proper to say that I do not mean to apply to this case so much of the opinion as implies that the question was too plain to be raised. For although I am decidedly of opinion
182 that the question *should be solved in favor of the plaintiff in the court below, I yet think it admitted of sufficient doubt to be raised; especially after the decision of the case in 9th Leigh, hereafter to be mentioned. In the case of Burroughs v. Lowder, 8 Mass. R. 373, which was an action on a prison bounds bond, the question was decided in the same way. The court in its opinion said, "We consider this point as put at rest in the cases referred to; nor is it unreasonable. The debtor's body is considered as a pledge for his debt. It is not for him to say the pledge was inadequate. If the sheriff is liable for the escape, it is clear that he must be answerable in the sum for which the debtor was held a prisoner." A similar decision was made by the Supreme court of errors of Connecticut in Seymour v. Harvey, 8 Conn. R. 63; and also by the Supreme court of New York in the case of Mandell v. Barry, 9 John. R. 234; although that case was afterwards reversed by the Court of errors, but on grounds arising out of the peculiar nature of their statute law of escapes, as before stated. The case of Perkins v. Giles, 9 Leigh 397, is relied on by the counsel of the plaintiffs in error. But that was an action on the official bond of the sheriff, and by the express terms of the statute giving a right of action on such bond to any person injured by the breach of the condition thereof, the recovery in such case can only be of such damages as the relator may have sustained by reason of such breach. And I therefore think that it does not apply to this case.

For the foregoing reasons, I am for affirming the judgment.

The other judges concurred in the opinion of Moncure, J.

Judgment affirmed.

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183 *Kennaird, &c. v. Jones.*

July Term, 1852, Lewisburg.

1. **General and Special Assumpsit—Joinder of Counts†—Case at Bar.**—A general *indebitatus assumpsit* may be joined with a count in *assumpsit* upon a special contract of bailment setting out the promise and undertaking of the defendants, the consideration on which it was founded, the breach of that promise by the defendants and their neglect and carelessness, and the loss to the plaintiff occasioned thereby.

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*For monographic note on Assumpsit, see end of case.

†**General and Special Assumpsit—Joinder of Counts.**—The principal case holds that a general *assumpsit* may be joined with a count in *assumpsit* upon a special contract of bailment setting out the promise and undertaking. Upon the question of joinder of counts, see the principal case cited in Langhorne v. Richmond Ry. Co., 1 Va. Dec. 796; Gray v. Kemp, 88 Va. 202, 16 S. E. Rep. 225.

Statute of Jeofails—Effect.—As to the effect of the statute of jeofails, see the principal case cited in Holliday v. Myers, 11 W. Va. 287; Long v. Campbell,

2. **Contract for Sale of Logs—Suit upon—Averments—Case at Bar.**—Vendor contracts to sell to vendees a raft of logs then lying in the Ohio river a half mile below their landing for a given sum, deducting therefrom the expense of floating the raft to their landing which they might incur over and above the services of one of the vendees and a negro in his employ; and they promise to pay him for the same the sum of three dollars down as earnest money, and the residue of the agreed price less the expense aforesaid, when they should be afterwards requested; and that they would cause the raft to be floated to their landing aforesaid, as soon as the state of the water would permit. HELD: That by the terms of the contract the residue of the price of the logs was not to be paid until they were floated up to the landing: And to entitle the vendor to recover, he must aver that the logs had been floated up to the landing; or that the state of the river had become such as to admit of it, but that the vendees had unduly neglected, failed and delayed to do it.

The case is stated in the opinions of Lee and Moncure, Js.

Fisher, for the appellants.
Fry, for the appellee.

LEE, J. This was an action of assumpsit in the Circuit court of Wood county, in which Lewis Jones, the defendant in error, was plaintiff, and Kennaird and Murdock, the plaintiffs in error, were defendants.

The declaration consisted of three counts. The defendants appeared and demurred generally to the whole *declaration, and also to each count thereof, 184 and the plaintiff joined in said demurrers. The defendants also pleaded "non assumpsere," and "not guilty," and the plaintiffs joined issue on both. The court then proceeded to hear the demurrers, and gave judgment thereon for the plaintiff, and that the same should be overruled. Whereupon the case being submitted to a jury, a verdict was found for the plaintiff, and judgment thereon was then rendered in his favor; and to this judgment the plaintiffs in error have obtained a supersedeas from this court.

The only questions presented by the record are those arising upon the demurrers to the declaration, and to the several counts which it contains. Upon the demurrer to the entire declaration we are first to enquire whether either of the counts be good; for if there be one good count, that demurrer must be overruled, unless it be found united with some other which cannot properly be joined with it. Duke of Bedford v. Alcock, 1 Wils. R. 248; Mumford v. Fitzhugh, 18 John. R. 457; Roe v. Crutchfield, 1 Hen. & Munf. 361; Henderson v. Stringer, 6 Gratt. 130. The third count is the ordinary indebitatus assumpsit for the price of logs sold and delivered, and for money due upon an account stated, and is clearly good as it stands, on general demurrer. The first count is upon a special contract for the sale of logs, and it is not contended that such a count might not properly be united with the third. But it is suggested that the second count is in the nature of a count in case, as for a tort, and cannot be properly joined with the other two. Such, however, is clearly not its true character: It is a count in assumpsit, upon a special contract of bailment, setting out the promise and undertaking of the defendants, the consideration upon which it was founded, the breach of that promise by the defendants, and their neglect and carelessness, and the loss to the plaintiff occasioned thereby. The *count is fully 185 sustained by the precedent in 2 Chit. Pl. 333, and is undoubtedly good, as assumpsit may be maintained against any bailee, upon the contract of bailment, for any neglect or breach of duty. 1 Chit. Pl. 115; and it is not only proper and correct, but recommended as advisable, to add to such counts, counts for goods sold and delivered, &c., and the general money counts. 2 Chit. Pl. 335, 6. I think, therefore, there can be no doubt the demurrer to the declaration was properly overruled.

I have already expressed the opinion that the second and third counts in the declaration are good, and the only remaining question is as to the first count; and this depends upon the true meaning and construction of the contract which this count sets out, and its legal effect. If it amounts to a mere sale of property, in the ordinary way, at a specified price, a part of which was paid in hand, and the balance to be

37 W. Va. 671, 17 S. E. Rep. 199. See also, *foot-note* to Boyles v. Overby, 11 Gratt. 202.

Special Demurrer.—In Sweeney v. Baker, 13 W. Va. 201, it is said: "Here at least duplicity in a declaration is an error of form only; and it has been expressly decided in this state, a demurrer to a count in a declaration, because of duplicity, ought not to be sustained; as special demurrers except to pleas in abatement are abolished by § 29, ch. 125 of Code of W. Va. See Mattie Coyle v. The B. & O. R. R. Co., 11 W. Va. 94. See also, *Kennaird v. Jones, 9 Gratt. 184;* King v. Howard, 1 Cush. 141; Smith's Adm'r v. Lloyd, 16 Gratt. 313." See, citing the principal case, Burkhart v. Jennings, 2 W. Va. 257; Coyle v. B. & O. R. R. Co., 11 W. Va. 106. See also, *foot-note* to Smith v. Lloyd, 16 Gratt. 295.

Judgments—Change of Law Subsequent to Procuring—Effect.—In Anderson v. Hygeia Hotel Co., 92 Va. 695, 24 S. E. Rep. 269, it is said: "The judgment was final prior to the enactment of the statute. This is not (except in a few cases specified in the constitution) a court of original, but appellate jurisdiction, and the writ of error must be disposed of in accordance with the law as it existed at the time of the rendition of the judgment. This court must affirm it, if there is no error therein according to the law as it stood when the judgment was rendered, and, if erroneous, reverse it, and enter such judgment as the circuit court 'ought to have entered.' Sec. 3485 of the Code; Currin *et als.* v. Spraull *et als.*, 10 Gratt. 145, 148; *Kennaird, &c. v. Jones, 9 Gratt. 183, 190;* N. & W. R. R. Co. v. Dougherty, decided at the November term, *ante*, p. 872; Kansas P. R. Co. v. Twombly, 100 U. S. 78, and Wright v. Graham, 42 Ark. 140. As was said by JUDGE SAMUELS, in delivering the opinion of the court in Currin *et als.* v. Spraull *et als.*, *supra*, 'if a party shows a defence valid at the time it is passed on by the court, a subsequent change in the law cannot deprive him thereof.' "

paid when requested, a simple count in indebitatus assumpsit, to the effect stated, would be quite sufficient. But the plaintiff did not think it safe to rely upon a general count of this kind, but deemed it expedient to declare upon and set out the special contract. He alleges, that in consideration that he would sell the defendants a raft of logs belonging to him, then lying in the Ohio river, about half a mile below the landing of the defendants, for a given sum, deducting therefrom the expense of navigating and floating the said logs to the landing of defendants, which they might incur over and above the services of Murdock (one of the defendants) and a negro in his employ, the defendants promised to pay him for the same the sum of 3 dollars down, earnest money, and the residue of the agreed price, less the expense aforesaid, when they should be afterwards requested; and that they (the defendants) would cause the raft to be navigated and floated to their landing
186 aforesaid as soon as the state *of the river would permit. It then avers, that the plaintiff thereupon sold and delivered the raft to the defendants, who paid the 3 dollars earnest money, but have failed to pay the balance of the agreed price, less the expense of floating the logs to their landing, although often requested so to do, and although plaintiff had been always ready to pay the expense of floating them as aforesaid. The question then arises upon this special contract, at what time the parties contemplated and agreed that the balance of the money (less the expense of floating the logs should be paid? Was it to be paid at the time of the sale and delivery of the logs,) or when they should be floated by the defendants up to their landing, and the expense of that work should be ascertained (or which would be the same) when the defendants should have had a reasonable opportunity and time for floating them, and ascertaining the expense after the state of the river had become such as to admit of it? If it was to be paid at the time of the sale and delivery, the simple indebitatus count would have sufficed; and it would have been unnecessary to have distinguished between the 3 dollars earnest money and the residue of the price of the logs. It would also have been unnecessary to aver that the defendants undertook on their part to navigate and float the logs up to their landing as soon as the state of the river should permit. It would seem rather from the stipulation, for the payment of the 3 dollars down, that the residue was not to be paid until a subsequent period; and when it is observed that this balance was to be subject to a deduction for the amount of certain expenses thereafter to be incurred about the logs, to wit, for floating them up to defendants' landing, and thereafter to be ascertained, it may be fairly inferred that it was not to be paid until the logs had been floated to the specified point, and the necessary expense of the work prop-
187 erly *adjusted; supposing, of course, that the defendants, who took that duty upon themselves, should perform it in due season when the state of the river would permit. But as the defendants might unduly delay this work of floating up the logs, and thus keep the plaintiff waiting for an unreasonable time for his money, it was stipulated that the defendants should perform that work as soon as the state of the river would permit. It seems to me, therefore, that the parties must have contemplated and understood that the balance of the price of the logs was not to be paid until the logs should have been floated up to the defendants' landing, and the expense thereby incurred ascertained and deducted; or until the defendants had had reasonable time and opportunity (after the state of the river should have become such as to admit of it) to float them up to their landing, and had delayed and neglected so to do. And in this view, and adopting this as the true interpretation of the contract between the parties, it would seem that the declaration should aver either that the logs had been floated up to the defendants' landing, or that the state of the river had become such as to admit of it, but that the defendants had unduly neglected, failed or delayed to do it; and for want of such an averment, or its equivalent, it seems to me that the first count is defective, as not showing a perfect and consummate right of action.

It is urged however, that even if this can be imputed as a defect in the declaration, yet that it is one which cannot be taken advantage of on general demurrer, because it is said, if there had been no demurrer the court would not after verdict for the plaintiff, correct the judgment, and that nothing can be taken advantage of on general demurrer which would not be a sufficient cause to arrest the judgment after verdict; and the opinion of the judges
188 in the case of Roe v. *Crutchfield, 1 Hen. and Munf. 361, are referred to and relied on in support of that position. That case was decided in 1807, and the opinions of the judges were in reference to the provision of the act of 1789, ch. 28 (1 Rev. Code of 1803, p. 112), declaring that on a general demurrer, the court shall not regard any defect or imperfection, unless something be omitted so essential that judgment according to law and the very right of the case cannot be given. This provision was re-enacted at the revisal of 1819, in almost identically the same terms; and according to those terms the court must have enough to give judgment, "according to law and the very right of the case."

In the case of Ambler et ux. v. Norton, 4 Hen. and Munf. 23-46, Judge Roane, alluding to this provision of our statute, remarked that "Notwithstanding the comprehensiveness of the above terms, we must have enough in the plea" (he was considering the subject of a demurrer to a plea in a writ of dower unde nihil habet) "to enable us to give judgment according to law and the right of the cause."—"On this subject," he adds, "I am of opinion that what is substance or not, is to be determined on every

action according to its nature."—"I also think," he says, "we ought to adopt a principle in relation to demurrers analogous to that adopted in relation to general verdicts. In respect to them it is held that though a matter must have been proved to the jury, and the general words of the act of jeofails would seem to extend to all such cases, yet that the gist of the action must be laid in the declaration, or else a judgment thereupon cannot be given." In Bac. Abr. (by Gwillim) p. 359, it is laid down that the established distinction herein between a general demurrer and a special demurrer, is that matter of substance, that is, the omission of anything that is necessary to show a right in the plaintiff, or material for the defendant in his plea, may be taken
189 advantage of on general *demurrer; but matters of form merely must be specially alleged and assigned as causes of demurrer; and it is said that the distinction is founded on the common law, and is but confirmed and explained by the statute 27 Eliz., ch. 5, § 1; and an omission by reason of which the right does not appear, is substance and bad on general demurrer; Heard v. Baskerville, Hob. R. 232; so that the enquiry resolves itself into the question, whether the omission is of matter of substance or of form only; of some matter necessary to show that the party has a perfect right, or only of something in the manner and form of stating his right. It is true that under the sweeping provision introduced into our Code at the revisal of 1819, that after verdict, no judgment should be arrested for any defect whether of form or substance, which might have been taken advantage of by demurrer, but was not so taken advantage of, the omission of the allegation in question in this case, if no demurrer had been filed, could not have served to stay the judgment after verdict; yet I apprehend that prior to the introduction of that provision, it would have been sufficient to have had that effect. A general demurrer has been put in and the question is the same, is the omission in the first count to aver that the logs had been floated and navigated up to the defendants' landing, or that the state of the river had been such as to admit of its being done, and that the defendants had unduly neglected or delayed to do it, or some other matter that would be equivalent to or serve as a substitute for such an allegation, a matter of substance or of form only? I think the former; because in the absence of any such allegation, it seems impossible to say that the plaintiff shows a perfect right to demand and recover the balance of the agreed price.

With regard to the provisions in the Code of 1849, referred to by the counsel (p. 650, § 31; p. 647, § 11; p. 680, § 3), I deem it
190 only necessary to remark, that *they prescribe no new or different rule as applicable to the question here, because all of them, so far as they could effect this question, are in fact embraced in the provisions of the act of 1819. But were this otherwise and if they did prescribe a new rule for the government of such questions, they could not apply in this case, as it was decided before the Code of 1849 took effect, and must be governed by the law then in force.

I am of opinion that the court erred in overruling the demurrer to the first count in the declaration; that the judgment should be reversed with costs, the verdict set aside and the cause remanded, with leave to the plaintiff to amend his declaration, and to the defendants to plead de novo.

MONCURE, J. . I concur in the opinion of Judge Lee, that the demurrers to the declaration, and to the second and third counts, were properly overruled. But I also think that the demurrer to the first count was properly overruled; and therefore dissent from his opinion on that part of the case.

The demurrer to the first count admits the contract to have been as therein set out; and we cannot therefore infer that it was otherwise from the rest of the declaration, or from considerations dehors the declaration itself. What then is the contract which the first count sets out? It is that Jones on his part agreed to sell and deliver to Kennaird and Murdock a raft of logs in the Ohio river about a half of a mile below their landing, in consideration whereof Kennaird and Murdock, on their part, promised to pay him the sum of 90 dollars, to wit, 3 dollars in hand as earnest money, and the residue when they should be afterwards requested, deducting therefrom, however, the expense of navigating and floating the said logs to their landing which they might incur over and above the serv-
191 ices *of the said Murdock and a negro in his employ; and also promised that they would cause the said raft to be navigated and floated to their landing as soon as the state of the river would permit. The plaintiff then avers that he did accordingly sell and deliver to the plaintiffs the raft of logs, and had at all times since been ready and willing to pay the expense aforesaid; and that the defendants did pay the said sum of 3 dollars in hand as earnest money, but had failed and refused to pay the residue of the said sum of 90 dollars, less the expense aforesaid, although often requested so to do. According to the terms of the contract as set out, Jones fulfilled his part of it by the sale and delivery of the raft. Kennaird and Murdock then became bound to pay 3 dollars in hand, and the residue of the 90 dollars, less the expense aforesaid, when afterwards (that is after the sale and delivery) requested, and to cause the raft to be navigated and floated to their landing as soon as the state of the river would permit. They paid the 3 dollars, but failed to pay the residue of the 90 dollars, less the expense aforesaid, though often requested: and for this breach the plaintiff counts. The only question in the case is, whether the said residue was payable on request, or after the raft should be floated to the defendants' landing? The

plaintiff expressly avers that it was payable on request, and the demurrer admits the averment to be true. It is quite probable that it was expected by the parties that, before such request would be made, the raft would be floated to the defendants' landing; that it would be so floated in a very short time, and that thus the actual expense of the operation, over and above the services of said Murdock and his negro, would be ascertained, and could be deducted from the said residue. It is quite probable that both parties would have preferred this, as a deduction of the actual was preferable to that of the estimated expense; and that, therefore, the plaintiff was willing that the 192 said *residue should be payable on request, instead of being paid in hand; intending not to request it for a short time, by which time it was expected that the raft would have been floated to the defendants' landing. If the plaintiff should be disappointed in his expectation that the raft would be floated in a short time, either by its being washed away, or by the state of the river, or other cause, he did not mean to deprive himself of the right, which the contract expressly gave him, to demand payment of the said residue; deducting in that case the estimated instead of the actual expense. The defendants did not stipulate for time to float the raft to their landing as a term of credit for the purchase money: that was expressly payable on request; and it would have been unreasonable, as well as against the terms of the contract, to have withheld the whole purchase money after request, merely for the purpose of deducting therefrom the actual instead of the estimated expense. If the plaintiff chose to make such request before the raft was floated, and the defendants were not in default for not having floated it, the jury in estimating the expense would of course take care to allow enough to cover it. But they could have had no difficulty in estimating the expense of floating a raft of logs a half a mile on the Ohio river in a proper state of water over and above the services of two men. They would have had to have made such estimate, it is admitted, if the defendants had delayed for a reasonable time to float the raft, or if it had (as it may have been) washed away by a flood. They seem to have actually made such estimate in the case, and allowed 10 dollars for the expense. That they might be required to do so, was contemplated by the parties by the very terms of their contract; though it was desirable to both, as before stated, that the actual instead of the estimated expense should be deducted, but not so desirable as to make the floating of the raft by the 193 defendants a *condition precedent to the right of the plaintiff to demand the purchase money.

But it is asked, why did the defendants promise to cause the raft to be floated to their landing as soon as the state of the river would permit, if he might be required to pay the purchase money before? We cannot be required to assign a motive for one of the terms of the contract when they are all plainly stated. It may have been convenient to the plaintiff to have the raft taken from his landing as soon as possible. It was doubtless desirable to him, as before stated, to ascertain the actual expense of the operation before the deduction was made, if it could be done in a reasonable time; and he therefore required a promise from the defendants to perform the operation as soon as the state of the river would permit. There may have been other motives which the record does not disclose. But these are matters of conjecture only, and cannot affect the case. It is enough that the defendants promised to pay the money on request; and it is no answer to say that he also promised something else. He may or may not have performed that other thing: at all events, the plaintiff charges no breach of promise in that respect.

It is also said that if the true construction of the contract be as supposed, the plaintiff might have relied alone on the common counts. This may be true, but yet it does not follow that he might not also rely on a special count, and thus have two strings to his bow.

I am for affirming the judgment.

ALLEN, DANIEL and SAMUELS, Js., concurred in the opinion of Lee, J.

Judgment reversed.

ASSUMPSIT.

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Cross References to Monographic Notes.

Costs, appended to Jones v. Tatum, 19 Gratt. 720.
Interest, appended to Fred v. Dixon, 27 Gratt. 541.

I. DEFINITION AND NATURE OF ACTION.

Definition.—The action of assumpsit is defined to be at common law an action for the recovery of damages for the nonperformance of a contract not under seal nor of record. It is not sustainable unless there has been an express contract, or unless the law will imply a contract. State v. Harmon, 15 W. Va. 115.

Nature Is Equitable.—The action of assumpsit is in some sense an equitable action, and is applicable to almost every case where money has been received by one, which in equity and good conscience ought to be refunded. Hughes v. Frum, 41 W. Va. 445, 23 S. E. Rep. 604; Jackson v. Hough, 38 W. Va. 236, 18 S. E. Rep. 575.

And it is immaterial whether the title to the money be legal or equitable; if the plaintiff has title thereto he may recover the money in this action. Thompson v. Thompson, 5 W. Va. 190.

As was said by NELSON, J., in Eddie v. Smith, 13 Wend. (N. Y.) 490, "The principles of this action are liberal, beyond that of any known to the practice of the courts." Or by MR. JUSTICE BLACKSTONE, "It is applicable to almost every case where a person has received money which, in equity and good conscience, he ought to refund." It is equally beneficial to the defendant, because the defence to the claim as well as the claim itself is governed by the same principles. Thompson v. Thompson, 5 W. Va. 190.

II. PERSONS ENTITLED TO SUE.

Guardian for Money Due Ward.—A guardian may bring assumpsit in his own name, upon a draft or order payable to himself as guardian, for money due his ward. Jolliffe v. Higgins, 6 Munf. 3.

Executor on Action Accrued after Testator's Death.—It is proper for an executor to bring an action of assumpsit for money in his own name, or as executor, where the cause of action does not accrue until after the death of the testator. Lawson v. Lawson, 16 Gratt. 230.

When Corporations May *Sue* and Be Sued.—When a charter for a corporation has been granted by a circuit court pursuant to § 1145 of the Virginia Code, and the tax thereon has been paid, the corporation has a legal existence, and may sue and be sued in assumpsit on its contracts. Coalter v. Bargamin, (Va.), 37 S. E. Rep. 799, 6 Va. Law Reg. 756.

III. GROUNDS OF ACTION.

1. SIMPLE CONTRACTS.

a. IN WRITING.

Repudiation of Contract—Action Lies before Balance Is Due.—An action of assumpsit may be brought to recover damages for failure to accept goods sold under a special contract, when the defendants repudiate the contract, before the time has elapsed when he was allowed to pay the balance due. James v. Adams, 16 W. Va. 245.

Recovery Had from All Makers of Promissory Note.—In an action of assumpsit on a promissory note, the declaration in which contains the common counts for money loaned, the plaintiff may recover of all the makers, although only one of them received the money from the note, and the others were sureties. Bank of Wheeling v. Evans, 9 W. Va. 373.

Agreement for Use of Land Not by Deed.—It was held in Goshorn v. Steward, 15 W. Va. 657, that the action of assumpsit for the use and occupation of lands, is maintainable under § 7, ch. 99, of the W. Va. Code, where the agreement is not by deed.

Contract with a Town.—The action of assumpsit will lie against a town for the recovery of money due the plaintiff for work done under a contract for the town, notwithstanding void certificates have been issued and accepted for such work. Johnson v. The Town of Alderson, 33 W. Va. 473, 10 S. E. Rep. 815.

When Assignor of Bond Liable to Assignee—Promissory Note.—The assignor of a bond is liable to the assignee in an action of assumpsit, if the assignee has used due diligence to recover the money from the obligor, and has failed to do so. The assignor of the promissory note was liable to the assignee before the statute of Anne, in case payment was not made by the maker, when demanded. Mackie v. Davis, 2 Wash. 219, 1 Am. Dec. 482.

The assignor of a bond assigns it by endorsing his name in blank for the purpose of enabling the assignee to buy goods on the face of the endorsement. H sells goods to the assignee on the faith of the endorsement, and before the time of payment for the goods arrived the obligor of the bond becomes insolvent. H may maintain an action of assumpsit against the assignor either as such or as guarantor of the bond. Hopkins v. Richardson, 9 Gratt. 485.

In an action of assumpsit by an assignee against a remote assignor of a bond or note, under the statute, 1 Rev. Code, ch. 125, § 6, the plaintiff may recover under the general counts for money had and received, and for money paid, laid out, and expended. Drane v. Scholfield, 6 Leigh 386.

Agreement Indemnifying Constable from Removal of Property.—When three persons enter into a written agreement to indemnify a constable "agreeably to law" from any loss by removing property under an execution from premises of landlord, the latter claiming it liable for rent, and this agreement is delivered to the officer on the day and at the place of sale, and the three signers acknowledge it as their act, this is a joint assumpsit to indemnify the officer, and the sale of it by him is a consideration to support the assumpsit as to all of them. Crawford v. Jarrett, 2 Leigh 630.

Special Contract for Work and Labor—Compensation in Money.—Where the terms of a special contract in writing for work and labor not under seal have been performed, the stipulated compensation, if payable in money, may be recovered in an action of general *indebitatus assumpsit*. Brown v. Ralston, 9 Leigh 582.

Lost Foreign Bill of Exchange.—If A purchase of B a foreign bill of exchange, which is afterwards lost before it is presented, and B refuses to give a second bill, A may bring *indebitatus assumpsit* for the purchase money. Murray & Co. v. Carret & Co., 3 Call 373.

Contract with Agent for the Undisclosed Principal—Either May Sue.—Where a contract not under seal is made with an agent, and in his name for an undisclosed principal, either the agent or the principal may sue upon it in an action of assumpsit. Where the agent has no beneficial interest in the contract, the declaration may be amended so as to show that the action is brought for the benefit of his principal. National Bank v. Nolting, 94 Va. 263, 26 S. E. Rep. 826.

On Endorsed Negotiable Note.—The payee in a negotiable note made the following indorsement on it: "For value received we hereby guarantee the payment of the within note at maturity, waiving demand, notice of nonpayment, and protest." This operated as an indorsement with enlarged liability, and the action of assumpsit may be maintained on such note together with other negotiable notes by the same maker, and with the simple indorsement of the same payees jointly against the makers and indorsers. Nat. Exch. Bank v. McElfresh, etc., Co. (W. Va.), 37 S. E. Rep. 541.

Lease of Premises—Only a Portion of Lessees Make Entry—All Are Liable.—Where two of four joint lessees entered upon certain premises, under a written agreement, made with the owner of the premises, and signed by all of them, but the other two did not make actual entry upon and occupy the premises, the occupancy of the first two was the occupancy of all four, and upon the terms designated in the agreement; and they are all lessees of the landlord, regardless of their relations to each other, and as such lessees they are responsible to the landlord in an action of assumpsit for the use and occupation of the land. Goshorn v. Steward, 15 W. Va. 657.

Initial Carrier Liable for Excess Charged by Connecting Carrier.—It is provided in Virginia by statute (Code of 1887, § 1295) that when a common carrier accepts for transportation anything directed to a point beyond its own terminus, it shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless released or exempted by contract at the time of acceptance, and the action of assumpsit will lie to recover from the initial carrier the excess of freight above the guaranteed rate, which had been paid to the connecting carriers. Va., etc., Co. v. Louisville, etc., R. Co., 96 Va. 776, 37 S. E. Rep. 310, 6 Va. Law Reg. 738.

Assignment of Judgment—Inducement.—Assumpsit may be brought against the assignor of a judgment, which is afterwards reversed, notwithstanding the assignment was by a sealed instrument, for in such a case the sealed instrument is not the ground of the action, but only the inducement thereto. Arnold v. Hickman, 6 Munf. 15. See Baird v. Blaigrove, 1 Wash. 170.

b. BY PAROL.

Agreement Altering Prior One under Seal.—A parol agreement, made subsequent to one under seal, may be declared upon in assumpsit, though it should alter the terms of the written agreement. The agreement is only the inducement to the real grounds of the action, the subsequent assumpsit stated in the declaration. Baird v. Blaigrove, 1 Wash. 170.

Agreement to Pay Money in Discharge of Bona Fide Claim.—In a dispute between parties over a *bona fide* claim by one against the other, and there is in law some foundation for the claim, the one claimed to be subject to a liability agrees to pay a sum of money, or to do anything else, and such promise is based on a sufficient consideration and may be enforced in an action of assumpsit. Davisson v. Ford, 23 W. Va. 617.

Use and Occupation of Land on Promise to Pay Certain Sum.—Independent of the statute, 11 Geo. II, ch. 19, the action of assumpsit lies at common law for the use and occupation of land, by permission and assent of the plaintiff on an express promise to pay the plaintiff a certain sum, or in general terms to pay him to his satisfaction for such use and occupation. Eppes v. Cole, 4 H. & M. 161, 4 Am. Dec. 512.

Agreement by Purchaser under Deed of Trust to Repay Excess Paid by One of the Debtors to the Creditors Secured.—A debt owed by two debtors jointly was secured by a deed of trust upon the land of one of them. The other debtor paid more than his share of the debt. The land was sold and the purchaser agreed to pay a certain sum, and in addition the excess of the share of the debt paid by the debtor who did not give any security for the debt. The purchaser failed to pay this excess, and the debtor who had paid it brought assumpsit against him for it. It was held that the action could be maintained, in Skinker v. Armstrong, 86 Va. 1011, 11 S. E. Rep. 977.

Promise to Waive Discharge in Bankruptcy, and Reassume Old Debt.—A verbal promise to pay a debt will be sufficient to bind one discharged in bankruptcy, if the promisor intended deliberately to waive the protection of his discharge and to rebind himself legally to pay the old debt. The action of assumpsit will lie on this verbal promise. Horner v. Speed, 2 P. & H. 616.

Payment Promised by Third Person for Subsistence Furnished a Married Woman Whose Husband Was Living.—A plaintiff in assumpsit is entitled to recover upon a parol agreement of the defendant, that if the plaintiff would furnish and supply a certain married woman and her infant children with board, washing and lodging for a certain time, he, the defendant, would pay him for it. The plaintiff averred and proved that he furnished the board, washing and lodging accordingly. The plaintiff may recover although the woman's husband be in the commonwealth at the time, and bound to furnish her and her children necessaries, and the defendant is not morally or legally bound, except by his promise. Lanier v. Harwell, 6 Munf. 79.

Promise to Indemnify Auctioneer if He Will Not Make a Resale.—The plaintiff in an action of assumpsit was employed by A and B to sell land at public auction, and sold it to C as the highest bidder. A, considering the sale inferior, directs the plaintiff to sell it again. B promises to indemnify the plaintiff if he will not resell it, to which he agrees. He is then sued by A and B and damages are recovered against him. The consideration of the promise made by B is both legal and sufficient to support an action against him upon his promise of indemnity. Carr v. Gooch, 1 Wash. 260.

Promise to Deliver Prisoner under Ca. Sa. or Pay the Debt.—A debtor is taken in custody by a *ca. sa.* sued out by his creditor. N. and W. promise the creditor that if he will release the debtor they will deliver him up again under the process, or will pay the debt. They fail to deliver him, and in an action of assumpsit brought by the creditor against them on this promise, he is entitled to recover the amount of the debt. Noyes v. Cooper, 5 Leigh 186.

Agreement of Appellee to Pay Costs, etc., if Appeal is Dismissed.—If the appellant promise the appellee, that if the latter will agree to have the appeal dismissed, the appellant will pay him the full amount of the debt, damages and costs then due upon the appeal, and the appellee consents thereto and the appeal is dismissed as agreed, the appellee may maintain assumpsit on this promise. Spotswood v. Pendleton, 2 Call 209.

Wrongful Discharge under Contract.—Where a decedent wrongfully discharges one who is bound by parol contract to work for him for a stipulated time, the action of assumpsit may be brought against his personal representative for breach of contract at common law. If the defendant dies while the action is pending, it may be revived against her personal representative. Lee v. Hill, 87 Va. 497, 12 S. E. Rep. 1052.

Minor Living with Relatives—When Recovery for Services.—Where a minor, residing with a relative, is led to believe that she will be paid for her services, and in expectation of compensation, faithfully performs such services, but is afterwards discharged without the reward she expected, and the relative denies all liability to her, she is entitled to recover the actual value of such services in an action of assumpsit, even though the defendant testifies that his promises were made in jest, and that he had no expectation or intention of recompensing her for her services, but was only acting towards her *in loco parentis*. Plate v. Durst, 42 W. Va. 63, 24 S. E. Rep. 580. *Compare* Riley v. Riley, 38 W. Va. 283, 18 S. E. Rep. 569.

Express Contract for Attorney's Fees by Married Woman Living Apart from Husband.—Where there is an express promise by a married woman living apart from her husband to pay an attorney for obtaining a divorce for her, she is liable to him in an action of assumpsit, where he gave credit to her *alone*. Peck v. Marling, 22 W. Va. 708.

2. SPECIALTIES.

Statutory Provisions in Virginia.—It is now provided in Virginia by statute that the action of assumpsit may be maintained in any case where the action of covenant will lie. Acts 1897-98, p. 103; Pollard's Supp. § 3246a.

In West Virginia the Action May Be Brought on a Sealed Instrument to Pay Money.—Under section 10, of ch. 99, of the W. Va. Code of 1868, an action of assumpsit may be maintained on a sealed writing, promising to pay money, if it be signed by the party to be charged or his agent. In such case where the count is on a sealed instrument, the same particularity in pleading is required, as if the declaration was in covenant. Kern v. Zeigler, 13 W. Va. 707.

An action of assumpsit is not allowed at common law on a bond, nor by the W. Va. Code 1868, ch. 99, § 10, upon a bond which is not a sealed instrument in writing containing a promise, undertaking or obligation to pay *moneys*, and a demurrer will properly lie to the declaration in assumpsit brought on another kind of bond. State v. Harmon, 15 W. Va. 115. See § 10, ch. 99, W. Va. Code 1899, containing same provision.

Guaranteeing Repayment of Borrowed Money.—The action of assumpsit will lie on a writing under seal guaranteeing the repayment of money borrowed, which is evidenced by the bond of the borrower, and is secured by a collateral mortgage which is to be repaid in monthly installments and payment of monthly dues on stock, and providing that after six months' default in monthly payments, at the option of the lender the principal debt shall at once become due and the mortgage foreclosed. The contract of the guarantor is secondary and he will not be liable upon his guaranty until resort has been made to the mortgage, also to the bond, unless the principal being insolvent, renders further pursuit fruitless. Middle States, etc., Co. v. Engle, 45 W. Va. 588, 31 S. E. Rep. 921.

Interest Coupons.—Under § 10, ch. 99, of the W. Va. Code a municipal corporation is liable in an action of assumpsit for recovery upon interest coupons, even if under seal, attached to bonds which it has issued by legislative authority to aid in the construction of a railroad. Brown v. Town of Point Pleasant, 36 W. Va. 290, 15 S. E. Rep. 209.

3. IMPLIED CONTRACTS.

Failure of Consideration.—Where money has been paid under an agreement for a consideration which has wholly failed, there can be no doubt that the action of assumpsit is the proper remedy for its recovery. Newberry Land Co. v. Newberry, 95 Va. 111, 27 S. E. Rep. 897; Garber v. Armentrout, 32 Gratt. 235; Buena Vista Co. v. McCandlish, 92 Va. 297, 23 S. E. Rep. 781.

Where the purchaser under a deed from a husband and wife is deprived of the property therein conveyed by reason of the deed being declared a nullity as to the wife, she recovering possession of the property, the grantee may bring assumpsit to recover back the purchase money paid for the property in an action of assumpsit for money paid under an agreement, the consideration of which has wholly failed. Garber v. Armentrout, 32 Gratt. 235. See Johnson v. Jennings, 10 Gratt. 1; Newberry Land Co. v. Newberry, 95 Va. 111, 27 S. E. Rep. 897; Robinson v. Welty, 40 W. Va. 385, 22 S. E. Rep. 73.

Same—Rescission—Refusal to Comply.—Where a contract of sale is not by deed, and no conveyance has been made, the vendee can recover back in an action of assumpsit what he has paid on the contract, when the consideration has failed, or the contract has been rescinded, or the vendor refuses to comply with his part of the contract. Bier v. Smith, 25 W. Va. 830.

Same—Modes of Recovery.—Where money has been paid on a contract which has been wholly rescinded or the consideration of which has wholly failed, the usual and better mode of recovering back the money paid under the agreement is on the common money counts of money had and received in an action of assumpsit, but it may be recovered on a special count, which must properly set out the fact that the consideration has wholly failed, and did not result from fraud or illegal conduct on the part of the plaintiff. Johnson v. Jennings, 10 Gratt. 1; Buena Vista Co. v. McCandlish, 92 Va. 302, 23 S. E. Rep. 781; Haigh v. U. S., etc., Assoc., 19 W. Va. 802.

Tort Waived and Assumpsit Brought on Implied Promise.—The well-settled doctrine is that after a tortious taking of goods the owner may bring trespass for the taking, or waiving the trespass he may bring trover for the conversion, or if they have been sold and the money received or otherwise appropriated or consumed, he may waive the tort altogether and bring an action of assumpsit for their value upon an implied promise to pay. Maloney v. Barr, 27 W. Va. 381; McDonald v. Peacemaker, 5 W. Va. 489.

Pro Tanto Benefits of Partial Performance of Special Contract.—It was held in Balt., etc., R. Co. v. Polly, 14 Gratt. 447, that "*indebitatus assumpsit* will lie to recover the value of work done under a special contract, if it be fully executed on the part of the plaintiff, and nothing remains to be done under it but the payment of a sum of money by the defendant." Even when the contract is not fully executed, and the plaintiff has only partially performed, the general weight of authority holds that under proper circumstances the plaintiff may recover in assumpsit on the defendant's implied promise to pay *pro tanto* for the benefit received. See Graves' Notes on Pleading, p. 118, and authorities there cited.

Work and Material under Contract Required by Statute of Frauds to Be in Writing.—Where a special contract cannot be enforced, because it is not in writing, as required by the statute of frauds, still the plaintiff may recover from the defendant in an action of assumpsit on an implied contract for the work which was done and the material furnished under the contract. McCrowell v. Burson, 79 Va. 290.

Where Agent Detains Money of Principal.—Wherever an agent secures the payment of money belonging to his principal, and detains it, he is liable in an action of assumpsit for its recovery. This rule will apply to anyone, who knowing the facts, collects money belonging to another, and keeps possession of it. Thompson v. Thompson, 5 W. Va. 190.

For Rent Paid to Wrong Person.—A decree was made for the sale of a tract of land on credit. Before the decree a contract had been made for the rental of the land, and in conformity to the contract a lease was made for a year. During this year sale was made under the decree, which was confirmed and the conveyance given to the purchaser. If in this case rent has been paid to the representative of the former owner, the purchaser of the land under the decree may recover it from him by an action of assumpsit for money had and received. Taylor v. Cooper, 10 Leigh 317.

Fees from Usurper of Public Office.—Where a person has usurped an office belonging to another, and taken the fees of that office, an action of assumpsit for money had and received will lie at the suit of the party entitled to the office against the intruder for the recovery of such fees. Booker v. Donohoe, 95 Va. 359, 28 S. E. Rep. 584.

Use and Occupation of Land.—The action of assumpsit for the use and occupation of land by permission of the plaintiff, may be brought on an implied as well as on an express promise. Sutton v. Mandeville, 1 Munf. 407, 4 Am. Dec. 549.

Money Paid Tax Collector under Protest.—Under the provisions of Acts 1881-2, p. 37, the proper remedy to recover money paid to a tax collector under protest, after he had refused to accept coupons in payment of taxes, is by assumpsit. Brown v. Greenhow, 80 Va. 118. This section was repealed by Acts 1893-4, p. 381.

Money Received from Security When Principal Debt Has Been Paid.—Where bonds were assigned to a vendor, not in payment of the land, but merely as security for the purchase money, after the purchase money had been paid, an action of assumpsit will lie to recover so much money as the vendor had received from the bonds. Brockenbrough v. Ward, 4 Rand. 352.

Illegal Salary Paid Attorney General.—Where a sum of money was illegally paid to the attorney general as salary by the auditor, and received by the former without authority of law, the commonwealth is entitled to recover the same in an action of assumpsit. Com. v. Field, 84 Va. 26, 3 S. E. Rep. 882.

Goods Procured by Fraud.—*Indebitatus* assumpsit will lie for the value of goods which the defendant by fraud procured from the plaintiff to sell to an insolvent person, and which the defendant has gotten into his possession. The law in such a case will imply a promise to pay for the goods from the circumstance of their having been the plaintiff's property and having come into the defendant's possession. Maloney v. Barr, 27 W. Va. 381.

Attorney's Fees for Obtaining Divorce for Woman Living Apart from Husband.—Where a wife, living apart and separate from her husband, employs an attorney and obtains a divorce, she is liable to an action of assumpsit on an implied contract for what his services are reasonably worth, if the husband is not liable to him for these services. Peck v. Marling, 22 W. Va. 708.

Attachments—Reversal of Judgment Quashing First Entitles That Creditor to Proceeds of Sale Paid Second Attaching Creditor.—Two attachments against an absconding debtor are levied on the same property, the first is quashed, but on appeal this judgment is reversed. Pending the appeal an order is made selling the property under the second attachment and the proceeds are paid over to the creditor in that attachment. The action for money had and received, will lie by the first attaching creditor against the creditor in the second attachment for the proceeds of the sale. Caperton v. McCorkle, 5 Gratt. 177.

4. TORTS.

Ground for Assumpsit.—Tort when there is a promise to pay for the injury may be the ground of assumpsit and will support an action founded on the promise. King v. McDaniel, 4 Call 451. This case cites and distinguishes Winston v. Francisco, 2 Wash. 187, where no assumpsit was alleged, and the court held that the omission of an averment of a

promise to pay was fatal as it was the very *gist* of the action.

Same—Seizure of Cattle.—Where cattle were taken by the defendant, who was an officer in the confederate army, and who offered to pay for the same in cotton, and on the refusal of the owner to accept the same, left certificate in relation to the pay for the plaintiff, and seized the cattle. This is a proper case for assumpsit and not for trespass, the tort being waived. McDonald v. Peacemaker, 5 W. Va. 439.

IV. WHEN THE ACTION DOES NOT LIE.

1. IN GENERAL.

Mere Fact That Article is Worthless.—The mere fact that an article proves to be worthless will not entitle the purchaser to recover the price paid in an action of assumpsit. Mason v. Chappell, 15 Gratt. 572.

Mere Fact That Article Fails to Equal Representations of It.—The mere fact that an article sold does not come up to the representation made respecting it, is not ground to assume that it was not the genuine article sold, so as to entitle the plaintiff to recover in an action of assumpsit for a failure by the vendor to comply with his contract. Mason v. Chappell, 15 Gratt. 572.

Specific Article Ordered—No Implied Warranty.—Where a specific article is ordered and furnished there is no implied warranty on the part of the vendor that it is suitable for the purposes to which the purchaser intends to apply it, although the purchaser states his purpose to the vendor, and in such a case the latter was not held liable in an action of assumpsit for the purchase price, in the absence of fraud or an express warranty, however unfit and defective the article may turn out to be. Mason v. Chappell, 15 Gratt. 572.

For Breach of Express Warranty, General Assumpsit Does Not Lie.—The action of *general indebitatus assumpsit* does not lie for the breach of an express contract of warranty. Robinson v. Welty, 40 W. Va. 385, 22 S. E. Rep. 73; Houston v. McNeer, 40 W. Va. 365, 22 S. E. Rep. 80.

Assumpsit for Money Paid, etc.—Will Not Lie Unless Money or Equivalent Be Paid.—The principal and his surety are bound in a bond to the obligee, which bond the obligee gives to the surety as an advancement to his daughter in marriage when the surety marries the obligee's daughter. The surety cannot upon these facts support an action of assumpsit against the principal for money paid, laid out and expended, by him for the principal's use, or any of the common money counts, for to maintain assumpsit for money paid, laid out and expended, money or some equivalent for money must be in fact paid. Butterworth v. Ellis, 6 Leigh 106.

2. AGAINST GOVERNMENTAL AGENCIES.

County Court.—The action of assumpsit will not lie against a county court, upon an order issued by said court upon the sheriff of a county, in favor of the owner of such order. Ratcliff v. County Court of Wayne Co., 33 W. Va. 94, 10 S. E. Rep. 28.

Turnpike Company Organ of State.—Where a turnpike company is composed exclusively of officers of the government, having no personal interest in it or in its concerns, and acting only as the organ of the commonwealth in effecting a great public improvement, an action of assumpsit will not lie against the president and directors of the company. Sayre v. N. W. Turnpike Road, 10 Leigh 454.

Tax Collector Who Has Paid Money to Treasurer.—The action of assumpsit for money had and received does not lie to recover taxes paid by a taxpayer to the collector, who in accordance with statutory provisions has turned the money over to the treasurer. Mallan v. Bransford, 86 Va. 675, 10 S. E. Rep. 977.

3. WHERE THERE IS NO CONTRACT.

Services Rendered by Minor to Uncle.—Where a minor lives with his uncle and is furnished with clothes and is supported by him, and the minor renders services without any understanding or contract as to compensation therefor, he cannot recover in an action of assumpsit the value of the services thus rendered, although they may have been greater in value than the support which he received. Riley v. Riley, 38 W. Va. 283, 18 S. E. Rep. 569. *Compare* Plate v. Durst, 42 W. Va. 63, 24 S. E. Rep. 580.

Money Paid Out by Attorneys Received under Decree of Competent Court.—Where money was received by attorneys for the plaintiff under execution by due process of law from a court of competent jurisdiction, which was received as his and disposed of as he directed, when the decree in the suit was subsequently reversed on appeal, a defendant who did not appeal cannot recover from the attorneys in an action of assumpsit, there being no privity between them. Green v. Brengle, 84 Va. 913, 6 S. E. Rep. 608.

Corporation Not in Existence at Date of Original Sale Not Made for Its Benefit Cannot Recover under That Contract.—Where the vendees in a contract for the purchase of real estate subsequently sell it to a corporation which was not in existence at the date of the contract, and the purchase was made only for their own benefit and not for the corporation, the latter, not being in privity with the vendor, cannot maintain an action of assumpsit to recover money paid to the vendor under that contract, the consideration for which had wholly failed. Newberry Land Co. v. Harman Newberry, 95 Va. 111, 27 S. E. Rep. 897.

4. WHO CANNOT RECOVER.

Creditor—When.—The father of a surety agreed with the creditor, who was suing the principal debtor, that if he would dismiss his suit against the latter *at his own costs*, he (the father) would pay the debt with interest. The creditor dismissed the suit *generally*. It was held in an action of assumpsit by the creditor against the father on his conditional promise to pay the debt, that the plaintiff was bound to perform the condition strictly in order to enforce the promise, and that he cannot recover, having dismissed the prior suit *generally* instead of *at his own costs*. Couch v. Hooper, 2 Leigh 557.

Same—Subsequent Ratification Not Averred.—And though the father subsequently approved the *general* dismissal of the suit, the plaintiff not having averred this subsequent ratification in his declaration, that fact cannot avail him. Couch v. Hooper, 2 Leigh 557.

Jailor Cannot Sue Creditor of Debtor for Prison Fees When Debtor Can Pay.—Where an action of assumpsit for money had and received was brought against the creditor of a debtor for the expenses of the latter while imprisoned on a writ of *ca. sa.*, the jailor cannot demand the prison fees of the creditor if the debtor is able to pay them, and the presumption is that he is able to pay them, until the contrary is shown. Rose v. Shore, 1 Call 540.

No Recovery by Plaintiff When Defendant Received Proceeds of Sale as Agent of Heirs.—The plaintiff in an action of assumpsit for money had and received cannot recover of the defendant, when the latter

did not receive the proceeds from the sale of certain salt as administrator of the owner, but only as the agent of his heirs, who therefore are the ones responsible to the plaintiff, the assignee of the money due on the sale of the salt. Brooks v. Hatch, 6 Leigh 534.

Beneficiary under Contract but Not a Party to It.—Upon a parol contract between S and R whereby the latter on consideration moving entirely from the former promises to pay to the daughter of the former a sum of money after his death, the daughter cannot maintain assumpsit for the money. The representative of the promisee only can maintain an action at law. Ross v. Milne, 12 Leigh 204, 37 Am. Dec. 646.

Landlord Cannot Recover Rent for Land from Which He Has Evicted Tenant.—In an action of assumpsit for the use and occupation of a farm for a year, it appears, that the landlord entered on a meadow a part of the premises, within the year, and mowed and carried away the hay without the consent and against the will of the tenant, who, nevertheless, continued to occupy the farm during the rest of the year. The disturbance of the tenant by the landlord in this case amounts to an eviction from that portion of the premises, and suspends the whole rent; the landlord thereby losing the benefit of the entire contract. Briggs v. Hall, 4 Leigh 484.

Militiaman Who Has Paid Substitute Subsequently Discharged.—If a member of militia employ and pay a substitute to perform his tour of duty, and thereupon the substitute be discharged by the commanding officer, the former cannot recover back the money paid in an action of assumpsit, upon the ground that the defendant after commencing the march was discharged as a supernumerary, and therefore never performed the tour of duty. Keys v. McFatridge, 6 Munf. 18.

Defendant Who by Special Plea Defeats Recovery of Purchase Price Cannot Recover Other Damages in Another Action.—Where the defendant in an action of debt for the purchase price of an animal, succeeds by a special plea under § 3299 of the Va. Code in defeating the action to the extent of the price paid for breach of warranty, he cannot subsequently maintain an action of assumpsit for other damages and expenses incurred on account of the breach of the warranty. Huff v. Broyles, 26 Gratt. 283.

V. THE PLEADINGS.

1. THE DECLARATION.

a. SUFFICIENCY.

Declaration in Individual Capacity Construed as Executorial.—Where a declaration in assumpsit was commenced in the name of the plaintiff, executor of the intestate, it being necessary to sue as executor, although it alleged that the defendant was indebted to the plaintiff and promised to pay to the plaintiff, yet, in support of the justice of the case, the declaration may be construed as in the plaintiff's character of executor. Lawson v. Lawson, 16 Gratt. 230.

Action for Breach of Contract.—It is sufficient for the declaration in an action of assumpsit for damages for breach of contract to allege a distinct promise, a valuable consideration for the promise and a breach of it. Payne v. Grant, 81 Va. 164.

b. AMENDMENTS.

Of Declaration on Policy of Insurance—Property.—In an action of assumpsit on a policy of insurance for loss by fire claiming a certain sum as damage, or for loss of certain property, an amended declaration may be filed claiming larger damages, or on additional property, under the same policy, by the same fire. Bentley v. The Standard Fire Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584.

Entitles Party to Continuance.—The plaintiff in an action of assumpsit, files by leave of court an amended declaration to which the defendant at once files his plea. The plaintiff is entitled of right to a rule to reply and it is an error for the court to refuse him a continuance and put him to a nonsuit. By § 4, ch. 171, W. Va. Code 1860, a month is given to parties to a suit to declare, plead, etc., and it is immaterial whether the case be at rules or in term. Bank v. Mathews, 3 W. Va. 26.

By Consent after Issue Joined—No Plea in Abatement to Same Variance between Original Declaration and Writ.—If the plaintiff be permitted to amend his declaration in assumpsit by consent of parties after issue joined on a plea to the action, the defendant ought not to be permitted to plead in abatement any variance between the amended declaration and the writ, which equally existed between the writ and the original declaration. Moss v. Stipp, 3 Munf. 159. See Payne v. Grim, 2 Munf. 297; Bradley v. Welch, 1 Munf. 284.

Plaintiff under Leave to Amend Files New Declaration—Plea to First Declaration Not Withdrawn Is Applicable to Second—Verdict Good.—The defendant pleads the general issue to a declaration in assumpsit, and the plaintiff under leave to amend files a new declaration as a substitute. The defendant does not plead again, and the jury is sworn to try the issue, which results in a verdict for the plaintiff. As the plea to the first declaration was applicable to the new declaration, and was not withdrawn, it must be understood that the defendant rested his defence on the same plea, and the verdict is good. Power v. Ivie, 7 Leigh 147.

To Amend Declaration for Variance from Writ, Latter Referred to without Oyer.—A variance between the writ and the declaration in assumpsit cannot be taken advantage of without craving *oyer* of the writ, yet it may be referred to in order to amend it, without *oyer*. Stephens v. White, 2 Wash. 203.

c. COMMON COUNTS.

(1) *In General.*

Concluding with a "Whereas" Valid.—It has always been a general rule in pleading, that facts necessary to constitute the cause of action should be directly and distinctly stated in the declaration, and should not be left for inference from other facts therein, and arguments, inferences and matters of law should be excluded. But a general *indebitatus assumpsit* count in a declaration concluding and "whereas, the defendants, afterwards to wit: on the day and year aforesaid, in consideration of the premises respectively, then and there promised to pay the said sum of moneys respectively to the plaintiff on request. Yet they have disregarded their promises, and have not paid any of said moneys, or any part thereof, to the plaintiff's damage $1,000, and therefore they bring suit," was held good on general demurrer. Burton & Co. v. Hansford, 10 W. Va. 470; Sayre v. Edwards, 19 W. Va. 352; Patton v. Elk, etc., Co., 13 W. Va. 259.

Same—Violation of General Rule of Pleadings.—If in the common *indebitatus* count in an action of assumpsit the promise is stated after a *whereas*, though the promise is the very gist of the action, yet such a count so framed will be held good on demurrer. See Burton v. Hansford, 10 W. Va. 470. The reason of this is, because the judges of England have prescribed for such a count in an action of assumpsit,

and the Virginia courts have upheld this form of pleading in assumpsit, although it is in apparent violation of the general rule of pleading that facts necessary to constitute the cause of action should be stated directly. Sheppard v. Ins. Co., 21 W. Va. 388.

(2) *Recovery in General.*

Freight for Goods Lost by Act of God Recovered by Carrier.—A common carrier contracts to deliver a crop of wheat at an agreed price per bushel. A large proportion of the crop is delivered in good order, but from the unavoidable effects of a storm, a small part is delivered in a damaged condition, and another small portion is lost. In an action of assumpsit by the carrier for the freight, he is entitled to recover under the common *indebitatus* count, the agreed price for the whole quantity so delivered or lost. Galt v. Archer, 7 Gratt. 307.

No Recovery on Note Not Negotiable Where Suit Brought.—An action of assumpsit was brought on a note which was negotiable at the place where it was made, but was not negotiable by the law of the state in which the suit was brought and where the liability of an assignor was different from that of an endorser. The facts averred in the count were not sufficient to make the defendants liable as assignors, in that it was not shown that the maker was insolvent at the time it became due, or that due diligence had been used to collect it. Under such circumstances there cannot be a recovery under the common counts in assumpsit. Nichols v. Porter, 2 W. Va. 12.

(3) *The Money Counts.*

(a) **When Proper.**

To Recover Commission for Sale of Land.—Where the plaintiff in an action of assumpsit sold land of the defendant without his knowledge, but the latter ratified the sale, agreeing to give the plaintiff one-half of one of the bonds for deferred payments of purchase money, but refused to do so when it was paid, an action of *indebitatus assumpsit* for money had and received, not for services rendered, was proper, having the common money counts. Jackson v. Hough, 38 W. Va. 236, 18 S. E. Rep. 575.

Money Paid for Another under Compulsion of Law.—Whenever the plaintiff in an action of assumpsit shows that he, either by compulsion of law or to relieve himself of liability, or to save himself from damage, has paid money which the defendant ought to have paid, the count for money paid will be supported, whether there be any privity of contract between the plaintiff and defendant or not. As where the promise was to a third person for the benefit of the plaintiff. Nutter v. Sydenstricker, 11 W. Va. 535.

(b) **Recovery under.**

Forfeiture of Insurance Policy—Recovery of Premiums Paid.—Where a contract of insurance is forfeited by failure to pay the annual premium, which is prevented by reason of the war between the states, the insured is entitled to have refunded so much of the premiums actually paid after the company retains an amount sufficient to compensate it for the risk which it incurred while the policy was in force, and the action brought by the plaintiff in such case should be assumpsit on the implied promise of the company to pay what *ex aequo et bono* is due and the declaration need contain nothing but the money counts. Abell v. Ins. Co., 18 W. Va. 400.

Bank Notes Given for Safe Keeping Can Be Recovered.—A sum of money in bank notes was given by a sick man to his wife for safe keeping. A few days later he died. The widow refused to deliver them to the executor, saying she intended to keep them. He sued her in an action of assumpsit for the money, the declaration containing only the common counts, and it was held that he was entitled to recover. Lawson v. Lawson, 16 Gratt. 230.

Holder May Sue Endorser of Promissory Note, Otherwise When for Accommodation.—As a general rule *indebitatus assumpsit* for money lent, or for money paid and expended, or for money had and received, lies against an endorser for the holder of a promissory note, and the endorsement is *prima facie* evidence to support those money counts; yet if it be found by special verdict that the endorsement and the discount of it was done for the accommodation of the maker, and the defendant received no part of the proceeds, in such case the holders cannot recover against the defendant on the money counts in assumpsit. Bank of U. S. v. Jackson, 9 Leigh 221.

Nonnegotiable Paper—Assignee May Recover from Assignor.—An assignee may recover against the assignor of nonnegotiable paper on the common counts for money had and received in an action of *indebitatus assumpsit.* Hughes v. Frum, 41 W. Va. 445, 23 S. E. Rep. 604, overruling Nichols v. Porter, 2 W. Va. 13.

(c) **Request.**

When the Request Is Express, When Implied.—In an action of *indebitatus assumpsit* for money had and received, which has been paid for the use of the defendant, the request necessary may be either expressed or implied. It will be implied where the plaintiff has been compelled to do what the defendant was legally compellable; where the defendant has adopted and enjoyed the benefit of the consideration, and where the plaintiff voluntarily does what the defendant was legally compelled to do, and the defendant afterwards in consideration thereof expressly promises. In certain cases the request will be implied where the plaintiff voluntarily does what the defendant is only morally compelled to do, and there is a subsequent promise by the defendant. Nutter v. Sydenstricker, 11 W. Va. 535.

(4) *The Account Stated.*

No Account Necessary When Insimul Computassent Count Gives Defendant Sufficient Notice.—If the proof offered by the plaintiff be such as to sustain the count of *insimul computassent,* it is of no importance whether there be any account filed or not; for this count does so describe the plaintiff's demand, as to give the defendant sufficient notice of the character thereof. Fitch v. Leitch, 11 Leigh 471.

Construction of § 86, Ch. 128, 1 Rev. Code.—Section 86, of ch. 128, 1 Rev. Code provides that "in every action of *indebitatus assumpsit,* the plaintiff shall file with his declaration an account, stating distinctly the several items of his claim against the defendant; and on failure thereof, he shall not be entitled to prove before the jury any item which is not so plainly and particularly described in the declaration, as to give the defendant full notice of the character thereof." It was held, in Fitch v. Leitch, 11 Leigh 471, construing this statute, that if the proof offered by the plaintiff is such as to sustain the count of *insimul computassent,* it is of no importance whether there be any account filed or not, for this count so particularly describes the plaintiff's demand, as to give the defendant notice thereof.

Count of Account Stated in Insurance Policy Sustained by Proof of Adjustment.—A general *insimul computassent* count in a declaration in an action of

assumpsit brought for recovery under a policy of insurance is sustained by proof of an adjustment of the amount due from the defendant to the plaintiff on account of the loss by fire of the property insured. Stolle v. Ins. Co., 10 W. Va. 546.

(5) *On Special Contracts.*

When Plaintiff May Declare Generally on Special Contract.—Wherever the plaintiff has done everything which was to be executed on his part before making his demand, and nothing remains but a mere duty on the defendant's part to pay money, the plaintiff need not declare specially, but may recover on a general count in assumpsit. Moore v. Supervisors, 18 W. Va. 680; Davisson v. Ford, 28 W. Va. 619; Jackson v. Hough, 38 W. Va. 236, 18 S. E. Rep. 575.

The plaintiffs and defendants entered into a special contract, by which the plaintiffs were to make certain sections of the defendants' railroad, in a special manner, to be completed by a specified time, under the supervision of the engineers of the defendants. The plaintiffs failed to complete it in the time specified, but with the consent of the defendants continued the work until it was completed. In an action of assumpsit under the common counts, the plaintiffs are entitled to recover. B. & O. R. Co. v. Lafferty, 2 W. Va. 104.

Same—Pro Tanto Benefits Received and Accepted.—Where work, which has been done by a plaintiff under a special agreement, but not in a stipulated manner, and was yet beneficial to the defendant, has been accepted and enjoyed by him, the plaintiff cannot recover upon the contract from which he has departed, but he may recover on the common counts for the reasonable value of the benefit which the defendant has derived from what he has done. B. & O. R. Co. v. Lafferty, 2 W. Va. 104.

Same—Special Contract Must Be Fully Executed.—The plaintiffs bring an action of assumpsit for work and labor done, and declared under the common counts. If it appeared from their evidence that the work was done under a special contract in full force, they can only recover the contract price, on proving the contract fully executed on their part. Balt., etc., R. Co. v. Polly, 14 Gratt. 447.

Same—Special Contract Mutually Abandoned.—Where a contract partly performed, has been abandoned by mutual consent, the plaintiff may resort to the common counts alone for what he has done under the special agreement. Balt., etc., R. Co. v. Lafferty, 2 W. Va. 104.

Same—No Recovery before All Purchase Money Is Due.—The plaintiff in an action of assumpsit on a special contract to recover damages for failure to accept and pay for property sold thereunder, cannot recover on the common counts, the action being brought before all the purchase money is due. James v. Adams, 16 W. Va. 245.

d. SPECIAL COUNTS.

(1) *In General.*

Terms of Contract Sued on Binding.—When a party declares in assumpsit attempting to recover upon a special contract, he is bound by its terms; to hold otherwise would clearly involve a legal absurdity. B. & O. R. Co. v. Rathbone, 1 W. Va. 87.

(2) *When Proper.*

Money Paid by Fraudulent Inducements.—Where the purchaser of real estate, which is subject to liens, is induced by false and fraudulent representations of a mortgagee in a fraudulent and voidable mortgage on said real estate to pay off said mortgage with a part of the purchase money, the purchaser may recover back the money so paid in a special count in general *indebitatus assumpsit*, setting forth specially the facts creating the liability and averred as the consideration of the promise. It may also be recovered back on the common count in general *indebitatus assumpsit* for money had and received, accompanied with a sufficient bill of particulars. Robinson v. Welty, 40 W. Va. 385, 22 S. E. Rep. 73.

Executory Contracts.—Where the contract sued on continues executory the plaintiff in assumpsit must declare specially; but where it has been executed, and nothing remains but the payment of the price by the defendant, the plaintiff may declare generally using the common counts, or may declare specially on the original contract. B. & O. R. Co. v. Lafferty, 2 W. Va. 104.

For Price of Land Sold.—The action of general *indebitatus assumpsit* will not lie for the price of a tract of land, but a special action ought to be brought stating the circumstances of the contract. Hoskins v. Wright, 1 H. & M. 378.

Special Usage of Bank.—Where a bill is made payable at a bank, at which there is a special established usage that bills payable there should be presented on the fourth and not on the third day of grace, this special usage must be alleged by a special count in the declaration in an action of assumpsit upon such bill, otherwise proof of presentation on the fourth day of grace will not be permitted. Jackson v. Henderson, 3 Leigh 196.

Recovery of Oil from Common Carriers Not in Wrongful Possession Nor Tortiously Disposed.—The declaration in an action of assumpsit brought to recover the value of oil claimed by the plaintiff, contained no good counts except the common counts. The oil was in possession of the defendant (a common carrier), at the time the action was brought, and not wrongfully, nor had it been sold or in any way tortiously disposed of. There also being no evidence of such sale or disposal, it was erroneous to instruct the jury that they should find for the plaintiff if they believed the oil belonged to him, as he is not entitled to recover the value of the oil under the common counts for oil sold and delivered to the defendant, or for money had and received for the plaintiff's use, there being no special count covering the case. Dresser v. Transportation Company, 8 W. Va. 558.

(3) *Averments in.*

Building Contract—Unnecessary to Set Out Dimensions.—In an action of assumpsit brought by a contractor against a county for the price contracted to be paid for building a jail, it is not necessary to set out in a special count the dimensions, or a description of the building in the declaration. Carroll County v. Collier, 22 Gratt. 302.

Same—Necessary to Aver Time of Completion.—Where in a declaration in an action of assumpsit by a contractor against a county for the price contracted for building a jail, the contract as set out in a special count fixes a time within which the jail is to be completed, but there is no averment that it was completed within that time. The count was held to be defective. Carroll County v. Collier, 22 Gratt. 302.

Defendant Absent from Place of Performance.—Where a contract was to be performed on a certain day and at a certain place, if the plaintiff in his declaration in assumpsit alleges in a special count that the defendant was not at the place of performance, but was out of the state on the day specified, it will be a sufficient allegation on his part to declare that he was ready and willing to perform his

contract, and on demurrer to the count will be good. Kern v. Zeigler, 13 W. Va. 707.

Condition Precedent—Excuse for Nonperformance.—Where an action of assumpsit is brought on an entire contract under seal, in which the covenants are dependent and the pleader sets forth the contract in a special count, it is not sufficient for the plaintiff to aver his readiness and willingness to perform the condition precedent contained in the contract, but he must go further and show a sufficient excuse for his nonperformance. Jones v. Singer Mfg. Co., 38 W. Va. 147, 18 S. E. Rep. 478.

Promise in Writing to Pay Debt of Another—Consideration.—A special count containing a promise of one party to pay the indebtedness of another, which is in writing, must set forth the consideration in declaring upon it, as such a promise in order to be binding must be founded upon a consideration. Winkler v. C. & O. R. Co., 12 W. Va. 699.

Agency Violated—Instructions of Principal.—In an action of assumpsit by a principal to recover from his agent the value of goods sold by him to insolvent persons on credit, in violation of his instructions, it is not necessary in the declaration to aver an express contract that the defendant should sell for cash only. It is sufficient to aver in a special count that the plaintiff had instructed the defendant not to sell on credit. Maloney v. Barr, 27 W. Va. 381.

e. JOINDER OF COUNTS.

(1) *When Proper.*

In Action to Recover Goods Embezzled.—In an action of assumpsit brought to recover goods or money which had been embezzled by an agent, a special count which sets out the embezzlement may be joined with the common counts in the declaration. Maloney v. Barr, 27 W. Va. 381.

Action on Insurance Policy.—In an action of assumpsit on an insurance policy for recovery for loss by fire, there may be included in the declaration with a count under sec. 61, ch. 125, in the W. Va. Code, the common counts or other counts proper in that form of action. Bentley v. The Standard Fire Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584.

Recovery of Taxes Paid under Protest.—It was held, in Brown v. Greenhow, 80 Va. 118, not to be improper to join a special count with the common money counts to recover in assumpsit taxes paid to a collector under protest.

On Special Contract of Bailment.—A general *indebitatus assumpsit* may be joined with a count in assumpsit upon a special contract of bailment, setting out the promise and undertaking of the defendants, the consideration on which it was founded, the breach of that promise by the defendants and their neglect and carelessness, and the loss to the plaintiff occasioned thereby. Kennaird v. Jones, 9 Gratt. 183.

Promises of Executor with Those of Debtor.—In an action of assumpsit against an administrator *d. b. n.*, counts upon promises made by the executor or a former administrator of the deceased debtor, as such, may be joined with counts on promises by the deceased debtor himself, to save the statute of limitations. In such case the counts upon the promises of the executor or former administrator, must distinctly aver the promises to have been made *as executor or administrator*, or they will be bad on general demurrer. Bishop v. Harrison, 2 Leigh 532.

Recovery of Attorney's Fees.—A firm of attorneys made a contract in writing with a client, which provided that the firm were to receive $100 certain and if the suit referred to was decided in favor of their client then they were to receive $200 extra. The attorneys in an action of assumpsit set out the agreement and alleged that their client dismissed the suit without their consent, and thereby hindered them from prosecuting it to a final decision although they were willing and ready so to do. The declaration also contained the common counts for work and labor, and an account stated. On a demurrer to the declaration and each count thereof it was held that they were sufficient and that the plaintiffs upon issue joined on nonassumpsit may recover, in addition to the $100 certain, such damages for their time and labor as they are reasonably worth, provided the whole recovery shall not exceed the entire amount stipulated in the contract. Polsley & Son v. Anderson, 7 W. Va. 202.

Special Count Alleging Usurpation of Office.—A declaration in assumpsit contains the common counts, and also a special count reciting the election of the plaintiff as county clerk, and that the defendant wrongfully and illegally intruded into the office, and received and collected certain fees to which the plaintiff was entitled. This discloses a consideration which supports the promise alleged to have been made by the defendant to pay the sum of money demanded in the declaration, and is not a count upon a tort, and the joinder is proper. Booker v. Donohoe, 95 Va. 359, 28 S. E. Rep. 584.

(2) *When Improper.*

Joinder of Tort Count with Contract Count.—It is well settled that causes of action arising in tort cannot be joined with causes of action arising from contracts except in rare instances. Thus, a declaration is bad on general demurrer which joins a count to recover damages for the breach of contract, with one to recover damages for a tort. At page 398, 4 Min. Inst. (2d Ed.), the author states this proposition in the following language: "It must be observed that causes of action in tort cannot be joined with causes arising out of contract. Thus trespass on the case in assumpsit cannot be joined with trespass on the case in trover and conversion; nor debt with trespass *vi et armis*." Gary v. Abingdon Pub. Co., 94 Va. 775, 27 S. E. Rep. 595.

Count against Executor in Representative with One in Individual Capacity—Misjoinder.—If in a declaration in assumpsit against an executor for a legacy, there be one count against him in his representative, and another against him in his individual character, this is a misjoinder of action, which is fatal on general demurrer. Kayser v. Disher, 9 Leigh 357.

f. THE ALLEGATIONS.

(1) *In General.*

All Necessary Circumstances Should Be Stated Clearly.—It is an elementary rule in pleading that the declaration in assumpsit must allege all the circumstances necessary for the support of the action, and contain a full, regular and methodical statement, with such precision, certainty and clearness that the defendant may be distinctly informed of the grounds of the action. All beyond this is surplusage, and where the declaration fails to conform in its averments to this rule it will be insufficient on general demurrer. Patton v. Elk, etc., Co., 13 W. Va. 259. See White v. Romans, 29 W. Va. 571, 3 S. E. Rep. 14.

Words "Trespass in the Case" Cannot Change Form of Action.—Where there are three counts in a declaration in assumpsit, the first two of which are plainly assumpsit counts, the fact that the plaintiffs in the other count say that complaint is made of a plea of "trespass in the case," instead of trespass on the case in assumpsit," cannot change the form of

action, nor affect the result upon demurrer. Gray v. Kemp, 88 Va. 201, 16 S. E. Rep. 225.

No Difference in Description of Express and Implied Contracts.—While the contract sued on must be truly set out in every declaration in assumpsit, it is well understood for purposes of pleading that there is no difference between an express and an implied contract, and that in every case, where the agreement is not in writing, the same identical words of description are employed to describe an implied as well as an express promise. Payne v. Grant, 81 Va. 164.

(2) *Construction of.*

Construction of Averment of Shipment of Goods as Per Agreement.—The averment in each of the counts in a declaration in assumpsit brought for the recovery of damages under a contract to carry goods, that they were delivered for shipment as they had agreed to furnish them, must be construed as averring that the goods were furnished within a reasonable time after the making of the contract. Southern Railway Co. v. Wilcox (Va.), 39 S. E. Rep. 144, 7 Va. Law Reg. 381.

Averment of Acceptance of Offer.—In an action of assumpsit on a simple contract an averment in the declaration that the offer was accepted necessarily implies that it had not been withdrawn, for there could be no acceptance of an offer which had been withdrawn. Southern Railway Co. v. Wilcox (Va.), 39 S. E. Rep. 144, 7 Va. Law Reg. 381.

Effect of Allegation of Performance of Conditions.—If the plaintiff in his declaration in assumpsit on an insurance policy, allege that he has on his part performed all the conditions of the policy, and has violated none of its provisions, he must be regarded as meaning such as have not been waived. Such as have been waived are in effect as if they had never been inserted in the contract. Levy v. Ins. Co., 10 W. Va. 560. See Ins. Co. v. Sheets, 26 Gratt. 858.

(3) *Matters of Defence Omitted.*

Matters of Defeasance May Be Omitted.—It is sufficient for the plaintiff in an action of assumpsit to state in the declaration so much of the terms beneficial to him in a contract for the breach of which he sues, and he need not state matters in defeasance of his action. But wherever circumstances existed, the omission of which will defeat the plaintiff's right of action, *prima facie* well founded, it must be a matter of defence, and should be shown by the opposite party. Simmons v. Insurance Co., 8 W. Va. 474.

Lien of Subcontractor under Mechanics' Lien Law.—It is not essential for the subcontractor in his declaration in assumpsit against the owner under the mechanics' lien law to allege that his account was approved by the general contractor; or that he after ten days' notice failed to file objection; or that it had been ascertained to be due the subcontractor from the general contractor. Va. Code 1873, ch. 115; Code 1887, secs. 2479-80. His claims to a lien are not made to depend by the law upon the admissions of the general contractor, or his failure to dispute the account within ten days. These may be matters of defence, but they do not constitute any part of the plaintiff's case, and are not necessary to the declaration. Norfolk, etc., Ry. Co. v. Howison, 81 Va. 125.

Application for Insurance Policy—Warranty.—Where no part of an application for insurance is set out in the policy, and no reference is made in the policy to the application, or any warranty therein, it is unnecessary for the plaintiff in an action of assumpsit brought on the policy, to state such warranties; they are matters of defeasance which should more properly come from the other side. Simmons v. Insurance Co., 8 W. Va. 474.

(4) *Sufficiency.*

Performance of Condition Precedent.—Where a condition precedent must be performed before liability will attach under a contract, in an action of assumpsit on this contract, it is sufficient for the declaration to contain a general allegation that the plaintiff has performed the condition precedent according to its true intent and meaning, and it is not sufficient to allege only that the plaintiff was ready and willing to perform his part of the contract. Kern v. Zeigler, 13 W. Va. 707.

Insurable Interest.—It is well settled that a policy of insurance is a contract of indemnity and that the assured must have an interest in the property insured, and hence in an action of assumpsit brought on such a policy the declaration must allege distinctly an insurable interest, when the policy is taken out, and also when the property was destroyed and damaged by fire. It is not a sufficient allegation that the property of the plaintiff was insured by the defendant. Quarrier v. Insurance Co., 10 W. Va. 507; Sheppard v. Insurance Co., 21 W. Va. 368. See Travis v. Peabody Ins. Co., 28 W. Va. 583.

Certificate of Magistrate, Notary, etc., Condition Precedent to Recovery—Kind of Officer Should Be Stated.—Where the declaration in assumpsit in a policy of insurance states as a condition precedent that the assured should produce a certificate under the hand and seal of a magistrate, notary public, or commission of deeds, etc., fair pleading requires that the kind of officer should be stated in the declaration, so that the court may determine whether it was the proper officer. The production of the certificate of the proper officer is a condition precedent and must be complied with, unless waived by the defendant. Simmons v. Insurance Co., 8 W. Va. 474.

(5) *Of Promise.*

Should Be Charged Positively, Not by Recitals.—The plaintiff in assumpsit must charge the promise by the defendant positively and not by way of recital only, for if the declaration be defective in this respect it is a fatal error and cannot be cured by verdict. Sexton v. Holmes, 3 Munf. 566. See Syme v. Griffin, 4 H. & M. 277.

Same—Warranty.—In an action of assumpsit to recover damages for defective machinery which the plaintiff had purchased, paid for, and returned as useless, the plaintiff must charge the promise, that the machinery would perform the work for which it was intended, positively, and not by way of recital. Wolf v. Spence, 39 W. Va. 491, 20 S. E. Rep. 610.

Written Agreement—Express Promise—Recitals Insufficient.—An express promise ought to be laid in the declaration in an action of assumpsit upon a written agreement; a mere recital of the writing, though a true copy, is not sufficient. Wooddy v. Flournoy, 6 Munf. 506. See Cooke v. Simms, 2 Call 39.

Of an Executor.—Where an action of assumpsit is brought by a legatee against an executor for a legacy, on the executor's promise to pay it, the declaration should charge the promise of the executor in his individual, not in his representative, character, and the attachment in such case must be *de bonis propriis*. Kayser v. Disher, 9 Leigh 357.

Loose Conversations Not Sufficient to Raise a Promise.—Loose conversations of an executor are not

sufficient to raise an assumpsit as a new promise, or as an acknowledgment, so as to revive an old debt of the testator. Henderson v. Foote, 3 Call 248.

Promissory Note—Express Promise Necessary.—In an action of assumpsit brought upon a promissory note, there must be an express assumpsit laid in the declaration; merely reciting the note *in haec verba* is not sufficient. Cooke v. Simms, 2 Call 39.

Promise to "Settle" Not Equivalent to Promise to Pay.—In an action of assumpsit against an executor for a debt of his testator on an open account, all the items of which appear to have been due more than five years before the testator's death, the plaintiff proves that the testator within five years after the date of the account promised to "settle" the account. Such a promise does not amount to a promise to pay, or such an acknowledgment of the debt, as would take the case out of the general statute of limitations. Aylett v. Robinson, 9 Leigh 45.

(6) *Of Consideration.*

Must Be Alleged and Proved.—A consideration must be set forth in a declaration in assumpsit in support of the defendant's promises sued on; it forms an essential portion of the contract, on which its validity depends. It must be truly stated, and proven as stated, or the plaintiff will fail for variance. If the entire consideration is stated, the entire consideration must be proved, or there will be a variance. Davisson v. Ford, 28 W. Va. 617; Beverleys v. Holmes, 4 Munf. 95.

No Averment of Sufficient Consideration.—A, executor of B, writes to C, a creditor of B, that as soon as he is able to dispose of his crops, he will pay the claim, or will let him have any property in his possession at a moderate valuation. This will not bind A in his own right, without an averment of assets, or a forbearance to sue, or some other consideration sufficient to support an action of assumpsit. Taliaferro v. Robb, 2 Call 258.

Want of Consideration Immaterial—Failure of Attorney to Sue.—Where the declaration in an action of assumpsit states that the plaintiff by the advice of the defendant, his attorney, instituted a suit against a third person, and the said attorney undertook to conduct the suit to the best of his skill, and yet mismanaged it by failing to file a declaration, etc., the want of a consideration is not material. Stephens v. White, 2 Wash. 208.

Special Contract—Entire Consideration Should Be Substantially Stated.—In an action of assumpsit on a special contract to recover damages for failure to accept and pay for property under that contract it is necessary that the entire consideration and the act to be done in return for it be stated in substance in the declaration; and if the proof establishes a contract materially different from the one alleged in the declaration, the court on motion should exclude the evidence from the jury. James v. Adams, 16 W. Va. 345.

Same—Sufficient Consideration Must Be Stated.—If a count in assumpsit upon a special contract between the plaintiff and defendant allege no sufficient consideration moving from the former to the latter, the action will not be sustained upon the ground of the promise and undertaking imputed to him. Hale v. Crow, 9 Gratt. 268.

Promise to Indemnify—Sufficient Consideration.—The plaintiff in a declaration in assumpsit made as agent a lease of lands seized in tail to D, who assigned to S, and bound himself with D in a bond to S to obtain a confirmation of the lease from the defendant, the issue in tail. The defendant promised to make the lease, and for years received rent from S, and then turned him out of possession. S then recovered damages from B on his bond. On suit by D against the plaintiff the same damages were recovered from him; pending this suit the defendant promised to indemnify D and the plaintiff against the suit of S. The consideration stated in this declaration is sufficient to maintain the action against the defendant for breach of promise to indemnify. Fields v. Spotswood, 1 Wash. 280.

Same.—A mill was devised to B on condition that he should pay to C $250. B accepted the devise provided C would indemnify him from any loss that might be caused by overflow to the mill due to the erection of a dam below it. In an action of assumpsit by B against C, the declaration setting out this contract shows sufficient consideration to support the promise of indemnity, and it is not necessary to allege in the declaration notice to the defendant of injury resulting from the erection of the dam. Chapman v. Ross, 12 Leigh 565.

Promissory Note—Consideration Must Be Stated and Proved—Common-Law Rule.—At common law the plaintiff in an action on a promissory note must declare upon the contract, as in assumpsit, stating and proving the real consideration at large. The note, though it could not be declared on, might be given in evidence in support of the contract stated, as in a count for money lent. Peasley v. Boatwright, 2 Leigh 198.

Same—No Averment of Consideration.—A judgment of the lower court holding that the action of assumpsit can be maintained in Virginia on a promissory note, without averring a consideration in the declaration, was affirmed by a divided court in Jackson v. Jackson, 10 Leigh 448.

Assignment of Bond without Consideration as Collateral Security—Assignor Not Liable.—A bond is assigned without consideration, and the assignee transfers it to H as collateral security for goods purchased on credit, with the understanding that if the assignor does not acknowledge his liability on said bond, H may return it and look out for other security. The assignor assures H in writing that he was aware of nothing that would affect his liability on the bond. When the time for the payment of the goods arrived the obligor in the bond was insolvent. This was held not to be a sufficient consideration to support an action of assumpsit by H against the assignor. Hopkins v. Richardson, 9 Gratt. 485.

(7) *Of Breach.*

When Several Counts—How Breach Should Be Charged.—In an action of assumpsit, if there be several counts in the declaration, the defendant should be charged, as having failed to pay the several sums of money aforesaid, and every part thereof; if this be not done, but the breach charged at the end of the last count be that he hath not paid "the said sum of money," and it appear upon a demurrer to the evidence, that the evidence adduced by the plaintiff applies to the first count, judgment ought to be given for the defendant. Ellis v. Turner, 5 Munf. 196.

Agreement for Sale of Land—Breach Sufficiently Charged.—In an action of assumpsit upon a written agreement for the sale of a tract of land, which sets forth the agreement of the vendor to give to the vendee possession and a conveyance free of encumbrances by a certain day, for which the vendee agreed to pay to the vendor a part of the purchase money on that day, and secure the balance by deed of trust or such security as might be required, and

the conveyance was not to be executed until the payment was made and the security given; the declaration in this action sufficiently charged a breach by stating that the plaintiff was on that day in lawful and peaceful possession of the land, and ready to give the defendant possession with a proper conveyance free from encumbrances, but that the defendant failed to make the payment and give the security. Moss v. Stipp, 3 Munf. 159.

(8) *Of Demand.*

By Creditor on Debtor Unnecessary.—A demand on a person for whose benefit a promise is made is not necessary to be laid in the declaration, as he is the debtor, and must seek his creditor and pay him. Pasteur v. Parker, 3 Rand. 458.

Not Necessary When Defendant Undertakes to See Money Paid to Plaintiff.—When the defendant undertakes to see money paid to the plaintiff, it is his business to look to the performance himself, without any notice from the plaintiff, and in an action of assumpsit it is not necessary for the declaration to contain an averment of notice and request by the plaintiff. Austin v. Richardson, 3 Call 202.

Demand against Sheriff.—*Indebitatus assumpsit* will lie against a sheriff for money received by him, or his deputy, under an execution; but the declaration ought to be so far special, as to distinguish the demand from one against him in his private capacity. Overton v. Hudson, 2 Wash. 172.

(9) *Of Damages.*

Several Counts—General Allegation at End of Declaration Sufficient.—It is not necessary to allege at the end of each count in a declaration in an action of assumpsit to recover damages for the breach of a contract, that damages have been incurred by the failure of the plaintiff to perform his promise named in the count. A general allegation at the end of the declaration, that the plaintiffs have sustained damages by the failure of the defendant to perform his several promises named in the declaration to the certain amount, is sufficient. James v. Adams, 16 W. Va. 245.

Not Proper When Promise Is to Perform an Act.—In the declaration in an action of assumpsit based on a promise not to pay money but to perform some act, it is neither necessary nor proper to allege the nonpayment of the damages, for the object of the suit is to recover these damages, when they shall have been ascertained by a jury. Davisson v. Ford, 23 W. Va. 617.

Greater Damages Cannot Be Recovered Than Are Laid in Conclusion of Declaration—Interest.—In an action of assumpsit greater damages cannot be recovered than are declared for and are laid in the conclusion in the declaration, but this restriction is confined to the amount of damages, the principal recovery, and does not affect the interest that may be allowed thereon by the jury. Georgia, etc., Ins. Co. v. Goode, 95 Va. 751, 30 S. E. Rep. 366; Cahill v. Pintony, 4 Munf. 371.

Recovery of Damages above Those Specified in Proofs of Loss.—The plaintiff is not limited in his recovery in an action of assumpsit on a policy of fire insurance by the amount of loss specified in the proofs of loss, in the absence of fraud. Bentley v. The Standard Fire Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584.

g. OMISSIONS.

(1) *Material.*

Promise to Pay Debt of Another—Omission to Allege Nonpayment by That Other Fatal.—A special count in a declaration in assumpsit brought on a promise of one person to pay the debt of another, which shows a consideration for the promise, but does not allege that the other has not paid the debt, if fatally defective. Winkler v. C. & O. R. Co., 12 W. Va. 699.

Judgment Arrested When Omission to Allege Consideration for Assignment of a Bond.—In an action of assumpsit against the assignor of a bond a consideration for the assignment should be set forth in the declaration, and if it be omitted judgment may be arrested. Hall v. Smith, 3 Munf. 550.

Omission of Promise to Pay Incurable by Verdict.—In an action of assumpsit the gist of the action is the promise to pay, and if this be not averred, the omission is not cured by verdict. Winston v. Francisco, 3 Wash. 187.

Requirement of Insurance Policy Must Be Alleged in Action on Policy—Omission Fatal.—A policy of insurance requires that after a loss, payment will be made sixty days after proof and notice are given the company in a certain manner. In an action of assumpsit brought on this policy it is necessary for the declaration to allege in this manner, and that proof and notice were given in accordance with the directions of the policy. Failure to make these allegations is fatal on general demurrer to the declaration. Quarrier v. Insurance Co., 10 W. Va. 507.

Adjustment of Loss with Insurance Company—What Omissions in Allegations Fatal.—Where an adjustment has been made with an insurance company of the loss caused by a fire, it is necessary for the declaration in an action of assumpsit based thereon to allege that this adjustment was made with the defendant company, and that it promised to pay the amount of the adjustment, and a failure to make these allegations is fatal to the declaration on general demurrer. An allegation that the adjustment was made with an agent of the company is insufficient. Quarrier v. Insurance Co., 10 W. Va. 507.

Relinquishment of Right of Administration as Per Agreement.—A declaration in assumpsit stated that the plaintiff, being a creditor of a deceased person, had moved the proper court to grant him administration of his estate, and the defendant, alleging that he was a creditor also, assured him that if he would withdraw his said motion, and suffer the defendant to have the administration, he (the defendant) would pay his debt out of the first money that should come to his hands as administrator. It also stated that the plaintiff then agreed to relinquish his right as administrator, and the defendant then and there administered upon the estate, but it did not aver that the plaintiff relinquished his pretension to the administration, in conformity with the said agreement. Such a declaration is altogether defective and cannot be aided by verdict. Daniel v. Morton, 4 Munf. 120.

(2) *Immaterial.*

Omission of Word "Surety" Immaterial.—When there are two signatures to an obligation to pay money, and it is expressed that one signs as surety, the word "surety" being annexed to his signature, both are jointly bound, and a declaration in assumpsit against both need not notice the suretyship, because it is immaterial. Riley v. Jarvis, 43 W. Va. 43, 26 S. E. Rep. 366.

Presentment for Payment—Sec. 1, Ch. 99, Code West Virginia.—A count in a declaration in assumpsit on a promissory note, omits to state that it was presented at the bank, where it was payable, for payment. But by Code of Va. 1849, ch. 144, § 1, re-enacted

by § 1, ch. 99, Code of W. Va. 1868 (§ 1, ch. 99, Code of W. Va. 1899), it is provided, that it shall not be necessary to aver, or prove presentation for payment, at the time and place, specified in a note, in order to recover of the makers. Bank of Wheeling v. Evans, 9 W. Va. 373.

Omission to State Cause of Action Arose in Jurisdiction of Court—No Error.—In an action of assumpsit in the superior court of the county, the declarations laying the venue in a different county, and omitting to state that the cause of action arose within the jurisdiction of the court, is not error sufficient in arrest of judgment. Buster v. Ruffner, 5 Munf. 27. See Turberville v. Long, 3 H. & M. 309.

Omission of Damages Unimportant.—It appears from numerous authorities that it is unimportant that the damages are left blank in the declaration in an action of assumpsit, but if the gist of the action be blank, it is a fatal omission. Blane v. Sansum, 2 Call 495; Stephens v. White, 2 Wash. 208; Taylor v. M'Clean, 3 Call 567; Craghill v. Page, 2 H. & M. 446; Digges v. Norris, 3 H. & M. 268; Winston v. Francisco, 2 Wash. 187.

(3) *When Cured.*

On Collateral Promise—Omission to Allege Notice, Performance and Failure to Pay Cured by Statute of Jeofails.—In a declaration in assumpsit on a collateral promise, the plaintiff should aver notice to the grantor, of the performance of the act contemplated by the promise, and perhaps of the failure to pay by the person in whose favor the undertaking was made. The omission of these averments will be cured by the statute of jeofails after verdict. Pasteur v. Parker, 3 Rand. 458.

Money Count—Sum Received Blank Cured by Verdict.—A count for money had and received in an action of assumpsit was held good after verdict, although the sum received was left blank. Hall v. Smith, 3 Munf. 550.

Action Sounding in Damages—Omission to Lay Damages Cured by Verdict.—The omission to lay damages in the declaration in an action of assumpsit, though it is an action sounding in damages, is cured after verdict by the statute of jeofails. Stephens v. White, 2 Wash. 208.

h. BILL OF PARTICULARS, ACCOUNT AND AFFIDAVIT.

No Part of Declaration.—The account which the statute requires to be filed in an action of assumpsit setting forth the items of the plaintiff's claim, is not a part of the declaration, and there can be no plea to it. Booker v. Donohoe, 95 Va. 359, 28 S. E. Rep. 884; Riley v. Jarvis, 43 W. Va. 43, 26 S. E. Rep. 366. See George Campbell Co. v. George Angus & Co., 91 Va. 438, 22 S. E. Rep. 167.

Former Law.—The former rule of law was that the account filed by the statute (Va. Code 1873, ch. 167, § 13, Va. Code 1887, § 3248), with the declaration in assumpsit, is a part of declaration, and is subject to demurrer. Wright v. Smith, 81 Va. 777. This case has been overruled in numerous cases. See George Campbell Co. v. George Angus & Co., 91 Va. 438, 22 S. E. Rep. 167.

Demurrer Does Not Lie for Defects Therein—Proper Practice.—The defects in a bill of particulars cannot be taken advantage of by a demurrer to the declaration. They are not within its scope, and it does not lie for such a purpose. Abell v. Penn., etc., Ins. Co., 18 W. Va. 400; Sheppard v. Ins. Co., 21 W. Va. 868. Where a sufficient bill of particulars is not filed, the proper practice is to apply to the court to require the plaintiff to file an amended and sufficient account; and if he fail to do so, to move the court to exclude evidence of any matter not described sufficiently to give him notice of its nature and character. George Campbell Co. v. George Angus & Co., 91 Va. 438, 22 S. E. Rep. 167. See also, Moore v. Mauro, 4 Rand. 488.

Office—May Supply Defects in Declaration.—The office of a bill of particulars is to give a fuller and a more particular specification of the matter contained in the declaration, and is to be read in connection with it, hence the bill of particulars supplies defects, if any, in the declaration. George Campbell Co. v. George Angus & Co., 91 Va. 438, 22 S. E. Rep. 167.

Must Conform to Claim in Declaration.—If the declaration in an action of assumpsit contained no count, which is based on the claim specified in the bill of particulars filed therewith, the items contained in it cannot be proven, and no recovery can be had therefor. Riley v. Jarvis, 43 W. Va. 43, 26 S. E. Rep. 366.

When Court Will Allow Amendment.—If substantial justice is promoted by allowing the plaintiff to amend his bill of particulars filed with a declaration in assumpsit, and it appears that this amendment operated no surprise to the defendant, the court acts properly in permitting the amendment and in refusing a continuance on account of it. Anderson v. Kanawha Coal Co., 12 W. Va. 526.

Application for Time for Defence to Bill of Particulars Should Be Made in Lower Court.—Where a motion by the defendant to require the plaintiff to file a bill of particulars was denied at the term where it was made, but before trial at the next term, the plaintiff appeared and filed a bill, in which the items of his claim were fully and clearly set out, no objection can be raised in the court of appeals that the defendants desired time for the preparation of their defence, as such application should have been made in the court below when the cause came on for trial. Central Lunatic Asylum v. Flanagan, 80 Va. 110.

Specific Payments before Suit Must Be Set Out in Bill of Particulars.—In an action of assumpsit no specific or partial payment before the suit is brought can be proved, unless its nature and the several items thereof are set out in the bill of particulars filed with the general issue. Shanklin v. Crisamore, 4 W. Va. 134.

Insufficient Account.—Where an account filed with a declaration in assumpsit under § 3248 of the Va. Code, only mentions the sums paid, not giving any information about them, this account is insufficient where the items are not plainly described in the declaration. Johnson v. Fry, 88 Va. 695, 12 S. E. Rep. 973, 14 S. E. Rep. 183.

Sec. 3249 of Va. Code Construed—Authorizing Court to Order a Statement by Plaintiff or Defendant.—The object of § 3249, of the Va. Code which authorizes the court in any action to order a statement to be filed of the particulars of a claim, or the grounds of defence, is to give the defendant definite information of the claim against him, and to give the plaintiff more particular information of the defence than is generally disclosed by a plea, so as to enable the parties to prepare more intelligibly for trial and to prevent surprises. It was enacted in the interest of justice and is a most serviceable statute for this attainment. But such statement does not constitute the issue to be tried, and it was not intended that it should contain the formality or precision of a declaration or plea, but is entirely

informal. It is not subject to demurrer, but when insufficient the court should require it on motion to be amended, or else strike it out. Columbia Accident Assoc. v. Rockey, 93 Va. 678, 25 S. E. Rep. 1009.

What Sufficient under 1 Rev. Code.—Under the statute, 1 Rev. Code, ch. 128, § 86, an account filed with a declaration in assumpsit for goods sold, charging goods sold "per account rendered," with proof that the account was rendered is sufficient. Robinson v. Burks, 12 Leigh 378.

Under 1 Rev. Code, 510, concerning proceedings in civil suits, etc., an account filed in an action of *indebitatus assumpsit*, which gives notice of the *character* of a claim is sufficient, although it may be made up of various *items* of which no notice is given. Moore v. Mauro, 4 Rand. 488.

Date of Account Immaterial if Declaration Gives It.—If in describing an account which is filed with it, the declaration in an action of assumpsit gives its date, it was not an error because the account itself was not dated, where it was presented as a debt at the date of the suit, and a verdict was rendered accordingly. Kenefick v. Caulfield, 88 Va. 122, 13 S. E. Rep. 348.

Items of Account Barred—Directions to Jury to Disregard.—Where an action of assumpsit is brought against an executor or administrator on an account, items of which bear date more than five years before the death of the testator or intestate, it is not necessary that the court should actually expunge those items; but, if they decide that it shall be done, and direct the jury to disregard them, it is sufficient. Hoskins v. Wright, 1 H. & M. 378.

Must Be Intelligible to Defendant—Description.—In an action of assumpsit, if the plaintiff proceeds under the statute, Va. Code 1873, ch. 167, § 4 (§ 3285, Va. Code 1887), a copy of the account sued upon, which is served upon the defendant, must be intelligible to him and inform him of the precise nature of the claim of the plaintiff, and its extent. Burwell v. Burgess, 32 Gratt. 472.

If No Objection is Made in Lower Court None Can Be Made in Appellate Court.—If the defendant in an action of assumpsit did not object to the account being proved, which was sued on, in the lower court, he cannot object in the appellate court, because there was no statement of the errors in the account sued on. Varner v. Core, 20 W. Va. 472.

Sec. 3286 of Va. Code—Account with Affidavit Filed with Declaration—No Pleas by Defendant without Affidavit—Waiver or Estoppel.—Where the plaintiff files with his declaration in assumpsit an account verified by his affidavit which is served upon the defendant with the writ, and the case goes to judgment in the office, unless the defendant shall file during term a plea in bar verified by his affidavit, this judgment will become final with the expiration of the term. But the statutory requirement that the defendant shall not be permitted to file his plea in such case unless accompanied by his affidavit (Va. Code 1887, § 3286), was imposed for the benefit of the plaintiff in order to prevent him from delay by dilatory pleas, and may be waived by him either expressly or by implication, or he may by his conduct be estopped from taking advantage of it, as when he takes issue of such plea. Lewis v. Hicks, 96 Va. 91, 30 S. E. Rep. 466; Spencer v. Field, 97 Va. 38, 33 S. E. Rep. 380.

1. SURPLUSAGE.

Joint Plaintiffs—Description as Partners.—In an action of assumpsit, where the plaintiffs are described as partners, but have a joint right of action, the description of them as partners, may be regarded as surplusage. Wilson v. Carter Oil Co., 46 W. Va. 469, 33 S. E. Rep. 249.

Effect.—Any allegations in a declaration which are surplusage, do not vitiate the count, and may be rejected. Patton v. Elk, etc., Co., 13 W. Va. 259.

Agreement to Saw Lumber—Averment of Title in Defendant Need Not Be Proved.—An action of assumpsit was brought upon a contract whereby the plaintiff agreed to cut and saw a large quantity of lumber for the defendant from a tract of land, which was represented to be the property of the defendant. The count in the declaration shows the breach of the contract in refusing to pay for the lumber delivered. An averment that title to the land was in the defendant is surplusage and need not be proved.

2. THE PLEAS.

a. IN ABATEMENT.—See monographic *note* on "Pleas in Abatement" appended to Warren v. Saunders, 27 Gratt. 259.

For Nonjoinder of Proper Defendant.—In assumpsit, the nonjoinder of a cocontractor as defendant can be taken advantage of only by plea in abatement, verified by affidavit, where the omission does not appear on the face of the declaration; and defendant after pleading the general issue, cannot, at the trial, take advantage of such nonjoinder, on the ground of variance between *allegata* and *probata*, though it appears that plaintiffs knew of the joint liability before bringing the action. Wilson v. McCormick, 86 Va. 995, 11 S. E. Rep. 976; Rutter v. Sullivan, 25 W. Va. 427; Prunty v. Mitchell, 76 Va. 169.

b. THE GENERAL ISSUE.

With Proper Conclusion Trial May Be Had without Similiter.—If the plea of nonassumpsit properly conclude to the country the plaintiff has the right to proceed to trial on it, without the formal addition of a similiter, as though issue had been formally joined upon it. Wellsburg v. Kimberlands, 16 W. Va. 555. See W. Va. Code, ch. 125, § 25. Douglass v. Land Co., 12 W. Va. 506; Balt., etc., Co. v. Faulkner, 4 W. Va. 180; Brewer v. Tarpley, 1 Wash. 363.

Issue "Not Guilty"—No Repleader after Fair Trial.—In an action of assumpsit the plea filed was "not guilty"; after a fair trial of the case has been had, all the facts and circumstances of the case have been inquired into, and a verdict and judgment have been rendered for the plaintiffs, the court will not allow the defendant the benefit of his own mistake, and award a repleader. While the plea is informal, it is now too late for it to be taken advantage of. Gray v. Kemp, 88 Va. 201, 16 S. E. Rep. 225. See Hunnicutt v. Carsley, 1 H. & M. 153.

Joint Plea—When Additional Plea is Offered Issue on Which is the Same Improper to Refuse.—Issue was taken on the joint plea of nonassumpsit filed by two defendants in an action of assumpsit. One of them asked leave to withdraw the plea as to himself, and file a separate one that they did not assume. This was refused, and he then asked leave to file such plea in addition, which was also refused. These rulings were held correct, as the issue on both pleas would be the same. Steptoe v. Read, 19 Gratt. 1.

Plea of "Nil Debet"—After Joinder of Issue and Verdict Error Cured.—Where a plea of *nil debet* was filed in an action of assumpsit, this plea might have been demurred to. But where the plaintiff did not do so, but chose to join issue upon it, after the rendition of a verdict, the appellate court will regard the issue as tried precisely as if the proper general issue rather than the improper one had been made up, and the case will be reviewed as if an

issue had been made up on a plea of nonassumpsit. Smith v. Townsend, 31 W. Va. 486.

c. SPECIAL PLEAS.

(1) *Sufficiency and Materiality.*

On Assigned Bond—Pleas Insufficient to Bar Recovery.—Assumpsit is brought in the name of D for benefit of V against a defendant as assignor of a bond. The defendant pleads that after assignment to plaintiff, and before bond became due, the plaintiff assigned unto one V all his right, title and interest, and that after assignment and before commencement of the action, the plaintiff took the oath of insolvency, and was discharged as an insolvent, whereby all his estate became vested in the sheriff. Neither of these pleas is a sufficient bar to prevent the plaintiff from maintaining the action. Dunn v. Price, 11 Leigh 203.

Delivery of Barrels under Agreement—Sufficient Plea in Bar.—Where an action of assumpsit was brought upon an agreement for the delivery of a quantity of flour barrels at the defendant's shop at certain times, with a stipulation that if the plaintiff was not ready to receive them, the same should be counted in the presence of a third party and be thereafter the property, and at the risk of the plaintiff, it was a sufficient plea in bar that the defendant was ready at the appointed times to deliver the barrels to the plaintiff, who was not then ready to receive them, and that the defendant according to the agreement counted the barrels, and at the time stipulated had them ready to be delivered to the plaintiff, and then and there required the plaintiff to receive the same, which he entirely neglected to do. Jones v. Stevenson, 5 Munf. 1.

Action in Insurance Policy—Defence of False Representations and Promises by Assured—Plea Rejected.—To an action of assumpsit on a policy of insurance, on a stock of goods, a plea was filed that the owner of the property insured made false representations to the defendant's agent when the policy was issued, as to the value of the goods, and false promises to keep the stock up to a certain value. This plea makes no good ground for defence, as the defendant's liability varies with the value of the stock, and any objection made to it should be rejected. Travis v. Peabody Ins. Co., 28 W. Va. 583.

Immaterial Plea—Confederate Notes.—H during the Civil War draws an order on the auditor of Virginia for interest due him, in favor of the cashier of a bank in Richmond, who collects the amount, and deposits the same to the credit of the drawer, as so much cash or dollars. In an action of assumpsit, the common counts are filed, and in addition to the plea of nonassumpsit, the defendant files a special plea alleging that the deposits were made in confederate treasury notes, and that H agreed that the same might be paid and returned to him. The plea is immaterial. Harrison v. Farmers' Bank of Va., 6 W. Va. 1.

(2) *Statutory Recoupment.*

In both Virginia and West Virginia, in any action on a contract the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title to real property, or of the title or soundness of personal property, as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract, and every such plea must be verified by affidavit. Va. Code 1873, tit. 51, c. 168, § 5, p. 1098; Va. Code 1887, c. 140, § 3299, p. 785; West Va. Code, c. 126, § 5, p. 813; Fleming v. Toler, 7 Gratt. 310; Shiflett v. Orange Humane Soc., 7 Gratt. 297; Isbell v. Norvell, 4 Gratt. 176; Pence v. Huston, 6 Gratt. 304; Watkins v. Hopkins, 13 Gratt. 743; Burtners v. Keran, 24 Gratt. 42; Keckley v. Winchester Union Bank, 79 Va. 458; Huffman v. Alderson, 9 W. Va. 616; Black v. Smith, 13 W. Va. 808; Wellsburg First Nat. Bank v. Kimberlands, 16 W. Va. 555; Morrow v. Bailey, 2 W. Va. 326; Jarrett v. Nickell, 4 W. Va. 276; Fisher v. Burdett, 21 W. Va. 626; Quaker City Nat. Bank v. Showacre, 26 W. Va. 48; Douglass v. West Virginia Cent. Land Co., 12 W. Va. 502; Bias v. Vickers, 27 W. Va. 456.

Recovery by Defendant under § 3299, Va. Code—Bar to Subsequent Action.—A party who filed a special plea under § 3299 of Va. Code for breach of warranty, may recover all damages he has sustained thereby, which he could recover in the action for the breach; but if he only claims a part of the damages he has sustained, and then brings an action of assumpsit for the other damages, the former judgment is a bar to the action. Huff v. Broyles, 26 Gratt. 283.

(3) *Set-Off.*

When Proper to Reject—Defence to Whole Action.—In an action of assumpsit based on a written contract, the defence goes to the whole action, and alleges the procurement of the contract by fraud and deceit, which, if proven, will defeat the action. A recoupment of damages is therefore not applicable, and the rejection of special pleas and set-offs filed for this purpose was proper. Dillon Beebe's Son v. Eakle, 43 W. Va. 502, 27 S. E. Rep. 214.

When No Recovery by Defendant in Absence of Set-Off.—In an action of assumpsit the declaration contains only the common counts, and a bill of particulars aggregates a certain sum. Issue is joined upon the defendant's plea of nonassumpsit and no account of set-off is filed by him. Under a rule of the court the case is submitted to arbitrament, and an award is made in favor of the defendant for a sum of money. No set-off having been filed with the defendant's plea, the only matter in dispute in the case is the demand of the plaintiff in his declaration and bill of particulars, and this was the only matter submitted to arbitration. Hence an award in favor of the plaintiff is erroneous. Swann v. Deem, 4 W. Va. 368.

Action by Administrator—Money Paid by Surety Since Death of Principal.—In an action of assumpsit by an administrator for a debt due his intestate in his lifetime, the defendant cannot set-off a debt due him for money paid as the surety of the intestate since his death. Minor v. Minor, 8 Gratt. 1.

(4) *Payment.*

Must Conclude to the Country.—The general plea of payment in an action of assumpsit denying the necessary general allegation of nonpayment must in every case conclude to the country. Douglass v. Central Land Co., 12 W. Va. 502.

Payment after Action Is Brought—Specially Pleaded.—In an action of assumpsit payment after the action is brought must be specially pleaded. Shanklin v. Crisamore, 4 W. Va. 134.

Payment before Action Is Brought.—The common-law rule provides in West Virginia that in an action of assumpsit payment before the action is brought need not be specially pleaded. Shanklin v. Crisamore, 4 W. Va. 134.

(5) *Statute of Limitations.*

(a) **In General.**

Extension of Period by W. Va. Act 1866—Does Not Apply to Assumpsit.—It was held in Gore v. McLaugh-

lin, 3 W. Va. 489, that the act of February 27, 1866, in relation to the statute of limitations, extending the time in which actions of trespass and case might be commenced in certain counties of the state, includes only actions of trespass and trespass on the case, and does not apply to actions on the case in assumpsit nor to actions *ex contractu*.

Time Excluded from Operation of Statute.—The time excluded by law from the operation of the statute of limitations in assumpsit, is from the 17th of April 1861 to the 1st of March, 1865. Balt., etc., Co. v. Faulkner, 4 W. Va. 180; Gore v. McLaughlin, 3 W. Va. 489.

(b) To What Time It Relates.

The Bringing of the Suit.—The plea of nonassumpsit within five years relates to the time of the bringing of suit, and not to the time of the filing of the plea. Henderson v. Foote, 3 Call 248, distinguishing Smith v. Walker, 1 Wash. 135.

If General to Filing of Plea.—The plea of nonassumpsit within five years, if general, will refer to the time of the plea pleaded, whereas it ought to refer to the institution of the suit, and if it concludes to the country the plaintiff will be precluded from bringing himself within the benefit of some of the exceptions to the act of limitations, by a replication. Smith v. Walker, 1 Wash. 135.

(c) Answer to Plea.

Sale of Slaves Recovered within Five Years Prior to Action.—In an action of assumpsit against an administrator, he pleads the statute of limitations. It is no answer to the plea, that the defendant's intestate sold to plaintiff slaves in payment of the debt declared on, and that the defendant, since the death of his intestate, had, as administrator, sued for, and upon the title alone, without regard to intestate's indebtedness to the plaintiff, had recovered the said slaves from the plaintiff within five years before the action brought. Johnson v. Jennings, 10 Gratt. 1.

(d) Form of Plea.

Debt Discharged in Bankruptcy—New Promise.—Where a debt is discharged in bankruptcy within five years after it is incurred, and a suit is brought on a new promise to pay it within five years after the new promise, a plea is bad that five years have elapsed since the original cause of action, or since the discharge in bankruptcy, and should be rejected. Horner v. Speed, 2 P. & H. 616.

Breach of Contract for Occupation of Land.—In an action of assumpsit for the use and occupation of land, where the cause of action arises from the breach of the contract, and not at the time of the making of the same, the plea that the defendant did not assume, as in the declaration set forth, within five years prior to the commencement of this suit, is not a proper plea. It should have been that the action did not accrue within five years prior to the commencement of this suit. Atkinson v. Winters (W. Va.), 34 S. E. Rep. 834.

(6) Pleas Provable under the General Issue.

Rejection Discretionary with the Court.—It is not an error for the court to reject special pleas setting up matter in defence to the action of assumpsit, when the plea of nonassumpsit has been filed, and the matter of the defence of such plea may be given in evidence under the plea of nonassumpsit, as their rejection could not have prejudiced the defendant. Bennett v. Perkins (W. Va.), 35 S. E. Rep. 8; Crews v. Farmers' Bank, 31 Gratt. 348; Fire Assoc. v. Hogwood, 82 Va. 342, 4 S. E. Rep. 617; Va., etc., Ins. Co. v. Buck, 88 Va. 517, 13 S. E. Rep. 973; Hale v. W. Va., etc., Co., 11 W. Va. 229; Balt., etc., Co. v. Laffertys, 14 Gratt. 478; Fant v. Miller, 17 Gratt. 47; Balt., etc., R. Co. v. Whittington, 30 Gratt. 805; Balt., etc., R. Co. v. Polly, 14 Gratt. 453; Brown v. Town of Point Pleasant, 36 W. Va. 290, 15 S. E. Rep. 209.

Where it is apparent from the character of the evidence that it had been introduced by the defendant under the general issue, it is not error to reject special pleas provable thereunder, setting up the same defence. George Campbell Co. v. George Angus & Co., 91 Va. 488, 22 S. E. Rep. 167; Southern Ry. Co. v. Wilcox, 7 Va. Law Reg. 381; Richmond, etc., Ry. Co. v. New York, etc., Ry. Co., 95 Va. 386, 28 S. E. Rep. 573.

In West End Co. v. Claiborne, 97 Va. 734, 34 S. E. Rep. 900, it was said that special pleas should be rejected when they contained defences which could be made under the general issue.

But in the recent case of Ches., etc., R. Co. v. Rison (Va.), 37 S. E. Rep. 820, 6 Va. Law Reg. 665, it was held that it was not error to permit the defendant to plead specially matters provable under the general issue, but not amounting to it. PHLEGAR, J., said: "While it has been held by this court not to be error to reject special pleas alleging matter which could be given in under the general issue (Fant v. Miller, 17 Gratt. 67; Va., etc., Ins. Co. v. Buck, 88 Va. 517, 13 S. E. Rep. 973), no case has been found which was reversed because such pleas were admitted." For collection of cases on this point see *foot-note* to Fant v. Miller, 17 Gratt. 67.

In Maggort v. Hansbarger, 8 Leigh 532, which was an action of assumpsit, PARKER, J., delivering the opinion of the court, said: "I know of no rule which inhibits the party from pleading specially what he might give in evidence under the general issue, unless the matter pleaded amounts to the general issue, that is, denies the allegations which the plaintiff is bound to prove. But where the cause of action is avoided by matter *ex post facto*, it may always be specially pleaded, whether it could be given in evidence under the general issue or not."

Special Pleas Amounting to General Issue Should Be Rejected.—When the effect of a special plea is to deny that the plaintiff in assumpsit ever had such a cause of action as is alleged in the declaration, it is equivalent to the general issue, and will be rejected on objection. Travis v. Peabody Ins. Co., 28 W. Va. 583; Balt., etc., R. Co. v. Polly, 14 Gratt. 447; Bank of Wheeling v. Evans, 9 W. Va. 373.

Special Plea in Discharge of Action May Be Filed.—But special pleas containing matters in discharge of the action might be filed; nevertheless, their rejection by the lower court will be no ground of reversal on appeal, where the case is decided on demurrer to the evidence, as no injury could have resulted to the defendants, all their defence being admissible under the general issue of nonassumpsit. Bank of Wheeling v. Evans, 9 W. Va. 373.

While a special plea, setting forth matters in discharge of the action, may be filed when the plea of nonassumpsit has been filed, yet when the matters set up in said plea may be given in evidence under the general issue, it is not error to reject such plea. Dillon Beebe's Son v. Eakle, 43 W. Va. 502, 27 S. E. Rep. 214.

Rejection of Special Plea with Leave to Plead General Issue Not Error.—In *indebitatus assumpsit*, if the defendant, after office judgment and a writ of enquiry, offers to plead in abatement that the matter of the suit was contained in a covenant under seal, and the court reject the plea, but give leave to plead the general issue, it will not be error;

for the defendant might have given the special matter in evidence under the general issue, and if it had been refused, might have filed an exception to the opinion. Porter v. Harris, 4 Call 485.

2. THE REPLICATION.

To Plea of Feme Covert—That She Lived Apart from Her Husband.—The defendant to an action of assumpsit on the common counts pleads that she was a married woman at the time of making the promises and undertakings declared on. The plaintiff's replication alleges that at that time she was living apart and separate from her husband. This is a good replication. Peck v. Marling, 22 W. Va. 708.

Defendant May Waive Objection to Want of Replication.—In an action of assumpsit the defendant plead nonassumpsit, on which plea issue was joined. He also filed a special plea for damages, but no replication was made to this, thereby entitling the defendant to nominal damages, and the jury tried the "issues joined." No objection to the want of a replication was made by the defendant, neither was any evidence offered to support the special plea, and judgment was rendered for the plaintiff. § 3300 of the Va. Code declares that every issue on a special plea of set-off shall be upon a general replication that the plea is not true. The failure to file the replication in this case did not invalidate the proceedings, but by not objecting the defendant consented to the trial, and he was in no position to complain of the irregularity. Briggs v. Cook (Va.), 38 S. E. Rep. 148.

4. DEMURRER.

To Whole Declaration When One Count is Good.—Where a general demurrer is filed to the whole declaration in an action of assumpsit, if any one of the several counts therein be good, or if one of several divisible matters in a single count be good, the general and familiar rule is that the demurrer must be overruled. Wright v. Smith, 81 Va. 777. See also, Power v. Ivie, 7 Leigh 147; Hollingsworth v. Milton, 8 Leigh 50; Henderson v. Stringer, 6 Gratt. 180; Ferrill v. Brewis, 25 Gratt. 766; Gray v. Kemp, 88 Va. 201, 16 S. E. Rep. 225; Nutter v. Sydenstricker, 11 W. Va. 535; Sheppard v. Peabody Ins. Co., 21 W. Va. 368.

No Ground if Bill of Particulars is Vague.—A failure to file a bill of particulars with a declaration in assumpsit, or if the bill is too vague and indefinite when filed, is no ground for demurrer. Sheppard v. Ins. Co., 21 W. Va. 368. See Abell v. Ins. Co., 18 W. Va. 400; Choen v. Guthrie, 15 W. Va. 113.

No Demurrer without Issue Joined.—In an action of assumpsit it is an error to permit the defendant to cross-examine the witnesses, or to demur to the evidence, without any plea having been filed or issue joined in the case. Petty v. Frick Co., 86 Va. 501, 10 S. E. Rep. 886.

Joinder of Absolute and Conditional Promise to Pay—Demurrer Improper.—In an action of assumpsit brought on a new promise to pay a debt which has been discharged in bankruptcy, it is no ground of demurrer to the declaration that two counts are joined in the same declaration, one on an absolute promise to pay, and the other on a conditional promise to pay when able. Nor is there any ground of demurrer to the first count that it declared on the new promise, and not on the original cause of action, for in such case the declaration may be in either form. Nor does a demurrer lie to the second count, that it does say in what the ability to pay consists. Horner v. Speed, 2 P. & H. 616.

Count in Tort Not Demurrable if it Contains Sufficient Matter to Maintain Assumpsit.—A declaration in assumpsit contains three counts, two of which are clearly in assumpsit, the third count is demurred to on the ground that the matter set forth therein is a tort, for which the action of assumpsit is not the proper remedy. But if sufficient matter is stated therein to maintain the action of assumpsit, the demurrer will be overruled. Hoppess v. Straw, 10 Leigh 348.

Declaration is Sufficient if it Contains in Effect All Allegations Prescribed by Statute.—A declaration in assumpsit on an insurance policy, not being intended to adopt the form prescribed by ch. 66 of the Acts of 1877, but that of the common law, will be held sufficient on demurrer where it in effect contains all the allegations prescribed by the statute. Travis v. Insurance Co., 28 W. Va. 583.

A declaration in assumpsit on a life insurance policy which is drawn in substantial conformity with the statute (Va. Code 1873, ch. 167, sec. 14), and sufficiently and accurately sets out the interest of the assured is good, and a demurrer to it was properly overruled. Valley, etc., Life Assoc. v. Teewalt, 79 Va. 421.

No Demurrer to Affidavit Denying Partnership.—Section 41, of ch. 125, of the W. Va. Code as amended by ch. 76, of the Acts of 1875, provided that where plaintiffs or defendants sue or are sued as partners and the names of the partners are set out in the declaration, it is not necessary to prove the partnership, unless with the pleading putting the matter in issue there be an affidavit denying such partnership. In an action of assumpsit brought by partners the defendants pleaded nonassumpsit and filed an affidavit denying the partnership. A demurrer to the affidavit was held immaterial pleading, and it was not error to try the case without noticing the demurrer. Rutter v. Sullivan, 25 W. Va. 427.

Insufficient Allegation.—In an action of assumpsit on a promissory note, the count alleges by the defendants, the makers, "a promise to pay the further sum of $6,000 (meaning and intending thereby $4,000), whereby the makers became liable to pay $4,000." This count was held bad on general demurrer. Bank of Wheeling v. Evans, 9 W. Va. 373.

Amendment of Count Demurrer to Which Erroneously Sustained in Lower Court.—Upon a demurrer to a count of a declaration in an action of assumpsit on the ground of duplicity, the demurrer is sustained, and thus the plaintiff, with the leave of the court amends the count. He cannot object in an appellate court that the court below erred in sustaining the demurrer. Hopkins v. Richardson, 9 Gratt. 485.

VI. EVIDENCE.

1. PRESUMPTION.

Possession of Personal Property Presumptive of Ownership.—In an action of assumpsit for breach of marriage contract, letters were admitted in handwriting of the plaintiff and addressed to respectively "Miss Mary," "Dear Mary" and "Dear Mollie." It was objected that the possession of these letters by the defendant did not constitute *prima facie* evidence of ownership in herself, and that she would have to prove by other competent testimony that she was the identical person to whom they were addressed. The well-settled doctrine is that possession of personal property is *prima facie* evidence of title and ownership and it is clear that possession of these letters by the defendant raised a strong presump-

tion that they were intended for her, and it was for the plaintiff to rebut this presumption. Tefft v. Marsh, 1 W. Va. 38.

Of Checks as Evidence.—A check, which is offered in evidence under the money counts in an action of assumpsit, is only *prima facie* evidence of money lent, etc., and the presumption raised by the check is rebutted when it is proved that no money had come into the hands of the defendant. Blair v. Wilson, 28 Gratt. 165.

2. ADMISSIBILITY, COMPETENCY AND RELEVANCY.

Admissions of Cocontractor Binding—Account.—Admissions by a cocontractor as to the correctness of an itemized account presented to him by plaintiffs, relating to the subject-matter of the contract are binding on defendant, and are admissible against him in an action of assumpsit. Wilson v. McCormick, 86 Va. 995, 11 S. E. Rep. 976.

Parol Evidence—Admissible to Show Contract a Guaranty.—In an action of assumpsit on assigned bonds, given as security for the payment of the purchase price of a tract of land, the defendant was declared against in one of the counts as an assignor, and in the others as a guarantor. In this case parol testimony is admissible to show the contract to be a guaranty, if such was the understanding, and recovery may be had upon it when so proved. Welsh v. Ebersole, 75 Va. 651.

Same—Admissible to Show Agency.—Where the paper sued on in an action of assumpsit is of doubtful meaning, being signed by the defendant, parol testimony is admissible to show that the defendant was the agent of a chief commissary in the Confederate army, and that the plaintiff knew that the defendant only bought as his agent. Walker v. Christian, 21 Gratt. 291.

Not Admissible under Insufficient Bill of Particulars.—If an insufficient bill of particulars is filed, evidence under it will not be admitted in an action of assumpsit. Minor v. Minor, 8 Gratt. 1.

Under § 4, Ch. 120 of W. Va. Code—Evidence of Specific Payments May Be Objected to Where No Bill of Particulars.—On a failure of the defendant to file with his plea of payment any bill of particulars, it is clear that under ch. 120, § 4 of the W. Va. Code, the plaintiff could have objected to the admission of any proof of any specific partial payment on the ground of surprise. But if he permits them to be proved, he thereby waives all objections, and they may be considered by the jury. Smith v. Townsend, 21 W. Va. 486.

Corporate Deed Admissible to Prove a Corporation.—In an action of assumpsit against a private corporation, a deed of the corporation signed in the corporate name by the secretary, under its corporate seal, duly acknowledged by the secretary, reciting that it is a corporation formed according to law, is admissible as evidence to prove the legal existence of the defendant as a corporation. Anderson v. Kanawha Coal Co., 12 W. Va. 526.

Written Agreement Admissible to Prove Occupation of Land and Terms of Rent.—In an action of assumpsit brought for the use and occupation of a tract of land, the written agreement for the rental may appear in evidence as proof of the occupation of the land by the plaintiff, and of the terms of the rent. Atkinson v. Winters (W. Va.), 34 S. E. Rep. 834; Goshorn v. Steward, 15 W. Va. 637.

Admission of Bailee Competent to Prove Him Liable for Loss of Slave.—The bailee of a slave, who was hired for farm work, without the permission of the bailor carried him on a voyage down the Ohio river where he was drowned. The admissions of the bailee to third persons that he had no authority to take him on the voyage, and that he would be liable in case the slave be lost, are competent evidence against him in an action of assumpsit for damages for the loss of the slave. Spencer v. Pilcher, 8 Leigh 565.

To Prove Wages of Slave Customary Hire for Farm Labor.—In an action of assumpsit brought for recovery of damages for the loss of a slave who was drowned, it was held relevant and admissible evidence to show that the amount of his hire was the usual and customary price for farm labor, and not for voyages down the Ohio river, where the bailee had wrongfully taken him. Spencer v. Pilcher, 8 Leigh 565.

Third Person Furnished Goods—Competent Witness.—In an action of assumpsit for goods furnished to a third person, such person is a competent witness for the plaintiff. Ware v. Stephenson, 10 Leigh 155.

Action on Assumpsit of Testator—Assumpsit of Executor Not Evidence.—In an action of *indebitatus assumpsit* brought against the administratrix of the intestate upon a store account, the declaration contained two counts, one for goods sold and delivered, and the other the *quantum valebant*, and in both instances charged the assumpsit of the testator. To this declaration the plea of nonassumpsit was filed, and on the trial of the issue upon the assumpsit of the testator the assumpsit of his executor cannot be received in evidence to establish the demand. Quarles v. Littlepage, 2 H. & M. 401.

Statement by Third Person Not Evidence in Action on Collateral Promise.—In an action of assumpsit on a collateral promise, a statement or account in writing by a third person showing the amount for which the defendant is liable is not evidence, although that person was the agent employed by the defendant in performance of the contract. Pasteur v. Parker, 3 Rand. 458.

Joint Defendants—One Not Competent to Prove Himself Alone Bound.—In an action of assumpsit on a joint, or a joint and several contract against two defendants, one of them is not a competent witness to prove that he was the only party to the contract, and alone bound by it. Steptoe v. Read, 19 Gratt. 1.

Examination of Same Witness in Prior Suit between Same Parties No Ground for Exclusion.—In an action of assumpsit the testimony of witnesses offered to prove the items in the plaintiff's account, ought not to be excluded from the jury on the ground that, in an action of debt between the same parties, the record of which action is not exhibited, determined during the pendency of the action of assumpsit, one of those witnesses was examined touching the same items claimed by the plaintiff, to repel or set off the credits then claimed by the defendant. Robertson v. Depriest, 6 Munf. 469.

Plaintiff Incompetent—§ 23, ch. 130, Code W. Va. 1868.—In an action of assumpsit brought to recover for work and labor done by the plaintiff for the decedent of the defendant, it was an error to permit the plaintiff to testify in her own behalf, in accordance with provisions of the 23d §, ch. 130 of the W. Va. Code of 1868. Owens v. Owens, 14 W. Va. 88.

Settled Account—No Evidence to the Items.—The defendant in an action of *indebitatus assumpsit* upon a settled account cannot go into an enquiry concerning the justice of the several items of demand stated in the account. Lyne v. Gilliat, 3 Call 5.

Action on Rescinded Contract under Seal—Admissible Evidence.—In an action of assumpsit for the recovery of money on a rescinded contract, the plaintiff may introduce the contract which is under seal. Its introduction not being for the support of the form of action, but as evidence to support the plaintiff's case, it is competent for the court to permit the plaintiff to offer it as evidence. Buena Vista Co. v. McCandlish, 98 Va. 297, 28 S. E. Rep. 781.

Action on Contract for Building a House—Evidence Admissible to Show Work Defective, etc.—A contract under seal is made between a builder and another person for the erection of a house, with provisions that if it is not finished by a certain time deduction shall be made from the amount agreed to be paid equal to the rent for the period of delay. Before work is commenced a parol agreement is made between the parties changing the work to be performed. Advances are made to the builder, and after the completion of the work there is a disagreement between the parties, and the builder brings an action of assumpsit for the balance due him in three counts, *indebitatus, quantum meruit*, and *insimul computassent*. The defendant pleads nonassumpsit and set-off. It was held, that evidence is admissible to prove that the work done according to covenant was defective and insufficient, and that the house was not completed by the time agreed, and the rent which would have been received had it been completed; and the plaintiff's claim can be diminished by the amount of such damages arising thereby. Davis v. Baxter, 2 P. & H. 133.

Assumpsit of Debtor in Five Years May Be Shown.—The act of 1792, 1 Rev. Code, p. 167, which makes it the duty of the court "in an action upon an open account against an executor or administrator, to cause to be expunged from such account items appearing to have been due five years before the death of the testator or intestate," relates only to open accounts and does not extend to settlements or assumptions, and therefore plaintiff in an action of assumpsit, in order to take his case out of the act, may give in evidence an assumpsit of the testator or intestate, within five years, to pay a stated balance. Brooke v. Shelly, 4 H. & M. 266.

Verdict and Evidence Submitted to Court—Judgment Given on Merits Whether Evidence Admissible or Not.—If the jury submit it to the court whether evidence annexed to their verdict supports either count in the declaration, and it appears that the plaintiff has not a right to the money claimed, judgment shall be given against him on the merits, whether the evidence was admissible under that form of declaring or not. Wood v. Luttrel, 1 Call 232.

Action for Work Done—Written Contract Must Be Produced, or Accounted for and Contents Proved.—If it appears from the plaintiff's evidence in an action of assumpsit for work and labor done, that the work was done under a written contract, it must be produced, or its nonproduction accounted for, and its contents proved, before the case can be further proceeded with. Balt., etc., R. Co. v. Polly, 14 Gratt. 447.

2. SUFFICIENCY.

What Sufficient to Charge Assignor of Nonnegotiable Paper.—In an action of assumpsit by the assignee against the assignor of a nonnegotiable instrument, the plaintiff to maintain his action must show that the maker was insolvent at the time the instrument was made or the contents fell due, or that he has used due diligence to recover from the maker and has failed, or that from some cause such a suit would have been of no avail. Merchants' Nat. Bank v. Spates, 41 W. Va. 27, 23 S. E. Rep. 681.

Proof of Plaintiff's Demand Necessary—Admission of Defendant.—The plaintiff in a declaration in assumpsit must prove the amount of his demand, although the defendant admits that he owed a debt. This admission is not sufficient to charge the defendant with the whole demand of the plaintiff. Quarles v. Littlepage, 2 H. & M. 401.

Engineer's Estimate Conclusive by Contract—Proof of Fraud Sufficient to Recover.—In an action of assumpsit for work and labor by a contractor on a railroad, against the company, under a special contract which provides that the final estimate of the engineer shall be conclusive upon the parties, if the plaintiff proves that the final estimate made by the engineer was fraudulently made, he may recover without proving further that he was unable to procure such final estimate as is required by the contract after demand on the company, or other proper exertions on his part. Balt. & O. R. Co. v. Polly, 14 Gratt. 447.

Acknowledgment of Defendant—Promise to Settle—Not Sufficient to Justify Verdict.—On a plea of nonassumpsit within five years, it was proved that the defendant within that time acknowledged the items in the plaintiff's account to be just, but said that he had some offsets; and that at a subsequent time, the defendant promises the plaintiffs to settle all their accounts fairly, and would not avail himself of the act of limitation. It was held that this proof was not sufficient to justify a verdict for the plaintiff. Sutton v. Burruss, 9 Leigh 381, 33 Am. Dec. 246.

Recovery of Lost Note Sufficient to Show it Genuine—Possessory Interest of Finder.—In an action of assumpsit brought by the finder of a bank note against a gratuitous bailee, to whom he had delivered it, it was held that such bailee was not liable for the loss of the note unless it was the result of gross negligence on his part, and that to entitle the plaintiff to recover he must show that the note was genuine and of the value claimed. In the absence of any claims of the rightful owner the finder has such a possessory interest in the note as will entitle him to recover the sum from the bailee, if he refuse to redeliver it. Tancil v. Seaton, 28 Gratt. 601.

4. UNDER THE COMMON COUNTS.

Check Admissible under Money Counts—Evidence of.—In an action of assumpsit the declaration in which contains the money counts, a check may be offered in evidence thereunder, and if there is no other evidence in the case, it is of itself sufficient to entitle the plaintiffs to recover on those counts. Blair v. Wilson, 28 Gratt. 165.

Evidence of Special Agreement Not Allowed under Common Counts.—In an action of general *indebitatus assumpsit* for services rendered as an overseer, or a *quantum meruit* for likewise services, the plaintiff cannot give in evidence the proof that the defendant had employed him as overseer, and was to pay him a certain quantity of tobacco. In such case he should declare upon the special agreement. Brooks v. Scott, 2 Munf. 344.

But Special Contract Must Appear from Plaintiff.—The defendant in an action of assumpsit cannot arrest the plaintiffs in the making out of their case, by appearing to show that the work sued for in the common counts, was done under a special contract, it not appearing from the plaintiff's evidence that there was any such contract. Balt., etc., R. Co. v. Polly, 14 Gratt. 447; B. & O. R. R. Co. v. Laffertys, 14 Gratt. 478.

Money Counts—Necessary That the Money Be Actually Received.—Money levied by the sheriff upon a judgment which is afterwards reversed, cannot be recovered back by general *indebitatus assumpsit* for money had and received, without proof that the money was actually received by the plaintiff, or applied to his use. Isom v. Johns, 2 Munf. 272.

Hire of Slaves by Copartners—What Writing by One Sufficient for Recovery.—Where the declaration was upon a general *indebitatus assumpsit* for the hire of five slaves, for which the defendants, being copartners, promised on the 1st of January 1811, to pay the plaintiff the sum of $350, when they should be thereunto afterwards required, the plaintiff should not recover upon a writing signed by one of the defendants, certifying that he had hired of the plaintiff five slaves at the price of $350, and that this should entitle the plaintiff to the other defendant's bond for the same, payable on the 1st of January, 1811. Wooddy v. Flournoy, 6 Munf. 506.

Account Stated—Witness May Testify That Defendant Acknowledged the Debt and Promised to Pay.—The plaintiff in assumpsit filed with his declaration an account commencing in these words: "1833, Jan'y 1. To balance due per account rendered, $1,405.07," which account he produced at the trial, and a witness was introduced to prove, that, at the date of this item, the plaintiff delivered to the defendant a full bill or account to the amount of $1,405.07, and that the defendant acknowledged the same, and promised to pay it. It was held, that such proof may be received under the *insimul computassent* count. Fitch v. Leitch, 11 Leigh 471.

When Inadmissible Evidence Would Have Been Admissible under Common Counts.—When a special contract is sued on in an action of assumpsit, and the proof varies materially from the declaration and is hence inadmissible, the proof, however, would have been admissible, if the declaration had contained a common *indebitatus* count. Davisson v. Ford, 23 W. Va. 617.

5. UNDER THE GENERAL ISSUE.

General Rule—Exceptions.—Under the plea of nonassumpsit in all actions of assumpsit, whether founded on an implied or express promise, any defence whatever which tends to deny the liability of the defendant may be admitted in evidence. The statute of limitations, bankruptcy and tender are believed to be the only defences which may not be proved under this plea, and they are excepted because they do not contest that the debt is owed, but insist only that no action can be maintained for it. 4 Min. Inst. (3d Ed.) 770; Va., etc., Ins. Co. v. Buck, 88 Va. 517, 13 S. E. Rep. 973; Morgantown Bank v. Foster, 35 W. Va. 357, 13 S. E. Rep. 996. And by § 3298 of the Code of Virginia it is provided that: "In a suit for any debt the defendant may at the trial prove, and have allowed against such debt, any *payment* or *set-off* which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise." See also, § 4, ch. 126 of Code of West Virginia, and Smith v. Townsend, 21 W. Va. 486.

Failure of Consideration May Be Proved under the General Issue—§ 3299, Virginia Code Construed.—In an action of assumpsit the defence of failure of consideration was set up under the general issue. It was claimed that this could only be done by special plea under § 3299 of the Va. Code, verified by affidavit, and in this case the requirements of the statute had not been conformed to, nor was it verified by affidavit. Prior to the enactment of this section in 1831, according to the practice at common law, it was competent to prove under the plea of nonassumpsit, failure of consideration, or anything which proved that no existing debt was due, with a few exceptions. (Columbia Accident Assoc. v. Rockey, 93 Va. 684, 25 S. E. Rep. 1009, and cases there cited.) The object of this statute was to enlarge the right of defence existing at common law by enabling defendants to make such defences to *sealed* instruments, and also to recover against the plaintiff any *excess* of damages he might have sustained, in order to settle all the rights of the parties under the contract in one suit. It does not impair any previous right, nor take away the right of any defence which the law had previously permitted to be made. Columbia Accident Assoc. v. Rockey, 93 Va. 678, 25 S. E. Rep. 1009. The contrary view is maintained in 1 Barton's Law Pr. (2d Ed.) 491; 4 Min. Inst. (3d Ed.) 770, 798, and in Keckley v. Union Bank, 79 Va. 458, where it was suggested that failure of consideration could not be proved under the general issue, but had to be filed as a special plea under § 3299, and verified by affidavit.

No Prejudice in Rejecting Plea, Evidence under Which Provable under General Issue.—Where the evidence to sustain a special plea, the issue upon which has not been properly made up, was admissible under the general issue which had been pleaded, in an action of assumpsit a judgment on a verdict will not be reversed for such irregularity, because such error could not in any manner prejudice the defendant, as no evidence could have been received under such special plea, except such as could have been received under the plea of nonassumpsit. Douglass v. Central Land Co., 12 W. Va. 502.

Accord and Satisfaction.—The defence of accord and satisfaction may be given in evidence under the plea of nonassumpsit, and it is not necessary that such a defence shall be pleaded specially. Bank of Wellsburg v. Kimberlands, 16 W. Va. 555.

Usury.—Under nonassumpsit usury may be given in evidence. Bank of Wheeling v. Evans, 9 W. Va. 373.

Illegality of Contract.—In an action of assumpsit the defence that the contract was illegal is clearly admissible under the general issue. Southern Railway Co. v. Wilcox (Va.), 39 S. E. Rep. 144, 7 Va. Law Reg. 381; Va. F. & M. Ins. Co. v. Buck, 88 Va. 517, 13 S. E. Rep. 973.

Fraud.—Under the general issue joined in an action of assumpsit, brought upon an award founded on parol submission, it is competent to prove at the trial that the submission of the defendant to the arbitration was procured by fraud. Bierly v. Williams, 5 Leigh 700.

Award Pending Suit Inadmissible.—An award made *pendente lite* cannot be given in evidence upon the plea of nonassumpsit. Harrison v. Brock, 1 Munf. 22.

Specific or Partial Payment before Suit.—The common-law rule prevails in West Virginia that in an action of assumpsit payment before the action is brought may be given in evidence under the general issue. A general payment before the suit is brought may be proved without a bill of particulars, but no specific or partial payment before suit is brought can be proved unless its nature and the several items thereof are filed with the plea. Shanklin v. Crisamore, 4 W. Va. 134.

Existence of Corporation Must Be Proved.—In Virginia and West Virginia on an issue joined on a plea of nonassumpsit in an action of assumpsit against a

private corporation, it is necessary to prove the existence of such corporation. Anderson v. Kanawha Coal Co., 12 W. Va. 526, citing Grays v. T. P. Co., 4 Rand. 578; Rees v. Conococheague Bank, 5 Rand. 329; Taylor v. Bank of Alex., 5 Leigh 475; Jackson v. Bank of Marietta, 9 Leigh 244; Hart v. B. & O. R. Co., 6 W. Va. 336.

Assumpsit of Partner on Dissolution.—If there be several partners, and one of them after the partnership is dissolved assumes a partnership debt, but afterwards pleads the act of limitation jointly with the other partners, to an action of assumpsit brought upon an account stated, the assumpsit may be given in evidence, for the plea of nonassumpsit admits that the defendants did once assume. Brockenbrough v. Hackley, 6 Call 51.

Evidence Inadmissible at Variance with Agreement Sued on.—A declaration in assumpsit brought upon a written agreement had no allegation concerning a note attached to the agreement, varying its terms. When the agreement was offered in evidence under the general issue it had the said note attached to it, and it was held inadmissible evidence, as there was a fatal variance between the agreement declared on and the agreement offered in evidence, unless it appeared that the note was attached without the knowledge or consent of the plaintiff, and hence was no part of the agreement. Newell v. Mayberry, 8 Leigh 250, 23 Am. Dec. 261.

Affidavit and Set-Off—Evidence of Latter Admissible When No Plea of Set-Off.—The defendant to an action of assumpsit pleads nonassumpsit, and with it files affidavit of set-off, and the set-off, which is a note. Though there is no plea of set-off or bill of particulars, the evidence in relation to the set-off is properly admitted. Bell v. Crawford, 8 Gratt. 110.

Action on Assumpsit of Testator—Assumpsit of Executor Inadmissible.—In an action of assumpsit upon the case against an executor charging an assumpsit of the testator, and on the plea of nonassumpsit by the testator within five years, an assumpsit of his executor cannot be given in evidence, to prevent the operation of the act of limitation. Fisher v. Duncan, 1 H. & M. 563. See Quarles v. Littlepage & Co., 2 H. & M. 401, and the cases there cited.

Bailment—Character of Bailee Inadmissible.—In an action of assumpsit brought to recover a sum of money in gold, which had been delivered to the defendant for safe-keeping, the only plea filed was nonassumpsit. The defence was that he had been robbed of it, while the plaintiff tried to prove a fraudulent appropriation by defendant. In this case evidence of the general character of the defendant is not admissible, and his failure to produce evidence of his good character is no ground for inference unfavorable to his integrity. Danville Bank v. Waddill, 31 Gratt. 469.

Same—Robbery.—In an action of assumpsit to recover a sum of money in gold which had been delivered by the plaintiff to the defendant for safe-keeping in bank, under the plea of nonassumpsit the defendant was allowed to prove that he had been robbed. Danville Bank v. Waddill, 31 Gratt. 469.

Action against Corporation—Bill of Exchange Drawn by it Admissible.—In an action of assumpsit against a private corporation it is proper to receive in evidence, on the trial of the issue of nonassumpsit, the bill of exchange drawn by the defendant on its agent, in favor of the plaintiff, and particularly described in the bill of particulars filed with the declaration, which contains the common money counts. They are clear admissions by the defendant of the justice of the plaintiff's demand, and were made by the defendant in the most solemn manner. To reject them would be obvious error. Anderson v. Kanawha Coal Co., 12 W. Va. 526.

Money Counts—Evidence of Source of Funds Admissible.—In an action of assumpsit for various sums of money lent to or paid for the defendant's intestate, though payments or set-offs cannot be proved without an account of such payments or set-offs filed, yet defendant under the general issue may prove that the money sued for or any part of it was not lent to or advanced for the intestate, but was paid out of money of the intestate in the hands of the plaintiff. Johnson v. Jennings, 10 Gratt. 1.

Action for Balance Due on Account with a Tanner—What Admissible.—In an action of assumpsit there were two counts, one for the agreed price of goods sold, and the other, *quantum valebant* for the same. The proof under the general issue is that the plaintiff (a tanner) received raw hides from the defendant, and credited him for the value, and sent him in return tanned leather and charged him with the value thereof. The debt claimed is the balance due on these dealings, and the proof is properly applicable to, and sustains the declaration. Gore v. Buzzard, 4 Leigh 249.

Sec. 3298, Va. Code Construed—Account Filed as Defence with General Issue.—In Johnson v. Jennings, 10 Gratt. 1, it was held, in construing § 3298 of the Va. Code of 1887, enacting that, "In a suit for any debt, the defendant may at the trial prove and have allowed against such debt any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise," that in the absence of such an account as contemplated by the statute, under the plea of nonassumpsit evidence will not be admitted to prove specific payment. Approved in Rich., etc., Co. v. Johnson, 90 Va. 777, 20 S. E. Rep 148.

VII. VARIANCE BETWEEN ALLEGATION AND PROOF.

1. WHEN MATERIAL.

Common Counts—Goods Paid for by Check.—Where an action of assumpsit is brought for goods sold and delivered, the declaration filed contains only the common counts, the bill of particulars is filed, and the only count in the declaration to which the evidence applied, was that for goods sold and delivered. If it is shown that the goods were absolutely paid for by a check, the demand upon the account is thereby extinguished, and there is no count in the declaration upon which the plaintiffs can recover. Blair v. Wilson, 28 Gratt. 165.

Qualification of Liability Must Be Noticed in Declaration.—Where the contract of the defendant, who is sued thereon in an action of assumpsit, contains as a part of it a provision qualifying his liability, the plaintiff in the declaration must notice such provision, or there will be a fatal variance. When this provision however in the written instrument is distinct from the clause on which the debt is charged, it is a matter of defeasance which should come from the other side. Simmons v. Insurance Co., 8 W. Va. 474.

Insurance—Omission to State Hour When Policy Began.—The declaration in an action of assumpsit brought on the insurance policy alleges that the policy was not in force "from the said 6th day of January 1870, until the 6th day of January 1871,"

whereas the policy states, "from the 6th day of January 1870, at noon to the 6th of January 1871, at noon." This is a material variance between the policy described and the policy produced. Simmons v. Insurance Co., 8 W. Va. 474.

Same—Declaration Must Conform to Requirements of Policy.—The declaration in an action of assumpsit on an insurance policy states that the money was "to be paid to the plaintiff in sixty days after notice and proof of the same," etc., while the policy states "the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same made by the assured and *received at this office*," etc. This is a material variance. Simmons v. Insurance Co., 8 W. Va. 474.

Entire Consideration Must Be Stated.—In an action of assumpsit founded on special contracts to recover damages for the failure and refusal to perform the same, generally the entire consideration must be stated, and the entire act to be done in virtue of such consideration; and generally in actions on special contracts, if any part of the contracts vary materially from that which is stated in the declaration it will be fatal, as a contract is an entirety. In cases of such material variance, on motion of the defendant's counsel the evidence of the plaintiff should be excluded from the jury, but the variance must be manifest. James v. Adams, 16 W. Va. 245. See James v. Adams, 8 W. Va. 568.

Count of General Law Merchant—Days of Grace.—In an action of assumpsit brought on a bill of exchange drawn in Virginia, and payable at the bank of Marietta, Ohio, the declaration counted on the general law merchant, and the general issue was joined. Proof of presentation on the *fourth* day of grace does not support the issue on the plaintiff's part, as the general law merchant requires presentation on the *third* day of grace. Jackson v. Henderson, 3 Leigh 196.

Value of Cattle before and after They Had Been Killed.—Where the declaration in assumpsit contained a special count, which alleged that the defendant was to pay the plaintiff the value of certain cattle before they had been killed, and the evidence showed that the defendant promised to pay for the carcasses thirty dollars a head, this was held to be a fatal variance. Davisson v. Ford, 23 W. Va. 617.

Description of Article Sold.—In an action of assumpsit on a contract for the purchase of a stock of goods, if there be a material variation, in describing the article sold, between the declaration and the proof, such variation is material and fatal to the suit. James v. Adams, 16 W. Va. 245.

Contract Proven Must Be Some One Alleged.—It is clear that in an action of assumpsit against a party on a promise or contract made by him to pay the plaintiff a certain sum of money, recovery cannot be had, if the contract proven is not the one stated in the declaration, but a joint contract made by the defendant and another. This is a variance. Davisson v. Ford, 23 W. Va. 617.

Account Stated for $600—No Evidence Allowed to Prove One for $500.—If a declaration in assumpsit contains only the *insimul computassent* count, stated for $600, without a bill of particulars, the plaintiff cannot introduce evidence to prove an account stated for $500. Under the ruling of Minor v. Minor, 8 Gratt. 1, such evidence was properly excluded as irrelevant to the issue under the pleadings as they were. Mann v. Perry, 3 W. Va. 580.

No Recovery in Action on Negotiable Note unless Negotiable When Suit Is Brought.—In an action of assumpsit brought upon a negotiable note, if a note when offered in evidence is not negotiable by the law of the state where the suit is pending, the plaintiff is not entitled to recover. Nichols v. Porter, 2 W. Va. 18.

Evidence Should Be Excluded if It Fails to Support Issue.—The defendant to an action of assumpsit plead the general issue. After the introduction of the plaintiff's evidence, the defendant moves to exclude it from the jury on the ground of a material variance between the proof and the declaration. This should be done if it clearly appears that the evidence offered by the plaintiff fails to support the issue on his part. Dresser v. Transportation Company, 8 W. Va. 553.

Bill of Lading Should Not Go to Jury if Not Applicable to Any Count.—If the plaintiff declares in assumpsit against a common carrier, without regard to the special contract between them manifested by bills of lading, the latter, not being applicable to any of the counts in the declaration, ought not to be allowed to go to the jury as evidence in support of the same. B. & O. R. Co. v. Rathbone, 1 W. Va. 87.

2. WHEN IMMATERIAL.

Nonjoinder of Cocontractor Not Appearing in Declaration.—It is well settled that the nonjoinder of a cocontractor as a defendant cannot be taken advantage of under the general issue in an action of assumpsit, on the ground of a variance between the *allegata* and the *probata*, when the omission of the cocontractor does not appear on the face of the declaration. Wilson v. McCormick, 86 Va. 995, 11 S. E. Rep. 976. See Prunty v. Mitchell, 76 Va. 169.

Variance in Damages in Writ and Count.—In an action of assumpsit, the writ lays the damages at $500, and the count lays them at $600. For want of appearance a judgment was entered by default, and the jury assessed the damages. The variance between the writ and the count was held to be immaterial. Dabneys v. Knapp, 2 Gratt. 354.

What Variance in Name of Plaintiff Immaterial.—Where the writ states the initial letter of the middle name of one of two plaintiffs to be P, while the count in the declaration in assumpsit states it to be B, but in both the writ and the count the partnership name of the plaintiffs is given, the variance is immaterial. Dabneys v. Knapp, 2 Gratt. 354.

It is no variance between the writ and the declaration in assumpsit, if the writ states the first christian name of the plaintiff by the initial letter, and the count in the declaration states the name in full. Dabneys v. Knapp, 2 Gratt. 354.

When Variance Immaterial.—Where the declaration in an action of assumpsit states an agreement that the plaintiff would *rent and furnish a house at L*, and board the defendant and his clerks for so much each, and the agreement proved was that he would *board the defendant and his clerks at L* for the sums stated in the declaration, the variance between the averments and the proof is not material. Wroe v. Washington, 1 Wash. 357.

Omission of Word "Treasurer" Immaterial When Defendant Was Personally Liable.—The defendant as treasurer of a jockey club agreed to rent for its use a piece of ground from the defendant, and bound himself in writing to pay the rent. The plaintiff brought an action of assumpsit on the parol agreement, and gave in evidence the written agreement not under seal, corresponding with that stated in the declaration, except, that in the latter the de-

scription as "Treasurer" is omitted. The variance is not material, as he was personally liable, and it was unimportant to give him his title. McWilliams v. Willis, 1 Wash. 196.

Action on Contract Made by Agent for Disclosed Principal May Be Brought against Principal—No Variance.—There is no variance between the allegation and proof where the declaration alleges a contract with the defendant, and the evidence shows that it was made through an agent for his principal, the defendant, who was disclosed. The account filed in the case was against the defendant and the agent, and the plaintiff offered to strike out the agent's name. But the defendants objected and this was not done, and for these reasons the decision that there was no variance was free from error. Richmond, etc., Ry. Co. v. New York, etc., Ry. Co., 95 Va. 386, 28 S. E. Rep. 573.

Date of Presentment of Note Stated under Scilicet Not Material.—In a declaration in assumpsit on a bill of exchange, brought by the holder against the endorser, it was alleged that it was presented for payment, "when the bill became due and payable according to the tenor and effect thereof, to wit, on the 27th of December 1816, at the bank of Marietta in Ohio," where it was payable and dishonored. The 27th of December was not the third but the fourth day after time of payment, but as it was averred that the bill was presented when it became due and payable according to its tenor and effect, and the date of the presentment was stated under a *scilicet*, the date stated was not material, and the plaintiff might have proved presentment on the third day of grace. Jackson v. Henderson, 3 Leigh 196.

Date of Judgment Not Material When Question of Time Was Not Involved.—When a declaration in assumpsit alleges that a certain judgment was rendered on the 30th of May 1870, and the record produced shows that it was rendered on the 31st of May 1870, it was objected that the record was inadmissible for this variance. The variance was held not material as the question involved was not when it was rendered, but whether it had been rendered. Sayre v. Edwards, 19 W. Va. 352.

Omission of One Commissioner in Order of Court Immaterial Where Three Were Appointed.—The declaration in an action of assumpsit brought against a county by a contractor for the price of building a jail, states that the county court appointed three commissioners to let out the building of the jail, and names the commissioners. The order of the county court offered in evidence by the plaintiff only names two of them. This was held no material variance and the order was admitted in evidence. Carroll County v. Collier, 22 Gratt. 302.

Consideration—Written Promise Not Mentioning It Admissible.—The plaintiff in his declaration in assumpsit brought on the promise of the defendant to pay the debt of another alleges a particular consideration. A written promise of the defendant which was produced in evidence, contained no mention in the consideration. This was no variance between the *allegata* and *probata*, as the written promise is proper evidence and the consideration may be proved by evidence *aliunde*. Colgin v. Henley, 6 Leigh 85.

Allegation of Credit Required and Proof of Note Given Will Not Prevent Recovery.—If the declaration in an action of assumpsit on a contract for the sale of property alleges that the defendant was required to pay a certain sum in cash and the balance on a certain credit, and the evidence shows that the defendant was required to pay the stated sum in cash and was to give his note for the balance, this is not a sufficient variance to destroy the right of the plaintiff to recover. James v. Adams, 16 W. Va. 245.

VIII. VERDICT.

1. FORM.

General Verdict Assessing Entire Damages on Several Counts Not Erroneous.—A general verdict in assumpsit, which assesses entire damages on several counts, none of which are defective, is not erroneous. Buster v. Ruffner, 5 Munf. 27.

In Current Money.—In an action of *indebitatus assumpsit* for a certain sum in pounds sterling of the value of a certain sum in current money of Virginia, for so much advanced by the plaintiffs to F. and S. at the request of the defendant, the damages were laid in current money. The verdict by the jury in current money was correct. Barnett v. Watson, 1 Wash. 372.

When It Pursues the Issue.—After the plea of *non-assumpsit*, the verdict of the jury that the defendant has not paid the debt and assessing damages occasioned by the nonperformance of that assumpsit, substantially pursues the issue. Barnett v. Watson, 1 Wash. 372.

On Good Cause of Action—Motion to Arrest Judgment Overruled.—Where a good cause of action is set out by a declaration in assumpsit, and no objection is made to the form or substance of the verdict, a motion in arrest of judgment by the defendant will be overruled. Travis v. Peabody Ins. Co., 28 W. Va. 583.

2. OPERATION AND EFFECT.

Omission of Facts Necessary to Plaintiff's Recovery Not Cured by Verdict.—Where matters which are collateral to the fact in issue, and necessary to the right of the plaintiff, are omitted in the pleadings, they cannot be presumed to have been proven, and therefore their omission could not be cured by verdict at common law. Bailey v. Clay, 4 Rand. 346.

Money Counts Presumed Proved.—If in an action of assumpsit on an inland bill of exchange, there be two money counts in the declaration, and the court gives an improper instruction to the jury with regard to the bill of exchange, after verdict it will be presumed that the money counts were proved, where the bill of exceptions to the instruction does not state there was other evidence. Willock v. Riddle & Co., 5 Call 358.

Misjoinder of Issue Cured.—It being stated in the record that issue was joined, the fact that there was a misjoinder of the issue is cured after verdict in an action of assumpsit by the statute of jeofails. Moore v. Mauro, 4 Rand. 488.

A misjoinder of issue upon a plea of payment in an action of assumpsit, where the plaintiff could not reply anything to this plea, except what had been alleged in his declaration, the blunder in the making of the issue, would have been cured after verdict by the statute of jeofails. Douglass v. Central Land Co., 12 W. Va. 502. See Moore v. Mauro, 4 Rand. 488; Southside R. Co. v. Daniel, 20 Gratt. 344; Simmons v. Trumbo, 9 W. Va. 363.

Failure to Allege Performance of Condition Cured.—In the declaration in an action of assumpsit founded on an agreement for sale and conveyance of property, the failure to allege the performance of a precedent condition will be cured by verdict. Bailey v. Clay, 4 Rand. 346.

Plea of "Not Guilty" Cured.—If to a declaration charging a tort, with an assumpsit upon it, the

defendant pleads not guilty, it will be good after verdict, notwithstanding the double aspect of the declaration, and the irrelevancy of the issue of the assumpsit. King v. McDaniel, 4 Call 451.

Omission of Gist of Action Not Cured.—Only that which must have been necessarily proved from the matter stated in the declaration will be presumed after verdict, and therefore the total want of an averment of a fact, which constitutes the gist of the action, will not be cured after verdict by the statute of jeofails. Chichester v. Vass, 1 Call 83, 1 Am. Dec. 509.

Omission of Names of Partners Cured.—On the authority of Murdock v. Herndon, 4 H. & M. 200, and Totty v. Donald & Co., 4 Munf. 430, it seems that a verdict will cure the defect in a declaration in assumpsit on behalf of a mercantile company, brought by the name of the firm and omitting to mention the names of the partners.

When Omissions of Averments Cured.—The declaration in an action of assumpsit upon a marriage promise, by which the defendant agreed to give the plaintiff, if he should marry his granddaughter, as much of his estate as he should give to any of his own children, should state the quantity and quality of the estate given by the defendant to his own children, and when the gifts were made. A verdict, if rendered, might cure the omission of such averments, but it will not do so where all the pleadings are defective. Smith v. Walker, 1 Wash. 185.

3. FOR EXCESSIVE AMOUNT.

Excess of Damages over Amount in Declaration May Be Released.—Since the act of January 20, 1804, as explained and amended by the act of January 29, 1805, if the jury in an action of assumpsit find for the plaintiff a larger sum than the amount of damages laid in the declaration, with interest from a day fixed in their verdict, the plaintiff may release the surplus beyond that amount, and take judgment for the balance, with interest as aforesaid. Cahill v. Pintony, 4 Munf. 371.

4. WHEN SET ASIDE.

Against Two Jointly for Individual Items.—On trial of an action of assumpsit against two defendants jointly containing the common counts, a bill of particulars was filed as an account against both of them. The evidence under nonassumpsit shows that some of the items in the bill of particulars are against the defendants individually. A verdict can only be found on the items in the account which are charges against the defendants jointly. This is not a case within the 19th § of ch. 131 of the W. Va. Code, and the verdict being against both for items against them individually, it will be set aside. Enos v. Stansbury, 18 W. Va. 477.

In Favor of Defendant Not Appearing.—An action of assumpsit is brought against two defendants jointly, and a writ of inquiry of damages was awarded against them. Only one appeared and set aside the office judgment and pleaded nonassumpsit. Issue was joined and a verdict was found for both of the defendants. The court overruling a motion for a new trial entered up judgment in favor of both defendants without executing a writ of inquiry against the other defendant. It was clearly erroneous to give a verdict in favor of a defendant who had not appeared, and the verdict of the lower court was set aside. Enos v. Stansbury, 18 W. Va. 477.

When No Issue Joined on Plea.—To an action of assumpsit the pleas of nonassumpsit and the act of limitations were filed. To the first plea plaintiff replied generally, and specially to the second, but the defendant put in no rejoinder. In the transcript of the record it was said that a jury was impanelled to try the issues joined. But the court of appeals decided that no issue was joined on the second plea, and therefore a verdict for the plaintiff be set aside and a new trial directed. Totty v. Donald & Co., 4 Munf. 430.

Variance between Declaration and Agreement Proved.—Where a declaration in assumpsit charges a common carrier for loss or damage in general terms, and an agreement is proved which shows that the transportation was at the plaintiff's risk, thus imposing a different liability from that charged, and a verdict is rendered against the defendants, it should be set aside and a new trial granted because of the variance. B. & O. R. Co. v. Rathbone, 1 W. Va. 87. See sec. V, *supra*.

IX. JUDGMENT.

1. FORM.

In Actions against Executors.—In an action of assumpsit by a legatee against an executor for a legacy, one count in the declaration alleges a promise made by the defendant, as executor, to pay the legacy. This is a count against the executor in his representative capacity, upon which the judgment can only be *de bonis testatoris*. Kayser v. Disher, 9 Leigh 357.

Same.—In an action of assumpsit against executors for money had and received by them to the plaintiff's use, it seems that the judgment should be *de bonis propriis*, and not *de bonis testatoris*. Martin v. Stover, 2 Call 514.

2. IN JOINT ACTIONS.

Common-Law Rule—Statutory Modification.—The common-law rule that in a joint action against several parties there can be but one final judgment, and it must be for or against all the defendants, is the same whether the contract be joint, or joint and several, or whether it is founded on several and distinct contracts. Steptoe v. Read, 19 Gratt. 1; Gibson v. Beveridge, 90 Va. 697, 19 S. E. Rep. 785. See also. Taylor v. Beck, 3 Rand. 316; Moffett v. Bickle, 21 Gratt. 280; Muse v. Farmers' Bk., 27 Gratt. 252. For statutory provision for the recovery of money by motion from any number of those liable in a joint contract, see § 3212 of the Va. Code of 1887.

The common-law rule above mentioned has been modified by statute, which provides that in such an action the plaintiff may have judgment against any other or others from whom he would have been entitled to recover had he sued them only, although he may be barred as to one or more of them. Va. Code 1887, § 3295. But in an action of assumpsit where the only plea was a joint one of nonassumpsit, and the plaintiff dismissed the suit as to one of the defendants, and there is nothing on the record which shows that the defence was merely personal to the defendant as to whom suit was dismissed and did not concern his codefendant, the statute has no application and it is not an error to refuse to allow an amendment to the declaration. Gibson v. Beveridge, 90 Va. 698, 19 S. E. Rep. 785.

When One Proves Defence to Foundation of Entire Action.—In an action of assumpsit against two defendants on a contract, although one of them confesses judgment, yet if the other proves a defence, which goes to the foundation of the entire action, there must be a final judgment in favor of both defendants. Steptoe v. Read, 19 Gratt. 1.

When One Defendant Defends after Suit Was Abated as to Him.—An action of assumpsit was instituted against a firm, one member of which appeared and plead *nonassumpsit*. Afterwards another member of the firm, against whom the suit had been entered abated, entered himself a defendant, and without filing a plea, united in defending the action. A judgment entered against the two is proper, as they did not discover by plea in abatement who the other partners were. Barnett v. Watson, 1 Wash. 372.

Against One after Suit Abated as to Other.—In an action on the case in assumpsit brought against two partners to recover a partnership debt, the writ was executed on only one, and as to the other it was returned "no inhabitant of the city," and the suit was entered abated as to him. Though the declaration charges that the defendant assumed with another, a fact which as to that other is not tried, yet this does not vitiate the defendant's assumpsit which found against him, and the judgment against one partner on the joint contract is not erroneous. If the defendant wishes to take advantage of the omission to sue both, he should have pleaded in abatement and pointed out the other partner. Brown v. Belches, 1 Wash. 8.

3. WHEN VALID.

Court Has Jurisdiction—No Affidavit as Required by Statute.—Sec. 3286 of the Va. Code provides that when in an action of assumpsit for money, an affidavit is filed with the declaration, stating that the amount claimed is justly due, etc., no plea in bar shall be received unless supported by an affidavit. Where in an action of assumpsit the plaintiff has proceeded in accordance with this statute and the defendant has not filed his plea of nonassumpsit with affidavit, which is stricken out and a subsequent plea with affidavit is rejected, final judgment for the plaintiff is not void as the court had jurisdiction of the parties and the subject-matter. Grigg v. Dalsheimer, 88 Va. 508, 13 S. E. Rep. 993.

Demurrer Improperly Sustained—No Injury to Plaintiff.—Where there are common counts in a declaration, and a special count be included, all the facts alleged in which could be as well proven by the plaintiff under the common counts, and the court improperly sustains a demurrer to such special count and the record shows that at the trial of the case the plaintiff sustained no injury by reason of the court sustaining the demurrer to the special count, the appellate court will not reverse the judgment below because of such error. Moore v. Supervisors, 18 W. Va. 630.

Improper Evidence Admitted.—In an action of assumpsit for various sums of money lent to or paid for the defendant's intestate the issues being on nonassumpsit, and the statute of limitations, and the verdict being for the defendant alone on the latter plea, the admission of improper evidence having reference to the issue on the first plea only, and which could have no influence on the issue on the last plea, is not ground for reversing the judgment. Johnson v. Jennings, 10 Gratt. 1.

Demurrer Improperly Overruled—Judgment in Other Court.—To a declaration in assumpsit containing two counts the defendant pleaded the general issue and afterwards filed two additional pleas to the first count. On demurrer to the pleas the lower court held them good and entered judgment for the defendant on the first count. Subsequently the issue tried on the second count, and verdict and judgment were rendered for the defendant on that count. The appellate court held that while there was error in overruling the demurrer, defendant was entitled to the benefit of the verdict and judgment on the second count. Dunn v. Price, 11 Leigh 208.

On Demurrer Plaintiff Proved Not Entitled to Recovery.—When the defendant to an action of assumpsit demurs to the evidence, and by demurrer shows that the plaintiff ought not to recover, the court cannot set it aside and award a new trial, but ought to enter judgment for the defendant. Knox v. Garland, 2 Call 241.

4. WHEN INVALID.

No Issue—Trial by Court.—There were two pleas filed by the defendant to an action of assumpsit, one the general issue, and the other the plea of the statute of limitations, on neither of which was issue joined. The trial was held before the court instead of the jury, under § 38, ch. 162, Code of Va. 1860. Judgment was rendered for the plaintiff. The court occupied precisely the relation to the case a jury would have done, and trial without issue joined is erroneous in either case. Balt., etc., R. Co. v. Faulkner, 4 W. Va. 180.

Same—No Plea Filed.—It is not an error to set aside a judgment given in an action of assumpsit where no plea has been filed, and no issue made up. Johnson v. Fry, 88 Va. 695, 12 S. E. Rep. 973, 14 S. E. Rep. 183.

In New Trial Not in Accordance with Conditions.—A new trial is granted to the defendant in an action of assumpsit on condition that he pay the costs of the first trial, and agree that any future trial be tried solely by the issue already made up by nonassumpsit, without any additional plea. On trial of the cause in another court the defendant on motion is permitted to file another plea. This cannot be granted and the judgment will be reversed, and the cause sent back to be tried on nonassumpsit, or any new matter which has occurred since the new trial was granted. Prunty v. Mitchell, 30 Gratt. 247.

On Erroneous Instructions.—In an action of assumpsit brought upon a paper, purporting to be a bill of exchange, but which is not a bill of exchange, and which does not import a valuable consideration, nor a promise by the drawer to the payee to pay, if the money is not paid by the drawee, the court instructed the jury that they might infer a consideration moving from the plaintiff to the defendant. The court erred and the judgment will be reversed, as the jury could only regard it as their duty to make the inference, and hence peremptory upon them, regardless of the weight of evidence. Averett v. Booker, 15 Gratt. 163.

In an Action against Intermediate Number of Obligors in a Bond.—The action of assumpsit on a joint and several bond must be brought either against all the obligors generally, or one of them singly, and not against any intermediate number. If an error in this respect appears on the record, the judgment will be reversed, notwithstanding such error was not pleaded in abatement. Leftwich v. Berkeley, 1 H. & M. 61.

In an Action When No Consideration Laid.—In an action of assumpsit, if no consideration for the promise be laid in the declaration, judgment ought to be arrested, notwithstanding it be founded on a written agreement. Moseley v. Jones, 5 Munf. 23. See Hall v. Smith, 3 Munf. 550.

On Demurrer without Trial of Issue.—Where issue was joined in an action of assumpsit on the plea of

the general issue, two special pleas were filed by the defendant, to which the plaintiff demurred. It was an error for the court to overrule the demurrer and give final judgment for the defendant, as no final judgment should have been given without the issue on the plea of nonassumpsit having been tried, or otherwise disposed of. Morgantown Bk. v. Foster, 35 W. Va. 357, 13 S. E. Rep. 996.

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194 *Walton v. Hale.

July Term, 1852, Lewisburg.

(Absent SAMUELS, J.)

1. **Caveat—Upon What It Rests.***—In a case of caveat the caveat rests upon the ground of the better right in the caveator to the land surveyed. Unless he can show such better right, the caveatee is entitled to the judgment, though it might appear that as against a party showing a right, his entry and survey were defective.
2. **Same—Tenant in Common.**—QUÆRE: If a tenant in common of an undivided interest in land may not maintain a caveat against the issuing of a grant to a third person, upon a survey of part of the land embraced within the limits of the grant in which he holds an undivided interest.
3. **Evidence—Recitals in Deeds.**†—In a controversy between a party claiming under a conveyance from a commissioner for the sale of delinquent lands and a party claiming under an adverse title, the recitals in the deed of the commissioner are not evidence against the party claiming adversely to the deed.
4. **Delinquent Lands—Sale—Conveyance by Commissioner to One Other Than Purchaser—Effect.**‡—A commissioner for the sale of delinquent lands conveys under a power; and a deed executed by him to other persons than those reported by him to have been the purchasers of the land, can avail nothing where his authority to make it does not appear, unless there has been such a long acquiescence and possession under the deed as to justify a presumption in its favor.

This was a proceeding upon a caveat entered in the Circuit court of Carroll county, by George Walton against the issuing of a patent to Fielden L. Hale for a tract of land in that county. The facts are stated in the opinion of Judge Allen. There was a judgment in favor of Hale; whereupon Walton applied to this court for a supersedeas, which was allowed.

Floyd and B. R. Johnston, for the appellant.

There was no counsel for the appellee.

195 *ALLEN, J. The appellant entered a caveat in the Circuit court of Carroll against the issuing of a grant to the appellee. The caveat rests upon the ground of the better right in the caveator to the land surveyed. Unless he can show such better right, the judgment in favor of the caveatee must be affirmed, though it might appear that as against a party showing a right his entry and survey were defective.

It appears from the facts found by the jury, that the land embraced by the entry and survey of the caveatee lies within the boundaries of a grant to Thomas Ruston and John D. Blanchard, dated the 11th December 1795. That, on the 5th September 1795, the said Thomas Ruston conveyed the whole tract to his son Thomas Ruston, Jr., and two daughters, Mary and Charlotte Ruston, which deed appears upon its face to have been merely voluntary. It contains no covenant of warranty, and it bears date and was acknowledged before the emanation of the grant. On the 12th of June 1839, the commissioner of delinquent and forfeited lands for Grayson county made a report to the judge in vacation, of lands forfeited to the Literary fund for the nonpayment of taxes charged thereon, and for the failure to enter them on the books of the commissioner of the revenue for said county; which report being examined was affirmed, and ordered to be recorded; and the commissioner was directed to proceed to sell the several tracts of land mentioned in the report. Amongst those tracts is one moiety of the tract granted to Ruston and Blanchard, re-

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***Caveat—Upon What It Rests.**—See the proposition laid down in the first headnote approved in Beckwith v. Thompson, 18 W. Va. 123.

Same—What It Must State.—See principal case cited in *foot-note* to Carter v. Ramey, 15 Gratt. 346; Trotter v. Newton, 30 Gratt. 588.

Same—Infirmity of Caveatee's Title.—See principal case cited in *foot-note* to Carter v. Ramey, 15 Gratt. 346; Harper v. Baugh, 9 Gratt. 518.

†**Evidence—Recitals in Deeds.**—In Holly River Coal Co. v. Howell, 36 W. Va. 501, 15 S. E. Rep. 218, the principal case is cited to the point that recitals in the deed of a commissioner of delinquent and forfeited lands are not evidence against a party claiming adversely to the deed. And in Miller v. Williams, 15 Gratt. 225, the principal case is cited as authority for the proposition that recitals in a deed, of authority to make such deed, is not evidence against those asserting an adverse claim.

See the principal case also cited in McDodrill v. Pardee, etc., Co., 40 W. Va. 576, 21 S. E. Rep. 882; Mason v. Bridge Co., 20 W. Va. 237.

In Sulphur Mines Co. v. Thompson, 93 Va. 816, 25 S. E. Rep. 282, it is said: "Few principles of law are more firmly settled than that in the case of a naked power, not coupled with an interest, the law requires that every prerequisite to the exercise of the power should precede it; that when the validity of a deed depends upon acts *in pais*, the party claiming under it is bound to prove performance of those acts; and that unless there be some statute making the recitals in the deed of the person making the sale *prima facie* evidence of the regularity of the proceedings, the acts *in pais* relied on to sustain the sale must be proved by evidence *aliunde*. Flanagan v. Grimmet, 10 Gratt. 421, 425-6, and cases cited; *Walton v. Hale, 9 Gratt. 194, 197-98;* Reusens v. Lawson, 91 Va. 226, 236, 21 S. E. Rep. 347; Deputron v. Young, 134 U. S. 241, 256-7." See monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564.

‡**Delinquent Lands—Sale—Conveyance by Commissioner to One Other Than Purchaser.**—In accord with the proposition laid down in the fourth headnote, see the principal case cited in Hitchcox v. Rawson, 14 Gratt. 532; Miller v. Williams, 15 Gratt. 225; Hall v. Hall, 12 W. Va. 17; Lennig v. White (Va.), 20 S. E. Rep. 842, 1 Va. Dec. 905.

ported in the names of Mary and Charlotte Ruston (the two daughters of Thomas Ruston), and the other moiety in the name of Thomas Ruston. On the 5th of September 1839, the commissioner returned to said court his report of sales made in pursuance of the order of the judge aforesaid, from which it appeared that the two tracts reported in the names of Mary and
196 Charlotte *Ruston, and of Thomas Ruston, had been exposed to sale, and had been purchased by R. Raper, D. Graham and F. Allison. No further order seems to have been made by the court in the premises after the return of the report of sales. The 8th section of the act to amend and explain the laws concerning western land titles, and for other purposes, passed March 30, 1837, Sess. Acts, page 9, provided that it should be the duty of the court, by whose order the sale was made, to direct its commissioner to convey to the purchaser, who should have paid up the whole amount of the purchase money. But such order of the court was rendered unnecessary by the act concerning delinquent lands, passed March 15, 1838, Sessions Acts, page 16; the 9th section of which authorizes the commissioner to receive the purchase money, and provides that the purchaser shall be entitled to his deed for the land so purchased and paid for, upon application to the commissioner. On the 19th of November 1840, the commissioner, professing to act under the authority of said proceedings, made a deed to a certain George Walton for the use of and in trust for Francis Allison, sr., and for all persons holding an interest in the Wythe lead mines, and now operating under the name and style of the Wythe lead mines company. The deed recites the proceedings, the sale made in pursuance thereof, of one of the tracts in the names of Mary and Charlotte Ruston, for the nonpayment of taxes charged thereon, the other in the name of Thomas Ruston, forfeited for nonentry on the commissioner's books; that F. Allison, sr., and the persons having an interest in the lead mines became joint purchasers according to certain proportions, which are specified, and the parties named; and the purchase money having been paid, and the purchasers having expressed a desire, in order to promote their convenience, that the legal title should be made to
197 Walton *for the use and benefit of Allison, and the persons having an interest in lead mines, the said Walton being one of those described as having an interest, the commissioner proceeds to convey the land to Walton in trust for Allison, and the persons having an interest in the lead mines, in the proportions before named and described. D. Graham, who, by the commissioner's report of sales, appears to have been one of the joint purchasers, is not named in the deed, nor does it appear what has become of his interest. These are all the facts touching the right of the caveator; nothing is found respecting the possession of the premises, or whether any person has ever entered under the Ruston and Blanchard patent. Nor does it appear what has become of the interest of Blanchard in the land granted. If the caveator could connect himself with the patent of Ruston and Blanchard, then although it might appear he was but a tenant in common of an undivided interest in the land, such interest would perhaps be sufficient to authorize him to enter a caveat against the issuing of a grant upon a survey of part of the land embraced within the limits of the grant. No partition having been made setting off his individual share, his interest in the whole would constitute such a better right as to entitle him, for the benefit of himself and cotenants, to resort to a caveat to prevent the emanation of a grant to a subsequent locator, who had entered the same as waste and unappropriated land.

But in this case it seems to me the caveator has utterly failed in connecting himself with the Ruston and Blanchard title. The commissioner to make sales under the delinquent land laws, under which these proceedings were had, has no interest in the subject of sale. He acts like a commissioner to make sales under a decree of the Chancery court, and is clothed with a
198 *mere naked authority. Having no interest in the land conveyed, the deed of the commissioner could avail nothing where his authority to make it did not appear, unless there had been such a long acquiescence and possession under the deed as to justify a presumption in favor of the deed, as was the case in Robinett v. Preston, 4 Gratt. 141. In this case no such presumption can be raised. The caveator has rested his right upon the deed and the proceedings which led to it. In such a case, and as against a stranger setting up an adverse claim to the title asserted, the recitals in the deed are no evidence. Carver v. Jackson, 4 Peters' R. 1, 83; Wiley v. Givens, 6 Gratt. 277. In the case of Masters v. Vaner, 5 Gratt. 168, a decree of the Chancery court and the marshal's deed were offered in evidence. The decree did not describe the specific land directed to be conveyed; but it was described with sufficient certainty in the deed. This court held that the recitals in the marshal's deed were no evidence as against a third person asserting an adverse claim, of the authority of the marshal to convey the specific tract; and that as the decree left it uncertain, it was necessary to produce the whole record, or so much thereof as would show that the land conveyed was the land embraced in the suit, before the deed could be used as evidence. In the case under consideration, the report of sales set out that Raper, Graham and Allison were the purchasers. By the 8th section of the act of March 30, 1837, it was the duty of the court to direct the commissioner to convey to the purchasers upon the payment of the purchase money; and the 9th section of the act of 15th March 1838 declares that the purchaser shall, on application to the commissioner, be entitled to his deed upon the payment of the purchase money. By each act the authority of

the commissioner is limited to a con-
199 veyance to the purchasers. *The deed in this case is to a stranger, if regard be had to the record of the proceedings, which are relied on as authorizing the commissioner to convey. The name of Walton nowhere appears as purchaser, or as having any interest in the subject. The recitals of the deed must be looked to as furnishing evidence, not only of his authority to make the deed to a stranger to the proceedings, but also of his authority to make it to him as trustee for himself and others, according to certain proportions therein named. But the conveyance does not show, even by way of recital, what disposition has been made of the interest of D. Graham, one of the joint purchasers, or why his name has been omitted. But for the recitals it would be a conveyance by an officer vested with a naked authority, undertaking to convey to a person having no connection with the proceedings from which he derived his authority, and who does not appear, from any legal evidence as against the caveatee, to have had any interest in the subject. The deed alone would not preclude the persons who purchased at the sale from calling for a proper deed. The apparently unauthorized act of the commissioner could not destroy their rights. Were they before the court, or had the caveator established a right to claim under the sale by the commissioner, the regularity of that sale and the interest which passed by it would be proper subjects of enquiry. The sale being in the names of the children of Thomas Ruston, it would be necessary to ascertain the effect of the deed to them. And the sale having been made of the entire tract, a question might arise, which has been discussed in other cases, whether all interest forfeited to the commonwealth, either in the name of the person reported by the commissioner, or of any other persons, passed by such sale to the purchaser. But as the caveator has failed to show, by legal evidence, any
200 *right whatever to the land surveyed, or any portion of it, even supposing the sale to have been regular, and to have entitled the purchasers upon procuring their deed to the land sold, the judgment in favor of the caveatee should, I think, be affirmed with costs.

DANIEL and LEE, Js., concurred in the opinion of Judge Allen.

MONCURE, J., dissented.

Judgment affirmed.

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201 *Butcher v. Creel's Heirs.

July Term, 1852, Lewisburg.

Deeds—Construction—Reservations—Uncertainty*—Case at Bar.—C. being the owner of land on one side of a river, on which there is a mill, saw mill, &c., propelled by water from the river, collected by means of a dam built in and across it, and abutting against the opposite banks where an acre of land had been condemned for an abutment, according to the statute, conveyed to B a portion of the land described as containing five acres, with all and singular the appurtenances thereto belonging, including the mill, saw mill, &c., and all other buildings of whatsoever nature, on or attached to the premises; "reserving to himself the right to build or erect a saw mill on the opposite side of the said river, or at the further end of the dam of the aforesaid saw and grist mill." HELD: There is not such certainty in the description of the part of the land intended to be excepted out of the conveyance as to withdraw it from the operation of the deed; and it cannot therefore be recovered in ejectment by C or his heirs.

This was an action of ejectment in the Circuit court of Wood county, brought by the heirs of John B. Creel against Peyton Butcher. On the trial the jury found a special verdict, on which the court rendered a judgment for the plaintiffs; and thereupon, Butcher applied to this court for a supersedeas, which was awarded. The facts of the case are stated by Judge Samuel, in his opinion.

Fry, for the appellant.

There was no counsel for the appellees.

SAMUELS, J. The record sets forth this case. John B. Creel was the owner of a tract of land on the northwest side of the Little Kanawha river in Wood county. On this land were a grist mill, saw mill and carding machine, which were propelled by the water of that stream, collected by
202 means of a dam built in *and across it, abutting against the opposite bank, where an acre of land had been condemned for an abutment, according to the provisions of the statute, 2 Rev. Code, ch. 235. Creel, so being the owner, sold and conveyed to T. Boulware and Bushrod W. Creel a portion of the land, described as containing about five acres, with all and singular the appurtenances thereto belonging, including the saw mill, grist mill and carding machine, and all other buildings of whatsoever nature, on or attached to the premises, "reserving to himself the right to build or erect a saw mill on the opposite side of the said river, or at the further end of the dam of the aforesaid saw and grist mill." J. B. Creel died, leaving the lessors of the plaintiff his heirs at law, to whom his real estate descended. Boulware and B. W. Creel sold and conveyed to Peyton Butcher, the plaintiff in error, their interest in the property, excepting out of their conveyance the rights reserved by John B. Creel in his conveyance to them. An action of ejection was brought by Creel's heirs against Butcher, for the purpose of recovering the acre of land against which the dam abutted.

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*In Benn v. Hatcher, 81 Va. 25, 28, it was held that uncertainty in a reservation in a deed may be cured by the election of the grantor, but that such election must be made within a reasonable time. The court said there was nothing in the principal case at variance with this proposition.

See monographic *note* on "Deeds" appended to Flott v. Com., 12 Gratt. 564.

Thus the question is presented, whether any interest remained in John B. Creel which descended to his heirs at law, and which might be recovered by them in an action of ejectment.

The deed from John B. Creel to Boulware and Creel is in terms sufficiently comprehensive to pass to them the fee simple title to the acre of land. Whitney v. Olney, 3 Mason's R. 28; Moore v. Fletcher, 4 Shepl. R. 63.

Unless the defendants in error can maintain that a valid exception was made by John B. Creel, they cannot recover. Considering that the condemnation of land for an abutment is authorized because of the necessity that the public shall have the use of mills; that the individual advantage 203 of the mill owner in nowise *enters into the reason for allowing such condemnation; that although the mill owner is vested with the fee simple title in the land condemned, yet he holds it by a tenure requiring him to keep his mill in a serviceable condition; it may well be doubted whether the mill owner could sell off the land condemned for an abutment, or, selling the mill, could except the land condemned. It is not necessary, however, to decide that question in this case. If John B. Creel had the power to separate the title to the mill from that to the abutment, by selling one and excepting the other, yet in this case no such exception was made. There is not such certainty in the description of the part intended to be excepted as to withdraw it from the operation of the deed: it is in nowise identified or distinguished from other portions of the acre. If it might be identified by entry and taking possession of so much of the land as might be necessary for the saw mill about to be erected, yet, as no such entry has been made or possession taken, a recovery cannot be had by the plaintiff. Authorities sustaining the positions here laid down will be found in Shep. Touch. 77 to 80; Hays' lessee v. Storrs, Wright's Ohio R. 711; Adams on Eject. 16; Case v. Haight, 3 Wend. R. 632; Thompson v. Gregory, 4 Johns. R. 80; Dygert v. Matthews, 11 Wend. R. 35; 4 Com. Dig. title Fait, E. 5, 6, 7; Jackson ex dem. Saxton v. May, 16 John. R. 184.

I am of opinion to reverse the judgment of the Circuit court with costs, and to render a judgment for the plaintiff in error, with the costs expended in the Circuit court.

ALLEN, DANIEL and LEE, Js., concurred in the opinion of Samuels, J.

MONCURE, J., dissented.

Judgment reversed.

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204 *Sexton v. Sexton.

July Term, 1852, Lewisburg.

(Absent SAMUELS, J.)

Partnership—Sale of One Partner's Interest to the Other—Good Faith*—Case at Bar.—Two partners carry on an extensive business, embracing various subjects, and they keep no regular set of books. One of them attends exclusively to the out door business, makes the contracts and executes notes for the firm, of which no regular account is kept. They at length quarrel, and the inn door partner insists upon a dissolution of the partnership, and there is a proposition to buy or sell. The out door partner, in making an estimate of the value of the partnership property for his own guidance in any proposition he may make or receive, attempts to make out a list of the debts due from the concern, and he estimates them at about one half that they turn out to be; but it does not appear that he represents them to his partner at any amount, or that his partner did or would have confided in any representation he made. After making his estimate he makes an offer to sell or buy at a specific price, and his partner agrees to buy at the price offered; and the contract is executed. HELD: That under the circumstances the selling partner was bound to the utmost good faith on his part. He was bound not only to disclose truly any information in his possession that might be called for, but if he perceived that the purchasing partner was laboring under incorrect views in reference to the amount of the debt due by the concern, by which he might be misled into too high an offer for the interest to be sold, it was his duty to furnish all the data he might have by which such views might be corrected and the mischief prevented; and in this case he does not appear to have violated his duty.

This was a suit in equity instituted in November 1842, in the Circuit court of Wythe county, by John Sexton against David Sexton. The bill charged that Joseph Sexton, who resided at Wythe courthouse, died in 1829, and by his will devised his real property to his two sons, the complainant and defendant, and directed that his business, which was large, and consisted in a tannery, saddlery and shoemaking establishment, and other business connected therewith, should be carried 205 *on, as it had been, for the next three years for the benefit of his widow who was then living. That the business was so carried on for some time, and was conducted principally by David Sexton, during which time the complainant was a minor and for the greater part of that period was residing in Alabama, where he was then learning his trade. That it was the request of their father that after the said three years had expired, the complainant and defendant should continue the business in partnership; and that they accordingly did business in partnership from 1831 to 1839.

That from the fact that David Sexton was the eldest and had acquired a full knowledge of the business, he naturally assumed the almost exclusive control of it, which had become very extensive and connected with various other subjects, such as the purchase of cattle, butchering for the town, peddling the various articles of the estab-

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*Partnership—Sale of One Partner's Interest to the Other—Good Faith.—For the proposition that, where one partner sells his interest to the other partner, the utmost good faith is required, see the principal case cited and approved in Tennant v. Dunlop, 97 Va. 244, 33 S. E. Rep. 620.

lishment, such as leather, shoes and saddlery, in different parts of the country; and that during all this time, the attention of the complainant was confined and limited to the business of the shop, and of necessity, he knew but little of the business generally. That all the money that was from time to time collected in the establishment, was generally demanded and received at the end of each day by David Sexton, and its application never made known to the complainant. That many of the hands in the establishment and the young men engaged in peddling were charged to keep the whole business as much a secret from the complainant as possible. that these things excited at the time the suspicion of the complainant, but he could not suppose there was any design to defraud him. That the partnership was continued during the period aforesaid, certainly not on such terms of harmony and good feeling as would have been desirable in a partnership conducted by brothers. That in the course of the business David Sexton had, as it had
206 *since appeared, executed his own individual note in numerous instances on contracts which it was alleged were on account of the firm; and this too after he had married and had acquired a separate property of his own, upon which he began to trade. That the longer the business was continued the more diffused it appeared to become, and consequently the complainant was less able to understand its capacity and extent. He therefore determined to make an effort to sever a connection, the business of which was so concealed from him, and which it was at least possible might involve him in inextricable difficulty, in addition to the daily indignities and insults which were lavished upon him by the said David.

That though aware of the disadvantage under which he would labor in contracting with the said David, who was well apprised of all the liabilities of the concern, and of the debts due to it, all of which had been so cautiously concealed from the complainant, yet he resolved to make the effort, and in May 1839, propositions were interchanged between them for a sale and purchase of the entire interest of the concern. That, preparatory however to the making the propositions, complainant said to the said David, that inasmuch as the business, at least all that part of it which had been done by him exclusively, and of which the books of the concern gave no information, and of which complainant had no personal knowledge, he must give him information on the subject that complainant might know the value of the concern, as well as its capacity to produce. That as to the value of the property, real and personal, belonging to the concern, as well as the amount of debt owing of which the books gave an account, complainant did not desire any information nor did he ask any. That the said David Sexton then distinctly informed the complainant that there were 8000 dollars then owing to the concern, which com-
207 plainant *was able to see from the books, and did see, was correct. He then distinctly informed complainant that the liabilities of the concern did not exceed 3000 dollars; he having stated that he had a list of all of them, leaving a balance in favor of the concern of 5000 dollars. That upon this information thus derived, and upon which complainant implicitly relied, the treaty for the contract commenced and was consummated.

That complainant was anxious to purchase the property and continue the business, as according to the information given by the defendant, of which he did not then doubt, it showed large profits during its previous existence, and complainant did not conceal his wishes on the subject, but they were communicated to the defendant by their mutual friends. That he expressed his willingness to give 9000 dollars in payments such as were named, and of this the defendant was informed; and he immediately came to the complainant with a proposition, either to give or take the said sum of 9000 dollars.

That superadded to all this, there was a further fraudulent and deceptive inducement held out to the complainant by the defendant, to induce him to make what the defendant then knew to be a bad and improvident contract. That the complainant observed to the defendant that he would have it in his power, if they should trade, to oppose complainant in business and thereby render complainant's business far less profitable, as the business at the place would not support two such establishments as they would each endeavor to keep up. To which the defendant replied that complainant need not give himself any fears on that subject, as he would promise and agree that he never would oppose complainant in business at Wythe court-house, the place where their business was carried on. And this constituted an important consideration and inducement to the purchase, which was shortly thereafter made.

208 *That under the circumstances hereinbefore disclosed, the complainant, on the 9th of May 1839, entered into a contract with the defendant, for the purchase of his entire interest in the partnership concern aforesaid, at the price of 9000 dollars, to be paid in five equal annual payments of 1800 dollars; and the complainant executed to the defendant his five notes, each for said sum of 1800 dollars.

That the complainant went on in good faith to perform his part of the contract, and did not discover for some time the iniquitous fraud that had been practiced upon him. That he paid the first two notes which fell due. That although he had not yet ascertained certainly the extent of the liabilities of the partnership, he has ascertained that instead of being 3000 dollars they would far exceed 5000 dollars, as he had already ascertained and adjusted debts to the amount of 5154 dollars 89 cents, and that there was probably much more to be heard of. That of very many of these debts the complainant had never heard until they

were presented for payment; and some of them were the bonds of the defendant, which he alleged were given for the partnership business. And further, that the defendant had, in violation of his contract, established himself near the establishment of the complainant, in business of the like character with complainant's, to compete with and oppose him.

That if complainant had been apprised of the true state of the concern, which he had no earthly means of ascertaining except through the defendant, he could not have been induced to make the contract; because his means would not have authorized him to make it; and because he would not have purchased a concern which to all appearances was not profitable.

That a suit had been brought on the third note of 1800 dollars due the 9th of May 1842, by the defendant, and judgment had been obtained, upon which complainant had given a forthcoming bond.

209 *The prayer of the bill was for an injunction to the judgment; that the contract might be set aside, the remaining two notes be decreed to be delivered up to the complainant; the amount paid by him returned with interest, and for general relief.

David Sexton answered the bill. He exhibited a copy of Joseph Sexton's will, and alleged that the plaintiff had greatly misrepresented its provisions; and he proceeded to point out the errors. He alleged that their father devised to them but one house, and no personal property; and that the plaintiff knew that all the real and personal estate except said house, had been acquired by them after the death of their father, and were the proceeds of the partnership business. He denied that the plaintiff did not understand the business of the partnership; and alleged that whenever complainant applied to him in a proper manner and at a proper time for information in relation to any branch of the business under the defendant's care, he gave him all the information in his power. He proceeded to answer in detail the various charges in the bill, denying some and explaining others. In answer to the charge of having fraudulently misrepresented the amount of the debts of the partnership, he says it is not true he informed the complainant the liabilities of the concern did not exceed 3000 dollars. That a regular set of books was not kept, and it was impossible to ascertain certainly the amount of the outstanding debts against the firm. That he hastily examined the books and papers, to ascertain as near as practicable the amount owing to the firm, and its liabilities. He does not remember whether or not the complainant requested him to give a list of the outstanding debts. That he did endeavor from his recollection to ascertain the amount of these debts, and to make a list of them. In this way he thinks he arrived at the conclusion that the outstanding notes and bonds owing by the firm

210 *amounted to between 3000 dollars and 4000 dollars. Open accounts were not taken into his calculation, because they were shown by the books. That he never represented the outstanding debts against the firm as amounting to any precise sum, because he did not know their exact amount, and because his estimate was made from memory only, as he believes was well known to the complainant. In making the estimate no interest was calculated on any of the outstanding debts. He said he had no recollection that he had ever heard that complainant would give 9000 dollars for defendant's interest in the concern. That if he had heard it, he was not influenced by it in determining what sum he would give for complainant's or take for his own interest. It was his opinion at the time, and still is, that the whole property of the firm was worth more than 18,000 dollars. He fixed the sum to be paid considerably less than he estimated its value, from the fact that he knew such a sum of money would be difficult to raise, and because he believed it to be just that he who should bind himself to pay such a sum of money for property ought to have a good bargain. At that time the property and debts owned and due to the firm were worth, after discharging all claims against it, more than 20,000 dollars. He denies that he ever agreed with or promised the plaintiff not to engage in the same kind of business at Wythe court-house, that they had been doing. He denies expressly that in negotiating the contract with the complainant he was guilty of any concealment or fraud, but he avers that he acted openly, fairly and honestly throughout the transaction.

Whilst the cause was pending in the Circuit court, the defendant recovered judgments on the two remaining notes, which were enjoined upon the grounds stated in the bill.

211 *The cause came on to be heard in April 1846, when the court held that the contract of May 9th, 1839, should not be rescinded, and, so far as the bill sought a rescission of the contract, it was dismissed. But the court held, further, that the plaintiff was entitled to relief to the extent of one moiety of the indebtedness of the partnership of D. & J. Sexton beyond the sum of 3000 dollars. And the case was referred to a commissioner to take an account of the indebtedness of the partnership on the 9th of May 1839, and report the same to the court, with any matter specially stated, deemed pertinent by himself, or required by the parties to be so stated.

In April 1848, the commissioner returned his report, by which it appeared that the firm of D. & J. Sexton were indebted, on the 9th of May 1839, in the sum of 6236 dollars 97 cents. The commissioner also reported a special statement, at the instance of the defendant, of the value of the partnership property at the same date, which showed that after allowing for all the debts due from the partnership, the property of the concern was then worth 18,729 dollars 3 cents.

In December 1848, the cause came on again to be heard, when the court, adhering to the opinion previously expressed, that the plaintiff was entitled to relief to the extent of one-half of the debts of the partnership above 3000 dollars, which was the sum of 1618 dollars 48½ cents, perpetuated the injunction as to that sum, and dissolved it as to the remainder. David Sexton thereupon applied to this court for an appeal, which was allowed.

The material evidence in the cause is stated in the opinion of the court.

Floyd and Sheffey, for the appellant.
B. R. Johnston, for the appellee.

212 *DANIEL, J., delivered the opinion of the court.

The court is of opinion that the Circuit court did not err in dismissing the bill of the appellee, so far as it sought a rescission of the contract of the 9th May 1839, in the bill and proceedings mentioned. But the court is also further of opinion that the Circuit court erred in holding that the appellee was entitled to relief to the extent of his portion of the indebtedness of the partnership concern of David and John Sexton beyond the sum of 3000 dollars, and in perpetuating the injunction, granted to prevent the appellant from collecting the amount of his judgment at law recovered by him against the appellee for 1800 dollars, with interest from the 9th of May 1842, as to the sum of 1618 dollars and 48½ cents, the half of such excess reported by the commissioner; this court being of opinion that the pleadings and proofs furnish no grounds for relief to the appellee to any extent whatever. The main allegations on which the relief prayed for was sought, were that the appellant represented to the appellee that the liabilities of the concern did not exceed 3000 dollars, when he in fact knew that they greatly exceeded the sum of 5000 dollars; and that he promised and agreed never to oppose the appellee in business at Wytheville. The last allegation is explicitly denied in the answer, and no proof whatever is to be found in the record to support it; and it therefore becomes unnecessary to consider whether, if proved, it would have furnished any ground for the relief sought. With respect to the first allegation, the appellant in his answer denies that he represented to the appellee that the liabilities of the concern did not exceed 3000 dollars. He states that a regular set of books was not kept, and that it was impossible to ascertain certainly the amount of the outstanding debts against the firm. That when engaged in the negotiation which led to the contract of the 9th
213 May *1839, he hastily examined the books and papers to ascertain as near as practicable the amount owing to the firm and its liabilities; that he does not remember whether the appellee requested him to give him a list of the outstanding debts or not; that he did endeavor from his recollection to ascertain the amount of debts outstanding against the firm, and to make a list of them. In this way he thinks he arrived at the conclusion that the outstanding notes and bonds owing by the firm amounted to between 3000 dollars and 4000 dollars; that open accounts were not taken into his calculation, because they were shown by the books; that he never represented the outstanding debts against the firm as amounting to any precise sum, because he did not know their exact amount, and because his estimate was made from memory only, as he believes was well known to the appellee.

It appears that the parties were not on speaking terms at the time of the negotiation which led to the contract of dissolution, and had not been for some time previous. They had no personal interview pending the negotiation; and Richardson, who mediated as a friend in bringing about an adjustment, is the only witness who speaks positively in reference to any representation made by either party touching the subjects of the contract. He states that he was frequently in the room of the appellant whilst he was making out his estimates for a proposition to buy or sell; that he (the appellant) estimated the value of the whole interest of the concern at about 18,000 dollars; and that he represented the debt due by the firm as being between 2000 dollars and 3000 dollars; and the debt due to the firm as being between 8000 dollars and 9000 dollars. It is to be observed that Richardson, though examined twice, does not in either of his depositions state that this representation was made for the information of the appellee, or that it
214 *was in fact ever communicated to him; and if his testimony in this respect is to be regarded as directly contradicting so much of the answer of the appellant as denies that he represented to the appellee that the debts due by the concern did not exceed the sum of 3000 dollars, it must be also further observed that this testimony stands unsupported by the other proofs in the record. It is in proof that no regular set of books was kept, and that the appellant, when urged by the appellee either to sell out his own interest or to purchase that of the appellee, desired to defer the negotiation; expressed a wish that the firm should continue in existence for a brief period longer, in order that the state of its affairs might be better ascertained, and each party the better enabled to arrive at a correct estimate of the value of the subjects to be bought and sold; and that he did not finally consent to enter upon the negotiation until hastened by a threat on the part of the appellee that he would file a bill for bringing the concern to a close, if he did not come to some conclusion at once; and that he then proceeded to estimate the value of the subjects of the treaty and to make the proposals, either to buy or sell, which resulted in the purchase of his interest by the appellee. It is true that Etler states that he held a conversation with the appellant a few days after the sale, in which the appellant stated that he had offered and

was willing to take or give the sum of 9000 dollars for the half of the concern; that a great deal of money was due to the firm; between 7000 dollars and 8000 dollars; and that the debt due by the firm did not exceed 3000 dollars. It is also true that Ryder states that the appellant, in a conversation with him a day or two after the contract of dissolution was entered into, told the witness that there were 8000 dollars due the concern, and that he thought there was not more than 3000 dollars due from the 215 concern; and that on his (the *witness) remarking that the appellee could never pay him in this world, the appellant replied that he did not see how he could help it, as there was about 5000 dollars due to the concern after paying the debts. Neither of these witnesses, however, disclose any admission on the part of the appellant that he had made any representation to the appellee in relation to the amount of debt due by the concern; and their testimony does not conflict with the idea, that any statements, made by the appellant to Richardson in reference to the amount of the indebtedness of the concern, were mere expressions of opinion or conjectural estimates hastily made from memory and without any design that they should be understood by Richardson as representations of the state of the outstanding debt, based on precise information. We therefore concur with the judge of the Circuit court in the belief expressed in his written opinion, that the record does not furnish the proof of any fraudulent representations made by the appellant in reference to the subject of controversy. We feel justified in going a step further and expressing the belief that the pleadings and proofs fail to disclose the practice of any dissimulation or the sort to any artifice on the part of the appellant to entice the appellee into the contract, or to mislead him as to the probable value of any matter that was the subject of their negotiation. As most if not all of the debts due by the concern were contracted by the appellant, and no regular books had been kept to which the appellee could resort for information as to their precise amount, we concede that the position of the appellant called for the exercise of the utmost good faith on his part. He was bound not only to disclose truly any information in his possession that might be called for, but if he perceived that the appellee was laboring under incorrect views in reference to the amount of the debt due by the con- 216 cern, by *which he might be misled into too high an offer for the interest to be sold, it was his duty to furnish all the data he might have, by which such views might be corrected and the mischief prevented. We do not, however, discover in the case the proof of any effort on the part of the appellant to abuse the confidence of the appellee, or to avail himself of any unfair advantage. We do not perceive that he has withheld any information called for, or that he has knowingly acquiesced in any mistaken views or estimates on the part of the appellee by which he might be ensnared into self deception and loss.

The bill, it is true, charges that pending the negotiation the appellee had frequently expressed his strong desire to purchase the interest of the concern, and continue the business, and also his willingness to give 9000 dollars for the moiety belonging to the appellant; that information of this state of things was communicated to the appellant, and that in consequence of it he made the proposition, either to buy or sell, at the price of 9000 dollars. The charge, though not made in terms, is thus inferentially suggested, that the appellant in making the proposition was in fact governed by the belief that 9000 dollars was the fair value of the interest, and by an honest desire either to give or take that amount for it, but by the belief that the appellee was acting under too high an estimate of the real value of the subject, in which he would probably be confirmed by such a proposition, and thus misled into an improvident bargain. In reference to this charge, it is sufficient to say that the answer expressly denies it, and that there is nothing in the testimony tending in the slightest degree to impeach the candor or sincerity of the appellant in making the proposition.

The judge of the Circuit court, whilst he acquits the appellant of all moral fraud 217 in the transaction, yet *holds him liable, on the ground that he has made mistaken representations about matters of business, the subject of the contract in relation to which he had information not possessed by the appellee; that the appellee has been misled by the representations, and consequently injured, and that the appellant is responsible for the consequences. The responsibility in some form and to some extent could not be denied, if the facts upon which it is based by the judge were admitted to be true. Neither of the facts, in our opinion however, appear in the case. We have already expressed our belief that the appellant made no representation as to any specific amount of debt as due by the concern; and we have no satisfactory data by which to arrive at a conclusion as to the amount which the appellee believed to exist at the time of entering into the contract; whilst all the proofs and circumstances go to negative the idea that the appellee based his views of the value of the interest purchased on any representation of the debts and liabilities of the concern which may have been reported to him as coming from the appellant. Instead of reposing confidence in the supposed superior knowledge of the appellant as to the extent of the debt due by the firm, it is in proof that the appellee greatly distrusted his partner, and regarded his conduct and statements with the utmost suspicion.

What estimates he made with a view to entering into the contract, or upon what data they were based, we are not informed by the evidence. He knew the value of the real estate; he was possessed of full information in respect to that branch of the

business which had been conducted by himself; and had, doubtless, a general knowledge and memory of the purchases which had been made for the firm. He knew, however, that there were no books furnishing precise information as to the ex-
218 tent of the indebtedness of the *firm, and his feelings of distrust and suspicion towards the other contracting party stood in the way of his relying on any statements which might come from him in relation to the matter. If he did not mean therefore to enter upon a contract of hazard, ordinary prudence would have required that he should postpone a settlement or adjustment till more accurate information as to the true condition and value of the different subjects to be treated about could be obtained. Yet we find him rejecting the proposal to defer for a while the conclusion of the bargain, thus discarding the only means of avoiding all risque, and hurrying the negotiation to a close. He cannot complain that he is held to have contemplated the hazard he might encounter, and to have intended to incur and abide by it. If under these circumstances his anticipations of profit have not been fully realized, we can not recognize the equity that would visit his disappointment on the other contracting party who pleaded for further time; and when it was denied, still left it to the election of the other party, either to give or take the price at which the interest was contracted for. The extent to which the value of the subject was to be affected by the outstanding debt was with each of the parties a matter of doubt and speculation, and neither can rightfully complain if the other acted with good faith. We can discover no want of it on the part of the appellant. We do not see that he has either said or done, or improperly omitted to say or do, anything whereby the appellee might be deceived and injured. We find in the case no ground on which the relief asked, or any relief in equity, can be properly based. And we come to this conclusion with the less reluctance, inasmuch as it is not made apparent that the appellee, even after allowing for the disappointment occasioned by the outstanding debt turning out to be larger than he anticipated, has made a hard bar-
219 gain. *Be this as it may, however, we do not perceive that the bargain was in any respect unfair, and know of no rule in equity by which the appellee can be relieved against its consequences. We think the injunction to the judgment on the note falling due on the 9th May 1842, ought to have been dissolved in whole with damages, and the bill dismissed with costs, &c. Decree accordingly.

Decree reversed, injunction dissolved, and bill dismissed.

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220 *Emerick, &c. v. Tavener.

July Term, 1852, Lewisburg.

Landlord and Tenant—Holding Over after Term Expires—Conveyances by Tenant of Part of Premises—Case at Bar.—T leases land to E by deed which is executed by E, and he thereby acknowledges that he is in possession under the lease, and covenants to restore the possession at the end of the term. E holds over after the term expires for seven years; and whilst in possession executes a deed by which he conveys a part of the leased premises to A in fee simple, with a covenant of warranty, and puts A in possession and disclaims to hold under T. T then institutes a proceeding of unlawful detainer against E and A. HELD:

1st. **Same—Same—Same—Unlawful Detainer—Liability of Tenant**—That E is responsible to T for the whole of the leased premises, though at the time of the institution of the proceeding A was in possession of a part of the land.

2d. **Same—Same—Same—Same—Recovery.**—That T's recovery is not to be confined to the land in the actual occupancy of E and A, but he is entitled to recover all the land demised; and he may show by parol testimony what constituted the demised premises.

3d. **Same—Same—Same—Same—Parties.**—That E and A were properly joined in this proceeding, though they did not hold the land jointly, but each held a part of the land in severalty: and if only one of them held any part of the land, T is entitled to a judgment against him, though there should be a judgment for the other.

4th. **Same—Same—Same—Same.**—Though if A was in actual possession of no part of the land claimed by the warrant at the time it issued, he would be entitled to a verdict in his favor, yet E, the lessee, would be responsible to T, and there should be a judgment against him, though at the time of the issue of the warrant he was not in the actual possession and occupancy of any part of the land.

5th. **Same—Alienee of Tenant—Notice to Quit—Case at Bar.**—A having entered on the land, claiming in fee under the conveyance from E, was not entitled to six months' notice to quit from T, though he had not expressly disclaimed to hold under the lease from T to E. And if he held expressly as under tenant of E, he would not be entitled to the notice. When T had determined the tenancy of E by six months' notice to quit, or E had disclaimed to hold as tenant, and thereby deprived himself of the right to notice, it was competent for T to proceed at once to oust both E and A.

6th. **Same—Unlawful Detainer—Description of Land—Case at Bar**—The lease being for a certain quantity of land, situate as therein described, and E having executed it under his hand
221 *and seal, and thereby recognized the description and boundaries therein specified, and that he then held the same in possession: and the warrant being for the precise tenement described in the lease, neither E nor A claiming under him, can be entertained to deny that the tenement had its boundaries, or that they were within them.

7th. **Same—Same—Evidence of Title in Lessee.**—E and A will not be permitted to introduce evidence of title to the land embraced in the lease, either in themselves or others; nor will they be permitted to introduce these title papers for the purpose of showing that they had not possession of the land claimed by T.

8th. **Same—Same—Description of Premises.***—T, if

***Unlawful Detainer—Description of Premises—Restitution Where Too Much Is Received.**—In Board of

entitled to recover, may recover according to the description of the land in the warrant or in the lease, and he must then point out at his peril, to the sheriff, the premises of which he is to give T possession; and if he takes more than he has recovered in the action, the court will interfere in a summary way and compel him to make restitution.

9th. Same—Tenant Holding Over—Recognition by Landlord—Effect †—E having entered under the lease, and held over after the term expired, if T did any act recognizing him still as his tenant, E became thereby tenant from year to year, upon the conditions of the original lease. If T did not recognize the continued tenancy, E was a tenant at sufferance, and not entitled to notice to quit.

10th. Same—Same—When Becomes Adverse.‡—E still being in as tenant after the term has expired, he continues to hold as such as long as he remains in possession, unless he disclaims to hold as such, and asserts a right adverse to T; and such disclaimer and assertion of adverse right are brought home to the knowledge of T by a full notice by E, of his disclaimer and assertion of title. And *quære*: If he must not surrender the possession to T.

11th. Same—Same—Liability of Alienee of Lessee.—A, by entering upon part of the land as purchaser from E, thereby became subject to the same relations held by E towards his lessor T, and neither could set up an adverse title, unless he showed he had restored the possession to T, or had disclaimed and held adversely, with full notice to T for the periods of limitation prescribed by the statutes.

12th. Same—Lessee Estopped to Deny Possession of Land Held.§—E and A could no more deny that the possession under which E entered was the possession of T, than they could controvert T's title.

The case is fully stated by Lee, J., in his opinion.

Fisher, for the appellants.

B. H. Smith, for the appellee.

222 *LEE, J. This is a case of unlawful detainer from the county of Wood. The warrant was sued out on the 18th of January 1848, by the defendant in error against the plaintiff, for the recovery of a tract of one hundred and sixty acres of land in that county. It was duly served upon the defendants therein named; and an appearance having been entered on the 24th of February 1848, a jury was empaneled for the trial of the cause. During its progress sundry bills of exception were taken by the defendants in the action (Emerick and Alton) to the opinions and rulings of the court, and the jury having found a verdict in their favor, the plaintiff (Tavener) moved the court to set it aside and grant him a new trial upon the ground that it was contrary to the evidence and to the in-

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Education v. Crawford, 14 W. Va. 796, it is said: "As the description of the premises, in the demise in the declaration, is also too general to serve as a direction to the sheriff, it is the practice for the lessor of the plaintiff, at his own peril, to point out to the sheriff the premises whereof he is to give him possession; and if the lessor take more than he has recovered in the action, the courts will interfere in a summary manner and compel him to make restitution. Jackson, etc., v. Stiles, 5 Cow. 418; *Emerick v. Tavener, 9 Gratt. 235;* Jackson v. Rathbone, 3 Cow. 291." See monographic *note* on "Unlawful Detainer" appended to Dobson v. Culpepper, 23 Gratt. 352.

†**Landlord and Tenant—Tenant Holding Over after Expiration of Term—Recognition by Landlord—Effect.**—Where the tenant holds over after expiration of his lease, and the lessor recognizes him still as his tenant, he becomes a tenant from year to year, upon the conditions of the original lease. For this proposition, see the principal case cited and followed in Allen v. Bartlett, 20 W. Va. 53. See *note* to principal case in 58 Am. Dec. 216.

‡**Landlord and Tenant—When Tenant's Holding Is Adverse.**—In Swann v. Young, 36 W. Va. 67, 14 S. E. Rep. 430, it is said: "In this state (W. Va.) such a deed by the tenant, and possession by the grantee under it, with knowledge thereof certainly and definitely brought home to the landlord, has somewhat the same effect as an actual disseisin under the common law. It renders such possession adverse, which, if permitted to continue for ten years after knowledge of such disclaimer, will bar the landlord's better right, and will be just as efficient in a court of equity as in a court of common law. Wiseley v. Findlay, 3 Rand. (Va.) 367; *Emerick v. Tavener, 9 Gratt. 220.* See Willison v. Watkins, 3 Pet. 43; Tayl. Landl. & Ten., § 522; Bigelow, Estop. 477; Campbell v. Fetterman, 20 W. Va. 398; Voss v. King, 33 W. Va. 236, 10 S. E. Rep. 402." See also, citing the principal case, Campbell v. Fetterman, 20 W. Va. 412; Reusens v. Lawson, 91 Va. 238, 21 S. E. Rep. 347. See *foot-note* to Alderson v. Miller, 15 Gratt. 279.

§**Landlord and Tenant—Denial of Landlord's Title—Estoppel.**—For the proposition that a tenant cannot dispute his landlord's title, the principal case is cited and approved in the following cases: Rakes v. Rustin Land, etc., Co., 2 Va. Dec. 157; McClung v. Echols, 5 W. Va. 215; Gale v. Oil, etc., Co., 6 W. Va. 210; Campbell v. Fetterman, 20 W. Va. 412; McFarland v. Douglass, 11 W. Va. 652; Miller v. Williams, 15 Gratt. 218, and *note*; Reusens v. Lawson, 91 Va. 258, 21 S. E. Rep. 347. The principal case is distinguished in Bushong v. Rector, 32 W. Va. 317, 9 S. E. Rep. 227.

In Turpin v. Saunders, 32 Gratt. 32, doubt is cast upon the question as to whether the estoppel exists where the tenant is already in possession when the lease is made, citing Miller v. Williams, *supra*. But in Locke v. Frasher, 79 Va. 413, citing and following the principal case, the doubt is resolved, this case holding that the general rule laid down above is not varied when the tenant is in actual possession at the time when he accepts the lease. See to the same effect, citing and following the principal case, for this proposition, Jordan v. Katz, 89 Va. 631, 16 S. E. Rep. 866. In Voss v. King, 33 W. Va. 240, 10 S. E. Rep. 408, it is said: "The doctrine announced in Franklin v. Merida, 35 Cal. 558, that, where a tenant already in possession of the premises accepts a lease from one claiming to be the owner, he will not be estopped to deny the title of such claimant, is not law in this state. It is only where a person in possession has been induced by fraud or mistake to believe that another has title when he in fact has none, and has upon that belief accepted the lease, that he will not be estopped. 2 Minor, Inst. (4th Ed.) 687; *Emerick v. Tavener, 9 Gratt. 220;* Alderson v. Miller, 15 Gratt. 279."

structions given by the court; and this being refused by the court, he excepted to the opinion of the court. Judgment having been rendered upon the verdict, Tavener then applied for and obtained a supersedeas from the Circuit court of Wood county; and upon a hearing in that court the court was of opinion that the judgment of the county court was erroneous; first, in giving the six instructions which it did give out of the nine asked for by defendants, and secondly, in overruling the motion for a new trial. The judgment was accordingly reversed, the verdict set aside and a new trial granted upon the principles indicated in the opinion of the Circuit court; and to this judgment from the Circuit court the defendants have obtained a supersedeas from this court.

The questions presented by the record are numerous, though several of them resolve themselves into one, and they will be considered in the order in which they appear to have been raised upon the trial in the County court.

The first is that presented by the first instruction asked for by the defend-
223 ants and given by the court. *If this could be construed to mean merely that the jury must be satisfied from the evidence that the defendant Emerick was, at the time of the institution of the suit, in the possession of some part of the premises claimed, either actually and directly, or by legal intendment, it might be free from objection. But considered in connection with the evidence, it seems clear that it raises and it may be presumed was intended to raise the question (presented in several different forms upon the record) as to the effect of the deed from Emerick to Alton, and his transfer of the possession to him upon the relations in which Emerick stood to his landlord, Tavener; and it must be construed as an instruction to the jury, that if Alton held the actual possession of the land conveyed to him by Emerick at the institution of the suit, as to that Emerick was not responsible to the plaintiff in this action; and the correctness of this conclusion is thus presented for our consideration.

The doctrine is well settled that if a privity of estate have existed between parties to an action, proof of title is ordinarily unnecessary; for a party is not permitted to dispute the original title of him by whom he has been let into possession. A tenant cannot be permitted to question or impugn the title of his landlord during the continuance of the tenancy, nor until he has restored the possession or done what would be regarded as equivalent; nor can he be permitted to deny that the possession so received was the possession of his landlord. And the rule is extended to the case of a tenant acquiring the possession by wrong against the owner, and to one holding over after the expiration of his lease; and it applies whether the question arises directly in an action brought against the tenant to recover the possession, or in a collateral form in some other action. Wood v. Day, 7 Taunt. R. 646; Fleming v. Good-
ing, 10 Bing. R. 549; Taylor v.
224 *Needham, 2 Taunt. R. 278; Cooke v. Loxley, 5 T. R. 4; Codman v. Jenkins, 14 Mass. R. 95; Inhab. of Watertown v. White, 13 Mass. R. 477; Galloway's lessee v. Ogle, 2 Binn. R. 468; Graham v. Moore, 4 Serg. & Rawle 467; Willison v. Watkins, 3 Pet. R. 43; Marley v. Rodgers, 5 Yerg. R. 217; Wilson v. Smith, Ib. 379; Jackson v. Dobbin, 3 John. R. 223; Crabbe on Real Property 327; Archbold on Landlord and Tenant 219. Nor is the rule varied where the tenant is in actual possession of the premises at the time he accepts a lease: he thereby as effectually recognizes the title and possession of the lessor, as if he had entered and taken possession under and by virtue of the lease itself. McConnell v. Bondry, 4 Munroe's R. 392. The same rule is recognized in equity. Wilson v. Lord Townsend, 2 Ves. jr. R. 693; Attorney General v. Lord Hotham, 3 Russ. R. 415.

When once this relation of landlord and tenant is established by the act of the parties, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or remotely, the succeeding tenant being as much bound by the acts and admissions of his predecessor as if they were his own. Doe v. Mills, 2 Adolph. and Ell. 17; Doe v. Austin, 2 Moore and Scott, 107; Doe v. Burton, 9 Carr. & Payne, 254; Doe v. Lady Smythe, 4 Maule and Selw. 367; Jackson e. d. Vandeuzen v. Scissam, 3 John. R. 499. It has been suggested, however, that although a party succeeding a tenant in the possession is to be presumed to have taken as tenant also, yet that he may repel that presumption and escape being concluded by the acts and admissions of his predecessor, by showing that he did not take in that character, as by producing a deed from the tenant purporting, (as in this case,) to convey the premises in fee. But the contrary has been expressly decided; and it has been held that though the party purchase and
225 enter upon the *premises under an absolute conveyance, he still, in judgment of law, is deemed to have entered as the tenant of the landlord, and to hold the possession subject to all the duties and responsibilities appertaining to that character.

Anciently it was held that if the tenant alien the estate in fee by a mode of conveyance which had the effect of divesting the estate of the reversioner, such as a feoffment, it was a forfeiture of the lease, and the lessor might enter. But this is now remedied in England by the statute, 8 and 9 Vict. ch. 106, § 4, which provides that a feoffment shall not have any tortious operation. But a conveyance under the statute of uses, such as the deed from Emerick to Alton, could not have the effect of a forfeiture, because it passed no greater interest than the tenant could lawfully convey, which was the interesse termini only; and this would not affect the rights and inter-

ests of the landlord. Bacon Ab. title Lease; Archbold's Landlord and Tenant 94. Thus Alton acquired, by the conveyance from Emerick and his transfer of the possession, as against the lessor Tavener, no greater right than that by which Emerick held the possession. He took the premises in the same plight and condition in which they were held by him, and with all the duties and responsibilities, so far as Tavener was concerned, which could attach to Emerick himself. This doctrine, that a tenant cannot be permitted, by any act of his during the tenancy, or until he surrenders the possession, to call in question his landlord's title, is as well sustained in reason and justice, as it is supported by numerous authorities; and the good sense and sound reason on which it is founded are very forcibly illustrated by the judge delivering the opinion of the court in the case of Wilson v. Smith, 5 Yerg. R. 379.

It is very clear, therefore, that Alton, after his acceptance of the deed, and 226 of the possession of the land *from Emerick, stood in the same relation in respect of it to Tavener as Emerick himself, and upon Emerick's disclaimer he was liable to be sued without notice to quit, and to be turned out of possession. Archbold's Landlord and Tenant, p. 87; Jackson v. Wheeler, 6 Johns. R. 272; Jackson v. French, 3 Wend. R. 339; Willison v. Watkins, 3 Peters' R. 43; Adams' Eject. 105. But it is supposed that even if he be so liable, yet that Emerick having parted with title and possession, is so no longer. If this be so, then Emerick has certainly changed his relations to his lessor by his conveyance to Alton, and has greatly modified the duties and responsibilities which they had involved, as well as the rights which his lessor could previously have asserted. One of the clearest and most undeniable rights which Tavener acquired by the lease to Emerick, was to receive peaceable possession of the premises upon the determination of the tenancy; and one of the plainest and most binding duties devolving upon Emerick was to surrender such possession. This is necessarily implied in every tenancy where not expressed; and in this case it was an express stipulation in the agreement of lease executed by the parties. A lessor may rest in security under a lease of his property to a tenant of his own selection, regarding the possession of his tenant as his own possession, held under his title and ready to be surrendered upon the determination of the tenancy; or if not surrendered, having a responsible man bound for it and for all costs that he may be compelled to incur if his tenant shall, by his own refusal or by putting others in possession who shall withhold the premises, render legal proceedings necessary to regain it. As Sir James Mansfield said, in Roe v. Wiggs, 5 Bos. & Pul. 330, "the tenant ought to be subject to the costs (of the suit for possession) if it be not delivered up by the under tenants; otherwise, a landlord would be in danger of hav-

227 ing a pauper put *into possession."

Accordingly, we find that where a tenant lets a portion of the premises to an under tenant, although on the determination of the tenancy he may have given a proper notice to his under tenant, and may have surrendered up all that part of the premises remaining under his control, he is still liable to his lessor in ejectment for the part withheld by his under tenant. Adams on Eject. 130. The case of Roe v. Wiggs, 5 Bos. & Pul. 330, was an action of ejectment by a lessor against his tenant to recover possession of the leased premises upon the determination of the lease. The defendant had sublet a part of the premises, and when served with notice to quit, he surrendered all that part retained by him, but his under tenants refused to quit the part underlet to them, and were in possession when the ejectment was served. It was objected in that case on the part of the defendant (the original tenant) that he was not, but the subtenants were in possession at the time the ejectment was brought; and that, although he might be liable to an action of assumpsit for not delivering up possession, yet the default of others could not make him a wrong doer in ejectment. The objection, however, was overruled, and there was a verdict for the plaintiff. A motion was made to set aside this verdict upon the ground that the original tenant ought not to be held answerable in this form; but the court held that the lessor could not be thus turned over by his tenant to regain his possession by a suit against a person who might be utterly irresponsible for costs, and that notwithstanding the transfer of his interest and possession by the tenant, he was still responsible to his lessor for the possession in an action of ejectment. And the same principle is recognized in the case of Pleasant e. d. Hayton v. Benson, 14 East's R. 234, where it was held that notwithstanding a subletting by the tenant, the original tenancy as to the lessor continued 228 *in full force and undetermined. And as when the lessor is entitled to demand possession of the leased premises, and finds another in possession claiming under his tenant, (whether as assignee, under tenant or purchaser, is immaterial, as we have seen, and he need not enquire,) he is clearly entitled to serve his ejectment upon him also, there could be no good reason why he might not unite him and his own tenant in the same action.

But it is supposed that if this be correct as to the action of ejectment, yet there may be a distinction between that action and the writ of unlawful detainer given by our statute; and it is suggested that the latter is a summary proceeding for the recovery of the very possession, against the party actually holding it and claiming it unlawfully; and that such an unlawful detainer is a tort in the nature of a trespass committed (in the case in judgment) by Alton, for which Emerick, who had no control over him, should not be held re-

sponsible in a proceeding of this character. I do not perceive any good reason for a distinction upon this point between the action of ejectment and the writ of unlawful detainer. I regard the latter as the mere substitute for the former to recover possession in those cases in which the right to the possession only is in controversy, in which the plaintiff is required to show no title to sustain his action, and in which the possession of the defendant has not continued more than three years (the statutory limitation in this form of proceeding) against the consent of the plaintiff; and upon whatever right and proofs he could maintain in such a case an action of ejectment against the defendants, he can upon the same right and proofs maintain this proceeding. As to the suggestion that the unlawful detainer is a tort in the nature of a trespass, for which the original tenant having no control over the party actually holding the possession ought 229 *not to be held responsible, it may be remarked, that the foundation of the action of ejectment is a supposed trespass, and yet we have seen he is clearly liable in that action. It has been held that where a tenant disclaims to hold under his lease, (as Emerick is proved to have done,) he becomes thereby himself a trespasser; his possession then becomes a tortious one, and the lessor's right of entry is complete; and he may sue at any time within the period of limitation. Willison v. Watkins, 3 Peters' R. p. 43. But a party may unlawfully detain the possession from him having right, without being himself in the actual possession, but through the agency and instrumentality of another who is. Here Emerick conveyed to Alton with certain covenants of warranty, and placed him in possession; and Alton is not at liberty to surrender the possession to Tavener. He is required by Emerick to retain the possession against Tavener and all the world until lawfully evicted, on pain, if he surrender it, of periling his remedy on the covenants of warranty in Emerick's deed. Thus Emerick may be said in a certain legal sense, for the purpose of this remedy, to cause and procure Alton to commit this supposed trespass by unlawfully detaining the possession from Tavener; and thus he himself becomes, according to the well settled doctrine on that subject, a principal trespasser, and jointly liable as such with Alton, the immediate agent. 3 Stark. Ev. 1445, and authorities there cited.

In every view, therefore, I am of opinion that taking this instruction in connection with the evidence, it did not give a correct exposition of the law upon the subject to which it relates, and that the County court erred in giving it to the jury; and consequently that the Circuit court did not err in directing that it should not be given upon a future trial.

The second instruction given on 230 the motion of the *defendant was, that under the lease given in evidence, in the absence of all other documentary testimony, the finding must be confined to the land in the actual occupancy of the defendants. This construction I think clearly erroneous. The plaintiff was not bound to show any title, and he had the right to show by parol testimony, if he could, what constituted the demised premises which he was entitled to recover. Crawford v. Morris, 5 Gratt. 90. The instruction was also calculated to mislead the jury in the terms in which it was expressed; and on both grounds I think the Circuit court properly directed it to be withheld from the jury on the future trial.

The third instruction the County court refused to give; and I will only here remark in regard to it, that I deem it clearly erroneous, and that the court was right in so refusing.

The fourth instruction was given, and it was to the effect that unless the jury should be satisfied the defendants were in the joint occupancy of the premises, enjoying the same jointly, they could not be joined in this proceeding, and they must find for the defendants. This presents the same question which I have considered upon the first instruction; and I have nothing to add to the reasons already assigned, why both defendants might be properly joined. But the instruction is otherwise erroneous in directing the jury to find for both defendants, even if they were not found in joint occupancy of the land; because if the party who was found to have no participation in the possession was entitled to a verdict in his favor, that was surely no reason why a verdict should pass also in favor of the other defendant who held the possession in severalty. I think the Circuit court properly directed this instruction to be withheld upon the new trial.

Of the fifth instruction asked for by the defendants, the object was to with- 231 draw and exclude from the jury *the lease executed by Tavener and Emerick, unless the plaintiff should offer some evidence of locality and boundary. This instruction the County court refused, and as I think, properly refused, to give.

The sixth instruction was, that unless the jury should be satisfied from the evidence that both the defendants were in actual possession of some part of the land claimed by the warrant at the time it issued, they should find for the defendant who was not proved to be in the actual possession or occupation of any part. If this instruction had been confined in its operation to the defendant Alton, it might have been free from objection; but as it is made to embrace the defendant Emerick also, and to place him and Alton on precisely the same ground, making the measure of his responsibilities the same as that of Alton's, it is in my view, for the reasons assigned in considering the first instruction, improper and erroneous; and the Circuit court did not err in directing that it should not be given on the new trial.

The seventh instruction was, that unless the jury were satisfied from the evidence

that the defendant Alton had disclaimed the tenancy, or had had six months' notice to quit, they must find a verdict in his favor. There was no privity of contract between Tavener and Alton. Alton entered into possession, claiming under a conveyance purporting to be in fee from the tenant Emerick, and if he had held expressly as under tenant of Emerick, it was neither necessary nor proper for the lessor Tavener to give him the half year's notice to quit. Alton had done no act to acknowledge holding under Tavener, but on the contrary, entered upon the premises claiming to hold adversely in fee. All that it was necessary for Tavener to do to entitle him to recover possession from Emerick his tenant, and eodem flatu, from Alton, was to determine the tenancy by the half year's notice
232 to quit to Emerick; *and that Emerick had rendered unnecessary by his formal disclaimer; as a tenant, by setting his landlord at defiance, or doing any act disclaiming to hold of him as tenant, forfeits his right to any notice to quit, and may be proceeded against immediately. And where a party claims to hold land in fee no notice to quit is ever necessary. Adams on Eject. 124; Archbold's "Landlord and Tenant" 87; Doe v. Long, 9 Carr. & Payne 773; Doe v. Grubb, 10 Barn. & Cress. 816; Jackson v. Deyo, 3 John. R. 422; Jackson v. Wheeler, 6 John. R. 272; Willison v. Watkins, 3 Peters' R. 43; Pleasant v. Benson, 14 East's R. 234; Roe v. Wiggs, 5 Bos. & Pul. 330. I think, therefore, there was no error in the refusal of the County court to give this instruction.

The eighth instruction was, that if the jury should be satisfied the deed from Emerick to Alton covered all the land which Emerick had in possession under the lease from Tavener, then the possession of said Emerick passed to said Alton at the date of the deed, and he had not at the institution of the suit such a possession as would subject him to this action, and that the jury must find in his favor. Without stopping to criticise the terms of the instruction according to which the mere execution of the deed by Emerick sufficed to put Alton in possession, although in fact he might still have retained the actual occupancy of the land, I will only remark that it raises exactly the same question of which I have already treated in considering the first instruction; and I have nothing further to add upon the subject. I am of opinion that the County court erred in giving this instruction, and that the Circuit court was right in directing it to be withheld on the new trial.

The last instruction asked for on the part of the defendant was, that the jury must be satisfied the claim of the plaintiff had boundaries and that the defendants
233 *were within them; otherwise they must find for the defendants. The warrant was for the recovery of the precise tenement described in the lease containing 160 acres of land, and situated as therein described; and Emerick had, by executing the lease under his hand and seal, recognized the description and boundaries therein specified, and that he then held the same in possession and was within those boundaries. Neither he nor Alton, who claims under him, can now be entertained to deny that the tenement had its boundaries, as it would be in direct contravention of the rule which forbids a tenant from disputing the title of his landlord, or questioning the very possession which he acknowledges he had received from him. But if it were otherwise unobjectionable, the terms in which the instruction was expressed might by their vagueness and want of precision, serve to mislead the jury; and on both grounds, I think the County court should have refused to give it.

The first bill of exceptions taken by the defendant was to the opinion of the court permitting a certain enquiry to be made of one of the witnesses. The enquiry was, however, afterwards withdrawn by the plaintiff, and nothing was said by that witness or any other in response to it. I dismiss it therefore without further notice.

The second bill of exceptions taken by the defendant was to the exclusion of the documentary testimony offered by him to be read to the jury. It consisted of a grant from the commonwealth to one Israel Lacy for 30,000 acres, embracing the land in controversy, which issued on the 20th of January 1797, with a certificate from the auditor showing that it had been forfeited to the commonwealth for nonpayment of taxes; also an entry made by Emerick of 100 acres of land, and a survey made for him of 117 acres of land, lying partly upon the 160 acres claimed by the plaintiff,
234 *and a grant to him for the same from the commonwealth, dated the 29th of February 1844; also an entry made by one Josiah D. Wilson and one Jacob Cork of 65 acres, lying wholly upon the 160 acres claimed by the plaintiff, and a grant to said Wilson and Cork for the same, dated 10th of May 1844; also the commissioner's books of Wood county, showing that the lands so patented to Emerick, and Wilson and Cork, had been duly entered thereon for taxation, and the receipts for the taxes properly chargeable thereon. The plain object and purpose with which the defendants sought to give this evidence to the jury, was to impugn and call in question the title of Tavener to the land. This I have already shown they could not be permitted to do in this action; and the County court rightfully refused to permit the evidence offered to be given to the jury.

The defendants then offered to give in evidence such of the papers before recited as, in their opinion, tended to prove that they had not possession of the land claimed by the plaintiff, or any part thereof; but the County court refused to permit any of the said papers to be read to the jury; and this refusal constituted the subject of the defendants' third bill of exceptions. Had the County court done otherwise, it would have completely nullified the decision which

they had just made, because the defendants might have thought all of these papers tended to prove that they had not the possession of the premises. I do not perceive how any of those documents could tend to throw light upon the question, whether Emerick and Alton had the actual possession of the premises at the date of the warrant or not, and I consider it as wholly irrelevant to that enquiry. To admit any of these documents would have effectually enabled the defendants to escape the operation and effect of the rule denying to them the right to impugn the title of the 235 lessor. I *think the County court was right in refusing to permit any of those documents to be given in evidence to the jury.

The defendants' fourth bill of exceptions was to the opinion of the court refusing three of the nine instructions which they had asked for, and which are set out also in the plaintiff's first bill of exceptions. With regard to the first and second of these instructions, which are, in substance and effect, the same as the third and fifth instructions set out in the plaintiff's first bill of exceptions, I will only remark, that I can perceive no ground upon which the lease from Tavener to Emerick should have been held void for uncertainty, or excluded from the jury, unless accompanied by evidence of the locality or boundaries of the land. The lease was of a tract of land "adjoining David Kinnaird," and formerly occupied by Henry Dye, containing 160 acres, and of which the said Emerick thereby admitted, under his hand and seal, that he was then in possession. The description thus given of the premises was much more precise than that required to be given in the complaint and warrant by the statute, and it was not for Emerick, I apprehend, to object that there was no proof of the boundary of the tenement, the locality of which he had distinctly recognized, and of which he acknowledged he held possession. The plaintiff, if otherwise entitled, may recover according to the description in his warrant or that in the lease, or such part as the verdict may find, and he must then point out to the sheriff the premises of which he is to give him possession, at his peril; and if he take more than he has recovered in the action, the court will interfere in a summary manner, and compel him to make restitution. Adams on Eject. 341; Jackson v. Rathbone, 3 Cow. R. 291; Camden v. Haskill, 3 Rand. 462.

The third of these instructions corresponds to the seventh of the series set 236 out in the plaintiff's first bill *of exceptions, and for the reasons then stated, I think the court was right in refusing to give it.

The defendants' fifth bill of exception was to the opinion of the court overruling their objections to the five several instructions asked for on the part of the plaintiff, and giving the same to the jury. The first of these instructions was, that if the jury believed Emerick entered into possession under the lease, but continued on the premises after the expiration of the term, he thereby became a tenant from year to year, according to the terms of the lease. The doctrine appears to be well settled, that where a tenant holds over after the expiration of his lease, and the lessor receives rent accruing subsequently to the expiration of the term, or does any act from which it may be inferred that he intends to recognize him still as such tenant, he becomes thereby tenant from year to year, upon the conditions of the original lease. Where, however, the lessor does no act recognizing a continued tenancy, the tenant holding over is but a tenant at sufferance, and not entitled to notice to quit. Adams on Eject. 110; Harding v. Crethorn, 1 Esp. R. 57; Doe v. Stennett, 2 Esp. R. 716; Bishop v. Howard, 2 Barn. & Cres. 100; Digby v. Atkinson, 4 Camp. R. 275; Hutton v. Warren, 1 Mees. & Welsb. 466; Jackson ex dem. Wood v. Salmon, 4 Wend. R. 327; Jackson v. McLeod, 12 Johns. R. 182; Wilde v. Cantillon, 1 John. Cas. 124; Jackson v. Raymond, Ib. 85, in n. In this case the tenancy created by the original lease terminated on the 1st of April 1840, and Emerick's being suffered to continue in the possession for upwards of seven years afterwards, might be regarded as a sufficient recognition of the tenancy on the part of Tavener to create a tenancy from year to year. Certainly the defendants cannot complain that Emerick's holding after the expiration of the original tenancy was placed on the more beneficial footing 237 of a tenancy from year to year *rather than that of a tenancy by sufferance. I think the court committed no error in giving this instruction to the jury.

The second instruction moved for by the plaintiff embraced the substance of the first, excepting that the relation between Tavener and Emerick, after the expiration of the original term, was described as a tenancy generally, without calling it a tenancy for years, and with this addition, that this tenancy continued as long as Emerick remained thereon, unless it appeared that he had disclaimed such tenancy and asserted a right adverse to the plaintiff; and that in such case, unless such disclaimer and assertion of adverse right were brought home to the knowledge of the plaintiff more than three years before the institution of the suit, he was entitled to recover against Emerick. It is clear, that possession of land, by the consent of the true owner, does not constitute adversary possession, and the possession of a tenant is the possession of his landlord; and his continuing in possession after the expiration of his term, as we have seen, creates an implied tenancy and is no disseisin of the landlord. Atherton v. Johnson, 2 New Hamp. R. 31; Jackson v. Raymond, 1 John. Cas. 85, in notis. Nor is his conveyance in fee a disseisin, unless at the election of the landlord. Jackson v. Davis, 5 Cow. R. 123. It is true it has been held that a tenant may by disclaimer, or by claiming the fee ad-

versely in his own right or that of another, convert the possession held under his landlord into a tortious and adversary possession. Willison v. Watkins, 3 Peters' R. 43. But I apprehend if this doctrine is to be sustained, he must at least give his landlord, who is reposing under the security of the tenancy, believing his tenant's possession his own possession, full notice of such disclaimer or assertion of adverse title. It was said by the judge delivering the opinion of the court in the case of Wil-
238 son v. Weathersby, *1 Nott & McCord, 373, that there must be a surrender of the possession to the landlord, or a distinct and bona fide abandonment of it at least, to put the tenant in a condition to dispute the lessor's title. He cannot be permitted to do so while he remains in possession. He has a right to purchase any title he pleases, but he is bound bona fide to give up possession and to bring his action, and recover by the strength of his own title. The relation between landlord and tenant is said to be in this respect similar to that between tenants in common, 3 Peters' R. 51; and it has been held with regard to the latter, that a silent possession by one tenant in common, accompanied with no act which can amount to an ouster or give notice to his cotenant that his possession is adverse, should not be construed into an adverse possession. Marshall, Ch. J., delivering the opinion of the court in McClung v. Ross, 5 Wheat. R. 116, 124; Purcell v. Wilson, 4 Gratt. 16. Still less it seems to me, would such a possession by a party coming in as a tenant, after the expiration of his term amount to an adversary possession. I think the court did not err in giving this instruction to the jury.

The third instruction asked for by the plaintiff embraced the substance of the second, and further sought an expression of opinion on the part of the court, that the defendant Alton, by entering on part of the land as purchaser from Emerick, thereby became subject to the same relations held by Emerick towards his lessor Tavener, and neither could set up an adverse title without showing that they had returned the possession; and that unless such possession had been restored to the plaintiff, or held adversely by the defendants for more than three years before the institution of this suit, the jury should find for the plaintiff. This instruction is entirely in unison with the views I have already expressed, and I think it unnecessary
239 to add *anything further to them. I will only remark that the instruction seems to be fully and directly sustained upon that branch relating to the plaintiff's right to recover, by the opinion of the court in the case of Willison v. Watkins, 3 Peters' R. 43. I think the County court committed no error in giving this instruction to the jury.

The fourth instruction embraced nothing more than did the second and third instructions, excepting perhaps the intimation to the jury, that if the tenancy claimed by Tavener to exist were established to their satisfaction, one of its legal consequences was, that the defendants could no more deny that the possession under which Emerick entered was the possession of his lessor, than he could controvert his title. This proposition was but a corollary from those already asserted, and entirely free from objection, for the reason I have already endeavored to assign.

The last instruction asked for on the part of the plaintiff, raises the same question which I have already fully considered in expressing my views upon the first instruction asked for on the part of the defendants, and to them I have nothing further to add. I think the County court was right in giving this instruction.

The last question in the cause is that arising upon the plaintiff's bill of exceptions to the opinion of the County court overruling his motion for a new trial, on the ground that the verdict was contrary to the evidence and the instructions of the court. The Circuit court reversed the judgment of the County court, upon the ground that that court erred in giving the instructions asked for by the defendants, and also erred in not granting the plaintiff a new trial, on the ground that the verdict was contrary to the evidence. The plaintiff proved that he had let the premises to Em-
erick for one year, commencing on
240 the 1st day of *January 1839, by a lease in writing, and signed and sealed by both parties, containing stipulations for the payment of rent, against waste, and for the peaceable surrender of the premises at the end of the term: the lease also recited that Emerick was in possession of the land at its date. He further proved that he had claimed the land as his for a number of years previously, and had made a verbal contract for the sale thereof to one Dye, about the year 1834, under which the said Dye took possession of it, built a cabin upon it, into which he moved his family, and lived upon the land some two or three years, during which time he cleared a small portion of it, and afterwards rented it for a year or two to subtenants; that without completing his purchase, and learning from Emerick that he had leased the land of the plaintiff, he, Dye, abandoned the possession. The plaintiff further proved, that on the 14th of April 1847 Emerick sold and conveyed by deed, with certain covenants of warranty, a tract of land, containing 46¾ acres by metes and bounds, lying in Wood county on Stillwell's creek, together with another tract adjoining the foregoing, containing 39 acres, also described by metes and bounds; covenanting to repay the purchase money and interest for the first described tract, if his title thereto should be superseded by a better within two years from the 1st of April 1846, and to warrant generally the title to the other tract. He further proved that Emerick owned and lived on the David Kinnaird farm, which adjoined the land in controversy, and had occupied the improve-

ment made by Dye on said land by cultivating the same, until within about two years, when he put the defendant Alton thereon under the deed aforesaid; and he further proved, that about the middle of November 1847 he produced the lease aforesaid, and demanded rent of Emerick for the premises; that Emerick acknowledged the lease to be his, but refused to
241 *pay rent, and that he, plaintiff, then demanded possession of the leased premises, and that Emerick refused to surrender the same, denied the plaintiff's title, and said he would neither pay rent nor surrender possession. The plaintiff here closed, and the defendants gave no testimony whatever tending to impair the plaintiff's right to recover upon the case so made. And upon this case I think it clear the plaintiff was entitled to recover, though as to the extent of his recovery, and whether on this joint action against Emerick and Alton, it must not be confined to that portion of the land of which Alton was placed in possession under his deed, I do not mean to be understood as expressing any opinion; the question not now arising in the case. I think, therefore, the County court erred in not setting aside the verdict, and granting the plaintiff a new trial.

And upon the whole case I am of opinion that there is no error in the judgment of the Circuit court, and that the same should be affirmed with costs.

The other judges concurred in the opinion of Lee, J.

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242 *McReynolds v. Counts & als.

July Term, 1852, Lewisburg.

Wills—Renunciation by Widow—Case at Bar.—M. by his will, devised his real estate to his wife for her life, and at her death to his son J; and he gave his personal estate, after payment of his debts, equally among his eight children. His real estate consisted of a farm on which he lived. His widow renounced the provision made for her by the will; and dower not having been assigned to her, she lived for some years on the farm, which she permitted her son J to cultivate and take the profits of, in consideration of his supporting her. Upon a bill filed by the other children to have dower assigned to the widow, and for a division and distribution of the estate, claiming an account of the rents from the widow and J. HELD:

1st. **Same—Same—Rights of Widow before Dower Assigned.***—The widow was entitled to occupy and cultivate the farm without rent until dower was assigned to her; and she might allow another to do it for her.

2d. **Same—Same—Disposal of Devise to Her—Indemnity of Legatees.**†—The two-thirds of the land remaining after the assignment of the widow's dower should be applied to indemnify the legatees of the personal estate for the loss they sustained by the widow's renunciation of the provision made for her by the will, and claim of her third of the personal estate; and for this purpose the said two-thirds of the land should be rented out and the proceeds applied to the satisfaction of the legatees.

3d. **Same—Same—Same.**—After the legatees have been satisfied for the loss of so much of their legacies as was taken by the widow, or after the death of the widow, whichever event shall first occur, the said two-thirds of the land is to be delivered to J as devisee in remainder under the will.

This is an appeal from a decree of the Circuit court of Russell county, made in a cause in which John Counts and others, heirs and legatees of Joseph McReynolds deceased, were plaintiffs, and Isaac and Rebecca McReynolds were defendants. The facts are stated in the opinion of Judge Samuels. The only additional fact which may be stated is, that by a verbal agreement between Isaac and Rebecca
243 McReynolds, *Isaac was permitted to cultivate the land and take the profits, in consideration of his supporting her.

B. R. Johnston, for the appellant.
Samuel Logan, for the appellees.

SAMUELS, J. Joseph McReynolds, by his last will, devised that his wife Rebecca McReynolds, during her life, should have the use and profits of all his real estate, as a home and support for her during her life, and, after her death, to pass unencumbered in absolute fee simple to his son Isaac, who is the appellant here. The personal estate, after payment of his debts, the testator directed to be divided into eight equal shares, one of which he gave to each of his seven living children, and one to the children of a deceased son. The widow waived and renounced the provision made for her by the will of her husband, and claimed her dower in the real estate, and her distributive share in the personal estate, as if her husband had died intestate. After this renunciation, the widow's dower not having been assigned to her, she continued for some years to occupy the land. 1 Rev. Code, ch. 107, § 2, p. 403. A bill was then filed by some of the children of Joseph McReynolds for the purpose of assigning the widow's dower, and making partition of the other two-thirds, and seeking an account of the rents and profits thereof. The Circuit court approving the principles asserted in the bill, by its decree directed

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***Rights of Widow before Dower Assigned.**—See monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

†**Wills—Renunciation by Widow—Disposal of Provisions for Her in the Will—Indemnity of Legatees.**—The widow cannot assert her paramount claim to distribution against the will, and also claim the provision, or any part of it, made for her by the will. If she elects to take the first, she must give up the last to indemnify the parties who are disappointed by her election. Findley v. Findley, 11 Gratt. 439, citing the principal case, and Mitchells v. Johnsons, 6 Leigh 461. See principal case also cited in Morriss v. Garland, 78 Va. 226. See, in accord, Kinniard v. Williams, 8 Leigh 400, 31 Am. Dec. 658.

The principal case was also cited in Nelson v. Kownslar, 79 Va. 479.

an assignment of one-third of the real estate as dower; a partition of the two-thirds into eight parts among the eight children of Joseph McReynolds or their heirs or vendees, and an account of the rents and profits of the two-thirds from the time of the waiver and renunciation. From that decree an appeal is taken to this court.

I am of opinion the Circuit court
244 erred in its decision *in regard to the rights of the parties as created and defined by the will of Joseph McReynolds, and as subsequently varied by the waiver and renunciation of Rebecca McReynolds the widow. The true construction of the will gave to Rebecca McReynolds an estate for life in all the testator's land, with remainder in fee to Isaac McReynolds. The waiver and renunciation placed the widow in precisely the same condition she would have occupied if her husband had died without a will. She had the right to occupy the mansion house and land belonging thereto without rent, until her dower was assigned. In this case the only land owned by the testator was the land belonging to the mansion house. She might occupy the land herself, or allow another to do it for her. It was, therefore, error to direct an account of rents and profits whilst it was so held either by her or by Isaac McReynolds with her permission. After the waiver and renunciation the widow became entitled to a distributive share of one-third of the personal estate after payment of funeral expenses and just debts, and to dower in one-third of the real estate. 1 Rev. Code, ch. 104, § 26, p. 381; 1 Rev. Code, ch. 107, § 11, p. 403. The remaining two-thirds, as a consequence of the waiver, would have passed at once into the possession of the remainderman, if no equity attached in favor of other persons. 6 Bac. Abr. title Remainder and Reversion, letter G., p. 756, 7 and 8; 2 Rolle's Abr. 415, pl. 4, 5, 6, 7, 9; Moor's Reports 519. The widow, by her renunciation of the will, disappointed the legatees to the extent of one-third of their respective legacies; by her waiver she gave up a life estate in two-thirds of the real estate. Familiar principles of equity authorize and require courts of chancery jurisdiction to sequestrate the property thus given up, and appropriate its profits to indemnify the legatees for their disappointment. Kinnaird's ex'or v.
245 Williams' adm'r, 8 *Leigh 400; Dillon v. Parker, 1 Swanst. R. 359; Gretton v. Haward, 1 Swanst. R. 409. The widow in this case having asserted her rights in opposition to the will, the interests which the will attempted to confer on her should be applied to indemnify the legatees for their loss, if any, consequent upon her taking a distributive share of the personal estate. The general rule, if allowed to prevail in this case, would require the sequestration of Rebecca McReynolds' life estate in the two-thirds of the land until the avails might indemnify the disappointed legatees, and then allow her to enjoy them until her death. The case before us, however, is withdrawn from the operation of the general rule by the statute, which puts an end to all her interest under the will, when she waived its provisions. After the legatees shall have been indemnified for their disappointment, the two-thirds should pass into the hands of Isaac McReynolds, the remainderman.

Applying these principles to the case, I am of opinion to affirm so much of the decree as directs the assignment of dower to Rebecca McReynolds; to reverse so much of it as directs an account of the rents and profits of the remaining two-thirds of the land, and as directs a partition thereof amongst the heirs of Joseph McReynolds, with costs to the appellant; to remand the cause to the Circuit court with directions to ascertain to what amount, if any, the legatees in Joseph McReynolds' will have been disappointed by the renunciation of the widow, and to cause the rents and profits during Rebecca McReynolds' lifetime, of two-thirds of the land to be applied as far as may be necessary to indemnify those legatees; and after full indemnification to the legatees, or after Rebecca McReynolds' death, whichever shall first occur, to place the land in the hands of Isaac McReynolds.

246 *The decree was as follows:

It seems to the court here, that so much of the decree of the Circuit court as directs an assignment of dower to Rebecca McReynolds in the estate of her late husband, Joseph McReynolds, is correct. But it further seems to the court here, that there is error in that part of the decree which directs an account of the rents and profits of the remaining two-thirds of Joseph McReynolds' land, and which directs partition thereof. It is therefore adjudged, ordered and decreed that so much of said decree as is hereby declared to be correct, be affirmed; and so much of it as is declared to be erroneous, be reversed and annulled; and that the appellees pay to appellant his costs expended in prosecuting his appeal here. It is further adjudged, ordered and decreed that the cause be remanded to the Circuit court, with directions to ascertain to what amount, if any, the legatees named in Joseph McReynolds' will, have been disappointed by the renunciation of the widow; and that for a period not exceeding the lifetime of Rebecca McReynolds, the rents and profits of the two-thirds of the land left, after assigning dower, be taken under the control of the court, and applied to indemnify the legatees for such disappointment. After indemnification to the legatees, or after the death of Rebecca McReynolds, whichever shall first occur, it is further adjudged and ordered that the land be placed in the hands of Isaac McReynolds, the remainderman.

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247 *Price v. Kyle.

July Term, 1852, Lewisburg.

1. **Arbitration Bonds*—Subsequent Endorsement†—Action of Debt—Case at Bar.**—P executes a bond sub-

*Arbitration Bonds.—See generally, monographic *note* on "Arbitration and Award."

†Bonds—Indorsement Considered Part of Bond.—In

mitting a certain matter to arbitration. The arbitrators disagree, and then P makes an endorsement on the bond by which he agrees that the arbitrators shall choose an umpire, and binds himself to abide by his award; and he signs and seals this endorsement. This endorsement is to be considered as a part of the bond, upon which as a whole, an action of debt may be instituted.

2. **Appeals—Law Governing‡—Case at Bar.**—A petition for an appeal having been presented to the court before the 1st of July 1850, though the appeal was not allowed until after that date, no damages are to be allowed upon affirming the judgment.

This was an action of debt in the Circuit court of Botetourt county, brought by William Kyle against John M. Price. The action was upon an arbitration bond, by which Price bound himself to Kyle in the penalty of 1000 dollars, to abide by and perform the award of two arbitrators selected to decide whether Kyle, who was a deputy sheriff, was entitled to have commissions upon two executions against the goods of Price which went into the hands of Kyle and were levied, but the property was not sold. The arbitrators differed in opinion; and then the following endorsement was made upon the bond: "I, the within bound John M. Price, having understood that the within named arbitrators, Thomas J. Michie and James L. Woodville, cannot agree upon an award in the within case referred to them, I am willing, and do hereby authorize the said arbitrators to choose an umpire, whose award I hereby bind myself, my heirs, &c., to submit to and abide and forever be governed by in the premises. As witness my hand and seal this 8th of April 1847.

John M. Price. (Seal.)"

248 *The arbitrators appointed an umpire, who made an award by which he awarded to Kyle 112 dollars 49 cents, and that Price should pay the expenses of the award.

The declaration set out the bond and the endorsement thereon and the award, and demanded the penalty. And to this declaration the defendant demurred. The question intended to be raised by the demurrer is, whether the endorsement was to be treated as a part of the bond, so that an action of debt might be maintained upon it; or whether it was to be taken as a distinct and substantive undertaking, upon which the action must be brought in covenant. The court below overruled the demurrer and rendered a judgment for the plaintiff: And the defendant obtained a supersedeas.

Hudson, for the appellant.
John T. Anderson, for the appellee.

DANIEL, J. The case turns on the effect of the sealed memorandum of the 8th April 1847 endorsed on the bond. In the written notes of argument filed by the counsel of the respective parties, it is contended on the part of the plaintiff in error, that the memorandum constitutes a new agreement wholly distinct from the bond of submission, and that the remedy for any failure to keep it is by an action of covenant on the agreement, and not by a suit on the bond; and, as authority in support of this position, the cases of Freeman v. Adams, 9 John. R. 115, and Brown v. Goodman, in a note to 3 T. R. 592, are referred to. Whilst, on behalf of the defendant in error, it is contended that the memorandum is to be considered, by relation to the date of the bond, as constituting part of the condition, and that the proper remedy for a breach is that which has been pur-
249 sued, to wit: suit *on the bond; and the cases of Shermer v. Beale, 1 Wash. 11, and Gordon v. Frazier, 2 Wash. 130, are cited as showing that the latter construction is in accordance with the decisions of this court.

The case of Freeman v. Adams, it must be admitted, is a direct authority in support of the views of the appellant. It will be seen, however, on an examination of the opinion of the court in that case, that it rests entirely on the case of Brown v. Goodman, mentioned above, and the case of Evans v. Thomson, 5 East's R. 189. And, in the case of Creig v. Talbot, 2 Barn. and Cres. 179, 9 Eng. C. L. R. 56, which was similar in all its features to that of Freeman v. Adams, Brown v. Goodman and Evans v. Thomson were very fully reviewed, and shown to furnish no authority for the proposition that an action could not, in such case, be maintained on the bond. The declaration in the case of Creig v. Talbot, after setting out the condition of the bond, stated that before the time therein limited for the making of the award had expired, the parties, by a deed endorsed on the back of the bond, agreed to give the arbitrators further time for making the award, and that an award was made within the extended time; and alleged nonperformance. Upon demurrer, the court were unanimous in holding that the action was maintainable. The judges in delivering their opinions, said that the legal effect of

Smith v. Spiller, 10 Gratt. 322, it is said: "In the cases of Broke v. Smith, Moor 679; Burgh v. Preston, 8 T. R. 483; and Gordon v. Frasier, 2 Wash. 130, the general principle is asserted, that a memorandum endorsed on a bond at the time of its execution, operating in favor of the obligor, and signed by the obligee, is to be considered as part of the condition of the bond. And in the cases of Creig v. Talbot, 9 Eng. C. L. R. 56; Shermer v. Beale, 1 Wash. 11; and *Price v. Kyle, 9 Gratt. 247*, decided by this court, at its last session in this place, the same rule was held applicable to like memoranda made at dates subsequent to the execution of the bonds on which they were respectively endorsed."

The principal case was also cited in Calwell v. Caperton, 27 W. Va. 412, 415. See principal case distinguished in Carter v. Noland, 86 Va. 571, 10 S. E. Rep. 605.

See also, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

‡**Appeals—Law Governing.**—See principal case cited in Crawford v. Halsted, 20 Gratt. 225. See also, monographic *note* on "Appeals."

the endorsement was not to drive the party to his action on that, but to vary the day mentioned in the condition of the bond, and to introduce as a term into that condition the extended period of time for making the award; that it was not the purpose of the parties to substitute the second deed in lieu of the bond, as a new and independent agreement of reference, but merely to vary the defeasance or condition, and to keep the bond in force as a subsisting security. Bayley, J., said that the case was clearly distinguishable from Brown
250 v. *Goodman, because there the submission was by deed, and it did not appear that the consent to enlarge the term was by deed; and he might have also added, that it did not appear that such consent was endorsed on the deed. Evans v. Thomson, he proceeded to show, instead of being authority against the right to maintain the action on the bond, was a strong case in its favor. Upon the authority of that case, the deed endorsed on the bond, he said, might be considered as virtually incorporating in it all the antecedent terms contained in the condition of the bond (with the alteration of the time within which the award was to be made), and might then be treated as a defeasance to the bond substituted in lieu of the original condition; and that the endorsement did not affect the bond as a security for the performance of the award, but only subjected it to a new defeasance. This decision was followed by the Supreme court of New Hampshire in the case of Brown v. Copp, 5 N. H. R. 346. The same doctrine also prevailed in the case of Penman v. Gardner, 1 Brevard's R. 498, decided by the Constitutional court of South Carolina.

It will be seen that Creig v. Talbot differs from Shermer v. Beale, in this: that whilst, in the first mentioned case, the endorsement is held as incorporating the antecedent condition of the bond, and thus constituting in the whole a new defeasance, in the last it was held, in the language of the court, that "the endorsement is to be considered as incorporated with, and as part of the condition of the bond, so as to constitute one entire agreement, and to be taken by relation to the date of the bond, so as to bring it within the original rule." The effect of each decision on the precise question before us is, however, exactly the same. For, whether we regard the endorsement as drawing to it the original condition, and making a new defeasance, or, by the fiction of relation, treat the
251 *endorsement as incorporated into the condition, in either case the original condition and the endorsement, as modified the one by the other, must be read as one entire agreement; and the bond still stands as a security for its performance.

The principles of Shermer v. Beale have been recognized by this court in the case of Gordon v. Frazier, 2 Wash. 130, and also in the case of Stone v. Hansbrough, 5 Leigh 422, and may be now regarded as well settled law in this state: And they seem to me to rule this case. I think the judgment ought to be affirmed.

The other judges concurred in the opinion of Judge Daniel.

Judgment affirmed, but without damages, the petition for the supersedeas having been presented before the 1st of July 1850, though not granted until after that date.

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252 *Stuart's Ex'ors v. Abbott & al.

July Term, 1852, Lewisburg.

(Absent DANIEL, J.*)

1. **Sale of Land—Retention of Title†—Case at Bar.**—A vendor retaining the title retains a lien on the land for the purchase money in the hands of a second purchaser.
2. **Executors and Administrators—Release of Lien‡—Case at Bar.**—The vendee being insolvent, a contract between one of the executors of the vendor and the second purchaser, which is doubtful in its import, will not be construed into an agreement to release the lien upon the land.
3. **Equity Practice—Release of Lien by Executor of Vendor—Effect.**—If one of the executors did contract to release the lien, it being the only security for the debt, it would not be enforced in a court of equity against the other executors.

This was a suit by the executors of Archibald Stuart deceased, against St. Clair Abbott and William Brown, to subject a tract of land in the possession of Brown for a balance of purchase money due from Abbott to Stuart's executors. In June 1823, Archibald Stuart sold to Abbott a tract of land then in the county of Monroe, but now in the county of Mercer, for 300 dollars, retaining the title. In 1826 Abbott made payments amounting to about 212 dollars 85 cents, and in 1829 he paid 6 dollars. In 1831 he sold the land to William Brown for 300 dollars, who paid him 210 dollars of the purchase money. In 1833 Brown paid to Gerard B. Stuart, one of the executors, 50 dollars, when Stuart gave to him the following paper:

"Received of William Brown 50 dollars, being part of a balance due on a bond executed by St. Clair Abbott to Archibald Stuart for 100 acres of land lying on Simmon's fork in the county of Giles, which land was sold by said Abbott to said

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*He is related to the appellants.

†**Sale of Land—Retention of Title—Subjection of Land for Purchase Price.**—For the proposition that, where the vendor retains the title to land, upon the sale of it, he has recourse upon the land for the purchase money, see the principal case cited and approved in Yancey v. Mauck, 15 Gratt. 308, and *note*; Stoner v. Harris, 81 Va. 461.

‡**Executors and Administrators—Release of Lien.**—Upon the question of the right of an executor or an administrator to release liens upon the land of their testator, see the principal case cited in Hoge v. Vintroux, 21 W. Va. 12; Stribling v. Coal Co., 31 W. Va. 90, 5 S. E. Rep. 326.

See monographic *note* on "Executors and Administrators."

253 Brown. Said Stuart's *executors agree to make a title to said Brown for the land as soon as Brown pays to them the balance of the purchase money due to said Abbott, provided that said balance amounts to 40 dollars.

Gerard B. Stuart, ex'or of
A. Stuart dec'd."

At the time this paper was executed the bond of Abbott was not present; and he was and has continued to be insolvent.

Brown in his answer insisted that by this paper the executors had released their lien on the land; and that Stuart had undertaken to make him a title upon his paying the balance he owed Abbott if it amounted to 40 dollars; and therefore that at most they could only subject the land for this sum: And so the court below held by its decree; from which Stuart's executors applied to this court for an appeal, which was allowed.

N. Harrison, for the appellants.
Caperton, for the appellees.

SAMUELS, J. It is somewhat doubtful whether the receipt given by Gerard B. Stuart, one of the executors, to the defendant William Brown, should be regarded as intended to make a new and substantive contract variant from that made by the testator in his lifetime with the defendant Abbott. Conceding, however, that it was so intended, yet under the circumstances of the case, it should not be allowed to have that effect. There were three representatives (of whom Gerard B. Stuart was one) charged with the official duty of collecting the assets of the estate; and with the further duty of conveying the land in the bill mentioned when the price of it should be paid. The only available security for the debt, which is part of the assets, is the land itself, inasmuch as Abbott, the purchaser, is utterly insolvent; and 254 the arrangement made by *Gerard B. Stuart, as understood by the appellees' counsel, is an executory contract to waive and renounce the only means of collecting a large proportion of the debt: In effect they would make it a contract to commit waste of the assets committed to the charge of the executors. 2 Wms. on Ex'ors 1104. Such a contract, if made, should receive no countenance in any court; it should not be enforced against Gerard B. Stuart himself; much less should the other executor and the executrix be compelled to unite in the devastavit.

I am of opinion that the decree should be reversed, with costs to the appellants; that the cause should be remanded to the Circuit court with directions to render a decree in favor of complainants against St. Clair Abbott for the balance due on his bond of June 26, 1823, with interest until paid, and costs of suit; and if the amount be not paid in a reasonable time to be fixed by the court, that the land in the proceedings mentioned, or so much thereof as may be necessary, be sold to pay the same and the costs of sale, on credits of six, eighteen and thirty months, for equal portions thereof, bearing interest, retaining the title as security for the price. If the money decreed to complainants shall be paid, that the deed filed in the papers be delivered to the defendant William Brown.

The other judges concurred in the opinion of Judge Samuels.

Decree reversed.

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255 *Allen, Walton & Co. v. Hamilton.

July Term, 1852, Lewisburg.

Judgment—Equitable Relief*—Case at Bar.—Upon a *scire facias* against special bail, he obtained a bail piece, arrested his principal, surrendered him to the jailor, and took the jailor's receipt for his body, and gave notice thereof to the attorney of the plaintiffs, they not residing in the county. Notwithstanding all this, there was an office judgment upon the *scire facias* against the bail, and he not appearing to defend the case at the next term, the office judgment was confirmed. Equity will not relieve the bail.

This was an appeal from the Circuit court of Bath county.

The case is stated in the opinion of Judge Allen.

Michie, for the appellants.
Fultz, for the appellee.

ALLEN, J. This is an application to a Court of chancery for relief in the nature of a new trial against a judgment at law. The appellant was special bail of W. W. Wolfenbarger, against whom the appellees had instituted an action of debt in the Circuit court of Bath county. A writ of ca. sa. being returned non est inventus, a scire facias was sued out against the appellant on his recognizance. The bill alleges that as soon as the appellant was apprised by the service of the scire facias, that proceedings were instituted to subject him to the payment of the debt, he, by the advice of his counsel, obtained a bail piece, arrested his principal, surrendered him to the jailor of Bath county, and took his receipt for his body. That the appellees did not reside in Bath county; but that on the day the surrender was made, notice of it was given to the attorney of the appellees, who was

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***Judgment—Equitable Relief against.**—See principal case cited in Hudson v. Kline, 9 Gratt. 384; Green v. Massie, 21 Gratt. 361; Goolsby v. St. John, 25 Gratt. 153; Perkins v. Clements, 1 P. & H. 153; Vance v. Snyder, 6 W. Va. 31; Shields v. McClung, 6 W. Va. 90; Morehead v. DeFord, 6 W. Va. 321; Ensign Mfg. Co. v. McGinnis, 30 W. Va. 543, 4 S. E. Rep. 788; *foot-note* to Haseltine v. Brickey, 16 Gratt. 116; *foot-note* to Slack v. Wood, 9 Gratt. 40. See also, *foot-note* to Green v. Massie, 21 Gratt. 356; *foot-note* to Goolsby v. St. John, 25 Gratt. 146.

New Trial—After-Discovered Evidence.—See principal case cited in Smith v. McLain, 11 W. Va. 668. See also, *foot-note* to Slack v. Wood, 9 Gratt. 40; *foot-note* to Brown v. Speyers, 20 Gratt. 296; *foot-note* to Read v. Com., 23 Gratt. 946.

256 at *the same time notified by the debtor of his intention to apply to a justice of the peace for his discharge as an insolvent debtor. That service of this notice was acknowledged by the attorney, and the debtor was discharged after taking the oath of insolvency. That being advised that his discharge was complete, and that judgment would be rendered against him at rules for the costs merely, he took no further steps for his defence; and that whilst he was absent from the county of Bath attending to his necessary business in another county, a judgment was rendered against him. By an amended bill it is further averred that he was advised by his counsel that upon surrendering his principal he would be exonerated from all liability as bail, except for the costs of the scire facias, and that there was no necessity to defend the scire facias, as nothing more could be done than to enter a judgment against him for the costs. The appellees demurred and answered. They admit in their answer that they did not reside in Bath county, deny all personal knowledge of the matters of fact averred in the bill, except so far as disclosed by the record, and rely on their judgment. A copy of the record in the case against the bail is filed, from which it appears that there was no appearance for the defendant, and the office judgment was confirmed in court on the last day of the term. There is also filed a copy of a notice from the debtor to the attorney at law of the appellees of his intention to apply for a discharge under the insolvent law, of which, however, there is no direct proof of service; the endorsement on the back purporting to be an acknowledgment of service, not appearing to have been signed by the attorney. There is also a copy of a schedule signed by the debtor, and of a discharge by the justice, though it does not appear from either the schedule or discharge to what execution they 257 relate. No depositions were *taken, and the case coming on to be heard by consent, the injunction was perpetuated with costs.

The numerous decisions of this court cited in the argument, to which may be added the case of Slack v. Wood, supra 40, decided during this term, have established the rule that a party having a good legal defence, shall not, after a judgment at law, bring the case into equity upon the legal matter, without alleging and proving a good excuse for not using it at law; and moreover, that a court of equity will not grant relief merely because injustice has been done. It is contended however in the bill, and has been insisted upon in the argument, that the circumstances of this case distinguish it from the cases to which the rule has been applied. That according to the terms of the act of assembly, 1 Rev. Code, § 54, page 502, by a surrender in court, or a surrender to the jailor, taking his receipt and giving notice to the creditor or his attorney, if he resides without the county, the bail is exonerated and discharged from his liability, and that as the matter operating such discharge is of record, the scire facias should have been dismissed, except for the costs thereof. The act referred to, provides that upon a surrender in the court the bail shall be discharged, or that he may discharge himself by surrendering his principal to the jailor, taking a receipt and giving notice. But the question still recurs, how is this discharge to be made to appear? If, as contended for in the bill, the scire facias should have been dismissed because the matter operating a discharge appeared of record, it must be on the ground that the court would be bound ex officio to take notice of all the record contained, and that the whole proceedings in the original cause constituted a part of the proceedings against the bail. If this were so, and the record disclosed the matter operating a discharge, then it would have been error to 258 *have rendered the judgment on the scire facias, and the proper course would have been to reverse it for this error appearing upon the record. But I do not suppose that even in case of a surrender in court, where every fact necessary to produce a discharge of the bail appears upon the record and proceedings of the original suit, the bail would be relieved from the necessity of showing it, when proceeded against by scire facias. It is not the duty of the court, unless the matter is brought to its notice by the defence, to look to the record to ascertain whether the bail has been discharged or not. And where, as in the present case, the surrender was not in open court, the record, even if examined, could furnish no such evidence. The surrender, receipt and notice were all acts in pais, of which the court could have no knowledge, until shown to it by the defendant. When duly established, the facts would show the bail was discharged, and so proof that a debt was duly paid would show that a plaintiff seeking to recover it, was not entitled to a judgment. But in either case the matters operating a discharge constitute a purely legal defence; and it is the duty of the party to avail himself of it at law. There is nothing in the terms of the act of assembly to distinguish the case of bail from that of any other defendant proceeded against at law, who, having a good legal defence, has neglected to make it. In this case, there is no excuse alleged except that he was advised that it was unnecessary to make any defence. With this the appellees have nothing to do. If without fraud on their part they have got a legal advantage, they cannot be deprived of it because the other side has acted upon an erroneous impression of his own, or the mistaken advice of his counsel; but as no proof is adduced that such advice was ever given, it is most probable that the allegation was made through mistake. The case is one of 259 great hardship on the bail, *but the books are full of such cases, and relief cannot be given without upturning a long series of decisions, and deciding that

no degree of laches in defending himself at law shall preclude a party from resorting to equity for relief.

I think the decree should be reversed with costs, the injunction dissolved and bill dismissed with costs.

The other judges concurred.

Decree reversed with costs; and this court proceeding to render such decree as the court below should have rendered, the injunction dissolved, and the bill dismissed with costs.

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260 *Senter & als. v. Pugh.

July Term, 1852, Lewisburg.

(Absent SAMUELS, J.)

1. **Public Roads—Appeal—Matter of Right.**—An appeal to the Circuit court is demandable as of right from an order of a County court discontinuing a public road.
2. **Same—Discontinuance of—Case at Bar.**—A County court having made an order establishing a public road and directing it to be opened, may entertain and act upon an application to discontinue the road before it has been opened.

This was an application to the County court of Grayson, by Drury Senter and Wilbourn Ross, to discontinue a public road. Robert Pugh entered himself a defendant, and opposed the motion. The jury appointed to view the road returned a verdict against the discontinuance of it. But the County court, upon hearing the evidence, ordered that the road should be discontinued. It appeared that in June 1842, the County court had established the road, and directed certain overseers of roads in the county, with their respective companies, to assist in opening it. The road, however, had not been opened or used as a public highway. Upon the rendition of the judgment by the County court, Pugh prayed an appeal to the Circuit court of Grayson county, which was granted.

When the cause came on in the Circuit court, it was heard upon a transcript of the record of the County court; and the Circuit court, on the ground that it was premature in the County court to entertain the application to discontinue the road, it appearing from the record that the said road never had been opened or traveled, reversed the judgment, and dismissed the application, with costs in both courts. From this
261 *judgment Senter and Ross obtained a supersedeas to this court.

Floyd, for the appellants.
B. R. Johnston, for the appellee.

MONCURE, J., delivered the opinion of the court.

This was a proceeding under our statute, 2 Rev. Code of 1819, p. 234, § 3, to discontinue a public road. Two questions arise in the case.

First. Is an appeal to a Circuit court demandable as of right from an order of a County court discontinuing a public road? We are of opinion that it is, and that the case is both within the words and meaning of the act of assembly, Sup. Rev. Code, p. 145, § 30, which declares that appeals to a Circuit court shall be demandable as of right from the orders of a County or Corporation court, in controversies concerning mills, roads or the like. This opinion is not in conflict with the cases of Hill v. Salem and Pepper's Ferry Turnp. Co., 1 Rob. R. 263, and Hancock v. Richmond and Petersburg Railroad Co., 3 Gratt. 328; in which it was decided that an appeal is not demandable of right to a Circuit court from an order of the County court affirming or disaffirming the report of commissioners appointed to assess the damages which would result from opening a road established by an act of incorporation. It is true, that in the latter case, Baldwin, J., in delivering the opinion of the court, said "that the law authorizing appeals as of right from orders of the County courts in controversies concerning roads, is applicable only to a controversy concerning the establishment of a road." But these words are to be construed in reference to the case in which they were used, and cannot be regarded as implying that the law is not also applicable to a controversy concerning the discontinuance of a road. As was
262 said in *reference to that case by Allen, J., in The Chesapeake and Ohio Canal Co. v. Hoy & als., 2 Gratt. 523, "it merely decides that in the particular case an appeal was not demandable as of right." The learned judge (Baldwin) was contradistinguishing controversies concerning the establishment of a road, from collateral controversies concerning damages occasioned by a road already established, as the road in that case had been by the act of incorporation; and intended only to say that an appeal was demandable of right in the former, but not in the latter cases. Wherever the existence of a public road is involved in a controversy (whether it be to establish or discontinue the road), the law authorizing appeals as of right applies to the case.

Secondly. Is it premature in a County court to entertain an application to discontinue a public road after it has been ordered to be established and opened, but before it is actually opened, or put in a condition to be traveled or used by the public? We are of opinion that it is not. After a road has been ordered to be established and opened, it may be actually opened at any time that may suit the convenience of the county, and can only be discontinued in the mode prescribed by law. Suppose that a road is ordered to be opened; but after the lapse of years, and before it is actually opened, public and private convenience requires it to be discontinued. Can it not be discontinued without first incurring the labor, expense and inconvenience of opening it? We think that it can. There is nothing in the terms of the law, and it would certainly be most

unreasonable, to require the road to be actually opened for the purpose only of being discontinued.

The result of the foregoing opinion is, that the judgment must be reversed, and the case remanded to the Circuit court for further proceedings to be had therein.

Judgment reversed.

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263 *Hale v. Crow & Wife.

July Term, 1852, Lewisburg.

(Absent SAMUELS, J.)

Contract with Sheriff to Survey Land—Assumption of Obligation by Successor—Case at Bar.*—A declaration alleges that J, a former surveyor of Grayson county, in consideration of a certain sum named, paid him by the plaintiff, had promised to furnish a land warrant and to enter and survey for plaintiff a certain piece of vacant land in Grayson county, with a view to enable plaintiff to obtain a grant for the same. That J wholly failed to make the entry; and that defendant having become the successor of J in the office of surveyor of Grayson county, in consideration of the promises of J, and of the payment to him by the plaintiff, and being required by plaintiff to enter said piece of land for plaintiff, agreed that he would furnish the necessary warrant for the purpose, and would enter the same in plaintiff's name in his office, and in due time would survey the same in order that plaintiff might obtain a grant; and that plaintiff agreed to pay the defendant his fees for the said survey whenever performed. It is then alleged that defendant failed to furnish a land warrant and enter said land for and in the name of the plaintiff, but had in fact entered and surveyed it for another person, to whom a patent had issued thereon from the commonwealth. Upon demurrer. HELD:

1st. **Same—Same—Consideration—Case at Bar.**—That considering this as a count in *assumpsit* upon a special contract between the plaintiff and defendant, it alleges no sufficient consideration moving from plaintiff to defendant, to ground and support the promise and undertaking imputed to him.

2d. **Practice—Misbehavior in Office—Failure to Set Out Any Act of Omission—Case at Bar.**—If it is to be considered a count in case to recover damages against the defendant for misbehavior or neglect of duty in his office of surveyor of Grayson county, then it does not set out any act, or the omission of any duty, on the part of the defendant as surveyor, under such circumstances as would render him liable in damages to the plaintiff in this action.

This case is stated in the opinion of the court delivered by Judge Lee.

B. R. Johnston and Floyd, for the appellant.

J. W. Sheffey, for the appellees.

264 *LEE, J., delivered the opinion of the court.

This is an action of trespass on the case brought by the defendants in error against the plaintiff in the Circuit court of Grayson county. The defendant demurred generally to the declaration, which contained but a single count, and the plaintiffs joined in demurrer; and after argument, the said demurrer was overruled by the court. The defendant then pleaded "not guilty," and the plaintiffs joined issue thereon. Upon this issue the parties went to trial, and there was a verdict for the plaintiffs on which the court gave judgment. Whereupon the defendant applied for and obtained a supersedeas from this court.

The declaration alleges that before the making of the agreement therein after to be mentioned, between the female plaintiff and the defendant, one Abner Jones had been the surveyor of Grayson county, and in consideration of certain sums named, which the female plaintiff had paid him, had promised to furnish a land warrant and to enter and survey for her a certain piece of vacant land in Grayson county, with a view to enable her to obtain a grant for the same from the commonwealth. That the said Jones wholly failed to make such entry; and that the defendant having become the successor of the said Jones in the office of surveyor of Grayson county, in consideration of the promises of the said Jones and of the payments made to him by the female plaintiff, and being required by her to enter said piece of land for her, agreed that he would furnish the necessary land warrant for the purpose, and would enter the same in her name in his office, and in due time would survey the same in order that she might obtain a grant; and that she on her part, agreed to pay the defendant his fees for the said surveying whenever performed. The declaration then alleges that the defendant utterly failed to furnish a land warrant and enter said land for and in 265 the name of the *female plaintiff, but on the contrary, had in fact entered and surveyed the same for another person to whom a patent had issued thereon from the commonwealth for the same; whereby the said land, which was of the value of 500 dollars, had become wholly lost to the plaintiffs.

Considering this as a declaration in assumpsit for the breach of a special contract between the female plaintiff in the action and the defendant, it must be regarded as defective, because it alleges no sufficient consideration moving from her to the defendant to ground and support the promise and undertaking imputed to him. The promises and undertakings of his predecessor in office and the payments made to him were not binding upon the defendant, nor could they constitute any valid or sufficient consideration for a promise on his part to make good the shortcomings of that predecessor. Nor does it change the case, that the female plaintiff, as the declaration alleges, agreed to pay the defendant his fees for the surveying when it should be performed. For it is clear that the payment of

*See *foot-note* to Fitzhugh v. Fitzhugh, 11 Gratt. 101.

those fees constituted no part of the consideration for the promise to furnish the land warrant and make the entry; they were to be the compensation for the particular service of making the survey, plat, &c., and the promise to pay them amounted to nothing more than the right the law gave to the surveyor to demand them upon rendering the services. The court is therefore of opinion that the declaration cannot be held a good declaration in assumpsit.

If the declaration, however, is to be considered as in case, to recover damages against the defendant for misbehavior or neglect of duty in his office of surveyor of Grayson county (and as such the parties from the pleadings would seem to have treated it), then it is to be enquired whether it alleges the doing of any act or the omission of any duty on the part of 266 *the defendant as surveyor as aforesaid, under such circumstances as would render him liable in damages to the plaintiffs in this action. It charges that the defendant, as such surveyor, being required to enter the said land (the same being vacant and unappropriated) for the female plaintiff, and in consideration of the promise of Jones, his predecessor, and of the payment made to him, agreed to furnish a warrant, and enter the same for and in her name in his office, and survey the same in due time, so that she might obtain a grant; but that he had failed to furnish the warrant and enter the land in her name, and had entered and surveyed it for another. Now it is no part of the official duty of the surveyor to furnish land warrants to a party desiring to enter waste and unappopriated lands. They are not issued by him, but by the register of the land office, on the payment of the consideration and fees into the treasury. The party desiring to make an entry obtains his warrant, and produces it to and lodges it with the surveyor of that county wherein the land or the greater part thereof lies, who is required to give a receipt for the same if demanded. Here the duty of the surveyor begins. Neither is it the duty of the surveyor to make the entry; the party holding the warrant is to direct the location thereof so specially and precisely as that others may be enabled with certainty to locate other warrants on the adjacent residuum; and the duty of the surveyor is to record this location with the date of the day on which it was made, in a book to be kept for that purpose; this is called the "entry." But he is expressly prohibited from admitting an entry for any land without a warrant from the register of the land office. Thus the failure of a surveyor to furnish a land warrant, or to make an entry for another, when no warrant is lodged with him, can amount to no such misbehavior in office or neglect of duty as under the 267 *circumstances disclosed in this case, will subject him in an action on the case to a liability in damages; and the remedy for any breach of an express contract or undertaking to that effect must be sought in an action of assumpsit on the special contract, setting out a good and sufficient consideration for the supposed promise, as in any other case of violation of a contract of agency.

After the entry shall have been made, it is the duty of the surveyor to proceed with all practicable despatch to make the survey upon it, first giving the notice of the time of doing so to the party in the manner prescribed by the act, and it is then the duty of the party entering the land to attend with proper chain carriers and a marker, on pain of losing the benefit of his entry; and a surveyor failing in this duty, or any other of the duties required by law, is made liable to any party injured for all damages he may sustain by reason of such failure. In this case, the declaration does not allege any failure to survey or to give notice of the time of doing so, that the plaintiff might attend with her chain carriers and markers. It rests the complaint of breach of duty on the failure to furnish the land warrant and make the entry. It is therefore unnecessary to consider under what circumstances a surveyor will be held liable for a failure to make a surveyor upon an entry as required by law. It is true it has been argued that a failure to make a survey in this case is sufficiently implied in the allegation, that the defendant had entered and surveyed the land for another person; but if the failure in this respect were the gist of the action, the ground on which the recovery is sought to be rested, it surely could not be sufficient to leave so material a matter to mere implication and intendment. It should have been directly and formally averred. But in truth, there is no necessary or proper implication to be made that the defendant failed to survey the land for 268 the female *plaintiff, from the averment that he had entered and surveyed it for another person; because nothing is more common than for a surveyor in the proper discharge of his duties, to receive entries and make surveys of the same lands for different persons claiming under different warrants. It is not for him to decide upon the validity of rights thus acquired, nor to pass upon the comparative merits of those that may be found conflicting. It is his duty to receive all such entries as parties may desire to make when they lodge their warrants with him under the regulations and conditions prescribed by law, and to make surveys for all alike upon their respective entries, leaving any questions as to the strength of the titles the parties may thereby acquire, to be decided by the proper tribunals.

Without considering therefore the other objections that have been urged to the declaration, the court is of opinion, for the reasons that have been stated, that the declaration in this case cannot be held good on demurrer, either as a declaration in assumpsit upon a special contract, or in case for damages occasioned to the plaintiffs by neglect of duty as surveyor on the part of the defendant. And this renders it unnec-

essary to decide any other question arising in the cause.

The judgment must be reversed with costs, the verdict set aside, and the cause remanded to the Circuit court, with instructions to sustain the defendant's demurrer to the declaration, unless the plaintiff shall apply for leave to amend the same, which, under the circumstances of this case, is to be granted if asked for, upon the usual terms of the said Circuit court.

Judgment reversed.

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269 *Carroll & als. v. Tiffany.

July Term, 1852, Lewisburg.

(Absent LEE, J.*)

Contract to Build Courthouse—Assignment—Interest of Original Contractor—Case at Bar.—C makes a contract with a County court for building a courthouse, and by the terms of the contract he is to give security for its performance. Owing to his insolvency he is not able to give the security, but with the consent of the County court entered of record, he assigns the contract to his son who gives the security; the persons becoming sureties for the son being unwilling to become sureties of C. The son then sells the contract for $1000. HELD: C had at no time such an interest in the contract as could be subjected to the satisfaction of his creditors.

The case is stated in the opinion of Samuels, J.

Price, for the appellants.
Grattan, for the appellee.

SAMUELS, J. The record in this cause is encumbered with a large quantity of matter not pertinent to the subject really in controversy. Separating the portions of the record on which the cause must be decided from the mass in which they are involved, the case is as follows:

Henry Tiffany, the appellee, obtained a judgment in the Federal court for the western district of Virginia at September term 1839, against the appellant, William Carroll; and one Daniel Felton, at the September term 1843 of the Circuit Superior court of law and chancery for Preston 270 county, obtained a decree *against the same William Carroll for the payment of money. Felton forthwith sued out a ca. sa. on his decree, had Carroll arrested thereon, who relieved himself from custody by taking the benefit of the acts of assembly for the relief of insolvent debtors. Henry Tiffany then filed his original bill against William Carroll, Amos Carroll, John Scott and Benjamin Morton, charging them with confederating for the purpose of hindering, delaying and defrauding complainant and others, the creditors of William Carroll, in the collection of their debts; alleging that a certain tavern-house in the town of Kingwood in Preston county, nominally bought by the defendant Scott, was paid for by money furnished by the defendant William Carroll, and that it was held in secret trust for him; that the money used in paying for the tavern-house was derived from a contract made by William Carroll with the County court of Barbour county for the erection of a court-house for that county; and seeking to subject the tavern-house, or the money derived from the contract aforesaid, to the satisfaction of complainant's demand. The defendants, and especially the defendant Scott, were interrogated minutely in the bill in regard to this subject; in regard to all which they answered, explicitly denying the fraud imputed, and giving a version of the transaction which entirely exculpated the alleged confederates from all the charges made against them.

Regarding the original bill as filed to enforce the lien of the judgment and to remove impediments out of complainant's way, the bill on its face presents a case of which the court might take cognizance. The objection made by the appellants here that the suit was prematurely brought, cannot therefore be sustained.

After the original bill was filed, the complainant sued out a ca. sa. on his judgment at law, on which his debtor, William Carroll, was arrested and discharged 271 *from custody, under the acts of assembly for the relief of insolvent debtors. Thereupon complainant filed a supplemental bill setting forth this additional fact, and asserting his claim to the money arising from the court-house contract. This money was the object of complainant's pursuit, either as money or as invested in the tavern-house aforesaid. The result of the controversy must depend upon the true construction of the contract for building the court-house. William Carroll, when wholly insolvent, entered into an inchoate contract with the County court for building the court-house, and by the terms of the contract he was required to give security for the performance of the work. Whilst the subject was in suspense, awaiting Carroll's compliance with the terms of the contract, before it should become binding on either party, Felton's ca. sa. was issued, and Carroll was arrested and discharged as above stated. In Carroll's condition it was impossible for him to give the security, and thus make the contract binding. It was agreed, however, between William Carroll, Amos Carroll and the County court, that William Carroll should assign his inchoate contract to Amos Carroll, and that Amos should give the security and take the contract on himself. The securities who signed the bond were willing to become bound as such for Amos Carroll, but were not willing to be bound for William Carroll. Although William Carroll also signed the bond, it is perfectly clear that the subject was thus fully understood. The fact of the assignment is entered upon the minutes of the proceedings had in the County court. After the assignment to

*He had entered the decree, though he had not decided the cause, in the Circuit court.

Amos Carroll, he sold the contract to Hall for a profit of 1000 dollars, which is the money in controversy here.

A correct analysis of this contract will show that in equity Amos Carroll should be regarded as the contractor; he was bound to indemnify William Carroll
272 *for his undertaking; he stood in the relation of principal to the securities; he alone was looked to by the court and all others for performance of the work. Nor could the charge of fraud be predicated on the fact of the assignment to Amos Carroll. In William Carroll's hands the contract was merely inchoate, and could be of no value whatever to his creditors. From his insolvency, he could not have given the security to make it binding. He had no assignable interest which could pass at the time of his discharge under Felton's ca. sa. At the time of his discharge under Tiffany's ca. sa. his interest had already been assigned in pursuance of the terms of the arrangement, by which alone he was able to make the contract at all.

On the whole, I am of opinion that neither complainant nor any other creditor of William Carroll was in any degree injured by the assignment to Amos Carroll; that whether the price for which Amos Carroll sold the contract to Hall be represented by Hall's bonds or by the tavern-house, it is beyond complainant's reach. I am of opinion to reverse the decree with costs to appellants; dismiss the original and supplemental bills, and that the costs of the Circuit court be paid by the appellees.

The other judges concurred.

Decree reversed.

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273 *Sillings & als. v. Bumgardner, Guardian.

July Term, 1852, Lewisburg.

(Absent LEE, J.)

1 **Suit to Obtain Possession of Ward's Estate—How Brought.***—A guardian is not authorized to file a bill in his own name to obtain possession of his ward's estate, but must file it in the name of the ward by his next friend.

2. **Suit by Distributee to Obtain Share—Parties.**†—In general one distributee cannot maintain a suit to recover his distributable share of the estate without making the other distributees parties.

3. **Equity Practice—Amended Bills—Addition of Parties**‡**—Case at Bar.**—A husband of one distributee who was also one of the personal representatives, and guardian of the other distributee, files a bill in his own name as guardian of the infant distributee, against the other personal representative and the sureties, charging that the personal representative was indebted to the estate and insolvent: and asking a decree against the sureties. There is a decree accordingly in the court below. Upon appeal the decree is reversed for want of proper parties; but the husband having an interest in right of his wife, the bill is not dismissed, but is sent back, that he may amend his bill and make proper parties.

In 1835 William A. Hanger died, leaving a widow Rebecca, and an infant son Robertson Hanger. At the May term of the County court of Augusta the widow, Rebecca Hanger, and Henry Imboden qualified as administratrix and administrator of William A. Hanger, and executed a joint bond with John Sillings and two others as their sureties. In 1839 John Bumgardner married the widow Rebecca; and in the same year qualified as guardian of Robertson Hanger. In 1843 he instituted a suit in equity in the Circuit court of Augusta county, in which he, describing himself as guardian of Robertson Hanger, was the only plaintiff, and the administrator Im-

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***Guardian and Ward—Suit to Obtain Possession of Ward's Estate—How Brought.**—For the proposition that a guardian is not authorized to file a bill in his own name to obtain possession of his ward's estate, but must file it in the name of his ward by his next friend, the principal case is cited and approved in Burdett v. Cain, 8 W. Va. 288; Morrison v. Householder, 79 Va. 631.

See monographic *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

†**Suit by Legatee to Obtain Share—Parties.**—In Rexroad v. McQuain, 24 W. Va. 35, it is said: "While a legatee whose legacy has been consented to by the executor may sue the executor for it at law without joining the other legatees—Brown v. Ricketts, 3 Johns. Ch. 553—still, where the fund out of which the legacies are to be paid proves insufficient or is subject to debts, which requires a proportional abatement from each legatee, all the legatees must be parties. Richardson v. Hunt, 2 Munf. 148; Sheppard v. Starke, 3 *Id.* 29; *Sillings v. Bumgardner, 9 Gratt. 273.*"

‡**Equity Practice—Amended Bills—Addition of Parties.**—For the proposition that; where it appears that the plaintiff has an interest in the suit, but the proper parties are not before the court, the cause will be remanded and the plaintiff allowed to amend his bill, the principal case is cited and approved in the following cases: Coffman v. Sangston, 21 Gratt. 269, and *note*; Dabney v. Preston, 25 Gratt. 841, and *note*; Belton v. Apperson, 26 Gratt. 222, and *note*; Stewart v. Thornton, 75 Va. 221; Morrison v. Householder, 79 Va. 629; Keyser v. Renner, 87 Va. 250, 12 S. E. Rep. 406.

In Dower v. Church, 21 W. Va. 50, it is said: "The want of proper parties is always a good ground of demurrer, and it has been frequently laid down by the courts in very broad language, 'that all persons materially interested in the subject of controversy ought to be made parties in equity; and if they are not the defect may be taken advantage of by demurrer or by the court at the hearing.' And also, 'that where such defect is apparent on the face of the records, although the bill cannot be demurred to in the court below nor the defect noticed by the court at the hearing, it will be noticed by the court at the hearing in the appellate court and the decree reversed for that cause.' See Dabney v. Preston's Adm'rs, 25 Gratt. 841; Armentrout v. Gibbons, 25 Gratt. 371; *Sillings v. Bumgardner, 9 Gratt. 273, 275;* Richardson's Ex'or v. Hunt, 2 Munf. 148; Sheppard's Ex'or v. Starke and Wife, 3 Munf. 29; McCoy's Ex'or v. McCoy's Devisees, 9 W. Va. 443; Lyman v. Thompson, 11 W. Va. 427."

boden and the three sureties were the only defendants; and in his bill, after setting out the foregoing facts, stated that
274 the administration *accounts had been settled, in which there were considerable balances found against the said Rebecca and Imboden. That the widow had not been credited with her distributable share of the estate, and that Imboden was insolvent. And he asked a decree against the sureties for the amount found due from Imboden.

The sureties answered the bill; and several questions were made in the cause which were not decided by this court. The court below gave a decree in favor of the plaintiff against Imboden, and if the decree against him should prove unavailing, then over against the sureties. From this decree they applied to this court for an appeal, which was allowed.

G. N. Johnson, for the appellants.
Fultz, for the appellee.

MONCURE, J., delivered the opinion of the court.

Several very interesting questions were discussed in this case, which it will be unnecessary, if not improper, at this time to decide. Among other objections taken by the appellants' counsel to the decree of the Circuit court is that of want of proper parties; which we are of opinion is fatal. The suit was brought to recover of an administrator the distributable balance due by him. The only distributees were the widow and child of the decedent; and neither of them was a party. Both were necessary parties. In general one distributee cannot maintain a suit to recover his distributable share without making the other distributees parties. Story's Eq. Pl., § 89; Richardson's ex'or v. Hunt, 2 Munf. 148; Sheppard's ex'or v. Starke, 3 Id. 29. So that if this suit had been properly brought in the name of either of the distributees, it could not have been sustained without making the other a party. But it is properly brought in the name of neither; and a fortiori, it cannot be sustained.
275 If the appellee intended *to assert in the suit the claim of his wife as a distributee, he should have made her a coplaintiff with himself. If he intended to assert the claim of his ward as a distributee, the suit should have been in the name of the infant by his next friend, and not in the name of the guardian, even though he be described in the bill as "guardian of the ward." A guardian is not authorized to file a bill in his own name to obtain possession of the property of his ward, but must file it in the name of the ward as his next friend. This was expressly decided by this court in the case of Lemon, guardian, v. Hansbarger, 6 Gratt. 301; and also by the Court of chancery of New York in the case of Bradley v. Amidon, 10 Paige's R. 235. The wife was also a proper party, because she was one of the administrators and a co-obligor in the administration bond given by them.

But the counsel for the appellee contended that this objection, not having been made in the court below, now comes too late. But it was not waived in the court below; the want of parties appeared on the face of the bill; and in such cases it is well settled that the objection is fatal in the appellate court, though not taken in the court below. 2 Rob. Pr. 276, 433, and cases cited; Richardson's ex'or v. Hunt, 2 Munf. 148; Sheppard's ex'or v. Starke, 3 Munf. 29.

The decree must therefore be reversed for want of proper parties. But ought the bill to be dismissed, or the case remanded, and permission given to amend the bill and make the proper parties? In the case of Lemon, guardian, v. Hansbarger, 6 Gratt. 301, the bill was dismissed: and that would be the proper course in this case if the appellee had no further connection with, or interest in, the case than as guardian of the infant. A bill filed by a sole plaintiff having no interest whatever in the subject matter of the suit, must be dismissed. Bradley v. Amidon, 10 Paige's R.
276 235. But *the appellee was otherwise interested in the case. He was interested as husband of one of the distributees, and was therefore a proper party to the suit. He should have joined his wife with him, who was also a proper party. But his omission to do so, though a defect, is not a radical one, and may be cured by amendment. It may be said that he sued in auter droit, as guardian and not as husband. But he cannot sue as guardian; and the words "guardian of Robertson Hanger, an infant under the age of 21 years," are mere descriptio personæ, and do not change the personal character of the suit. It is only the individual suit of the appellee. The bill states a case and asserts a claim in which not only the infant, but the appellee and wife are interested. By striking out the descriptive words, and inserting the name of the wife, and that of Robertson Hanger, by his next friend if he be yet an infant, or making him a defendant, the defect of the bill would be cured.

We are therefore of opinion that the decree should be reversed, and the cause remanded in order that proper parties may be made, and further proceedings had therein.

Decree reversed.

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277 *Leas' Ex'or v. Eidson.

July Term, 1852, Lewisburg.

(Absent LEE, J.)

1. **Contracts—Sale of Land—Mutual Mistake as to Boundary—Equitable Relief.***—In a written contract for the sale and purchase of land by the acre, the purchaser will not be relieved in equity on the

*Contracts—Mistake—Reformation.—"Although a deed or other instrument may be reformed, when through mistake or accident it does not accurately represent the agreement of the parties, it is necessary that both the agreement and the mistake shall be made out by the clearest and most satisfactory

ground of a mutual mistake as to the boundaries of the land, unless the mistake is fully and clearly proved.

2. **Chancery Practice—Evidence—Answer.**†—Plaintiff after setting out his case in his bill, states what he understands is the pretention of the defendant. This is not such an allegation as will constitute the answer responsive thereto evidence, and will throw the burden, of disproving it upon the plaintiff.

The case is stated in the opinion of Judge Moncure.

Fultz, for the appellant.
Baldwin, for the appellee.

MONCURE, J. This was a suit brought by Swoope, executor of Leas, against Eidson, for the specific performance of a contract under seal for the sale of "the plantation on which said Leas resided in his lifetime, supposed to contain 260 acres, at 15 dollars per acre," payable by installments. Performance was resisted on the ground of mistake as to a parcel of land containing fourteen acres, which it was alleged was embraced in the lines by which the plaintiff sold and defendant purchased; and was of such value, intrinsically and relatively to the balance of the tract, as to entitle the defendant, if he could not get the said parcel of land, to have a rescission of the contract, or at least such an abatement of the purchase money as would compensate him for the injury. After a survey was made and sundry depositions
278 were taken in the *cause, it came on for hearing; when the Circuit court, being of opinion that the contract was entered into under a mutual mistake of the boundaries of the land materially affecting and impairing the value of the land to the purchaser, yet not to such an extent as that it might not be compensated for by an abatement from the purchase money, or as would justify the court in rescinding the contract or refusing specific performance upon any terms, decreed the execution of the contract upon the terms of compensating the defendant by an abatement from the purchase money for the injury resulting from the mistake; which the court from the testimony in the cause estimated and assessed at 500 dollars. From this decree the plaintiff appealed to this court. The case was submitted without argument at the last term, when the court being of opinion that the contract was not entered into under a mutual mistake, reversed the decree of the Circuit court, and decreed the execution of the contract without any abatement from the purchase money. But afterwards during the same term, the decree was set aside and the case reinstated on the docket for argument. During the present term, the case has been fully argued and now comes up for reconsideration.

It is now well settled that a mutual mistake of the parties in a matter which is part of the essence of the contract and substance of the thing contracted for, will be corrected by a court of equity, and may be good ground for rescinding the contract or executing it on equitable terms of compensation, according to circumstances, even though the contract be in writing, and required to be so by the statute of frauds. 1 Story's Eq. Jur., § 134, 144, 152, 142; 1 Munf. 330; 6 Id. 283; 3 Rand. 504; 6 Id. 552; 3 Leigh 113. There is no doubt but that if the contract in this case was in fact entered into under a mutual mistake of the boundaries of the land, the mistake
279 was in a matter *which was part of the essence of the contract and substance of the thing contracted for, and the defendant was entitled to relief in some form or other, whether in the form of a rescission of the contract, or of compensation for the injury, is a question which need not and is not intended to be decided in this case. Supposing compensation to be the proper form of relief, the sum of 500 dollars would not seem from the evidence to be an extravagant assessment. In the view we take of this case, the only question which it will be necessary to decide is, whether in fact there was any such mistake?

To obtain relief on the ground of mistake in a written contract, and especially a contract coming within the purview of the statute of frauds, the mistake should be fully and clearly proved. Thompson v. Jackson, 3 Rand. 504. "In all such cases," says Story, "if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties. But if the proofs are doubtful an

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testimony. Where the mistake is established by other preliminary written agreements, equity more readily interferes than in cases where the mistake is to be established by parol evidence. But even where there is a preliminary article of agreement or settlement, it must be made plainly to appear that the parties intended in their final instrument merely to carry into effect the control or arrangement set forth in the prior agreement. The very circumstance that the final instrument of conveyance differs from the preliminary contract, affords of itself some presumption of an intentional change of purpose or agreement, unless there is some recital in it, or some other attendant circumstance, which demonstrates that it was merely in pursuance of the original contract." Carter v. McArtor, 28 Gratt. 360, citing the principal case, and Mauzy v. Sellars, 26 Gratt. 641, as authority. For this proposition, the principal case was also cited in Garnett v. Loven, 80 Va. 460; Shen. Val. R. Co. v. Dunlop, 86 Va. 352, 10 S. E. Rep. 239; Pulaski Iron Co. v. Palmer, 89 Va. 386, 16 S. E. Rep. 275; Donaldson v. Levine, 93 Va. 476, 25 S. E. Rep. 541; *foot-note* to Carter v. McArtor, 28 Gratt. 356. See also, *foot-note* to Mauzy v. Sellars, 26 Gratt. 641.

†**Equity Practice—Evidence—Answer Alleging Affirmative Matter.**—The principal case was cited in James River, etc., Co. v. Littlejohn, 18 Gratt. 77, to the point that, where an allegation of the answer is affirmative matter, not responsive to any allegation of the bill, the burden lays on the defendant to prove it.

See also, monographic *note* on "Answers, in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571.

unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy." 1 Story's Eq. Jur., § 152. And again he says, "Relief will be granted in cases of written instruments only where there is a plain mistake clearly made out by satisfactory proofs. It is true that this, in one sense, leaves the rule somewhat loose, as every court is still to say what is a plain mistake, and what are proper and satisfactory proofs."—"But the qualification is most material, since it cannot fail to operate as a weighty caution upon all judges; and it forbids relief whenever the evidence is loose, equivocal, contradictory, or in its texture, open to doubt or opposing presumptions." Id., § 157. Let us now
280 see whether the *alleged mistake in this case is fully and clearly proved according to the requisition of the rule above stated.

Leas in his lifetime was seized of a tract of land in Augusta, containing 375 acres. Before his death he sold and conveyed 115 acres of the tract by metes and bounds to Engleman, leaving the residue of 260 acres unsold at his death. After his death, and in less than a year after the sale to Engleman, the sale was made by his executor Swoope to the defendant Eidson. In the contract of sale the property sold is described as "the plantation on which said Leas resided in his lifetime, supposed to contain 260 acres," which was precisely the quantity remaining of the original tract after deducting what had been sold to Engleman. The parcel of land in controversy containing fourteen acres, had in fact been embraced in the sale and conveyance to Engleman. But the defendant contended that it had been embraced in the sale to him. One of the dividing lines between the land sold to Engleman and the residue of the tract was designated in a plat filed in the case as the line A Q. The defendant contended that in the sale to him, the lines designated in the same plat as A Z, and Z X were represented as the true dividing lines, instead of the line A Q. The parcel of land in controversy is between these three lines and the outer line of the whole tract. The material part of the answer which sets up this ground of defence is in these words: "When the complainant as the executor of the said Leas, offered the farm for sale, and respondent thought of purchasing, the boundaries of the tract were of course subjects of enquiry and examination, and respondent was shown the marked lines A Z, Z X as the true lines in that direction; these lines complainant caused to be shown to all who enquired about the boundaries, and it was by these lines that complainant sold and respondent purchased." If this statement in the answer had been sustained by
281 the evidence, the defendant *would have maintained his defence, and been entitled to relief. His counsel in this court argued that the statement was directly responsive to the bill; and was therefore not only evidence, but was of such weight that it must be disproved by at least two witnesses, or one and corroborating circumstances. The portion of the bill to which this statement was supposed to be an answer is that in which the plaintiff, after setting out the contract, and the refusal of the defendant fully to perform his part of it, uses these words: "pretending, if your orator has correctly understood him, that he was entitled under said contract to a portion of another tract of land which had been sold and conveyed by said Leas in his lifetime to Engleman, who had, under said purchase, held possession of said land for many years before the death of said Leas." These words of the bill were not intended as part of the statement of the plaintiff's case, nor to charge that the defendant was in fact entitled according to his pretension; nor was the defendant interrogated in any way in regard to such pretension. They were merely intended, as is very common in bills, to suggest the pretension on which the defendant sought to evade his obligation, and not to admit the truth of the pretension, nor to afford the defendant an opportunity to make it evidence against the plaintiff by affirming it. Therefore, even if the answer had been directly responsive to the allegation, if any, imported by these words of the bill, it would not have made the matter of the pretensions evidence against the plaintiff. What is that allegation? That the defendant pretended, &c. The only direct response to that allegation which could be evidence against the plaintiff, is that the defendant did or did not pretend; not that he was or was not entitled under his contract to the land in controversy. But the answer does not respond to the allegation even in this latter form. It does
282 not directly say that the *defendant is entitled under his contract to the land in controversy; on the contrary, it in effect admits that Engleman was entitled to the land under his prior deed. But it affirmatively states, that by certain lines the "complainant sold and respondent purchased." It behoved the defendant therefore to sustain this statement by full proof. Did he do it? I think not. There is not a particle of evidence to show that either the plaintiff or the defendant knew anything of the disputed lines at the time of the sale; on the contrary, it appears from the testimony of Wright, that the plaintiff knew nothing about them. There is not a particle of evidence to show that the plaintiff, or anybody else, ever showed these lines to the defendant, or gave him any information about them at or before the time the contract was entered into. The defendant made no attempt to prove his allegation, that he "was shown the marked lines A Z, Z X as the true lines in that direction," and that "it was by these lines that complainant sold and respondent purchased." This was the very gist of his defence.

If the fact had been as stated, it would

probably have been susceptible of easy proof. He does not pretend that the plaintiff had shown him these lines. He says "the boundaries of the tract were of course subjects of enquiry and examination, and he was shown the marked lines, &c., as the true lines in that direction." By whom were they shown to him? He does not say, and does not prove. He says, "these lines complainant caused to be shown to all who enquired about the boundaries." By whom did complainant so cause them to be shown? The defendant does not say, and does not prove. On the contrary, the plaintiff proved by Engleman, who was naturally supposed to be the person referred to by the defendant, that he did not show these lines to the defendant before his purchase, and was never authorized by the plaintiff to 283 *do so. The defendant seems to have taken a general view of the land, and was willing to buy it at 15 dollars per acre without reference to the precise locality of the lines. Brown proved that plaintiff asked defendant if he had seen the land and was satisfied, and defendant responded affirmatively. If defendant desired to know the boundaries before he purchased he could have had a survey, or at all events could have had them shown to him in such a way as to enable him to prove the fact beyond all controversy. If he considered the precise locality of the boundaries a matter of any importance, he should, and doubtless would, have pursued that course. The whole evidence in this case strongly tends to prove that neither the plaintiff nor the defendant had any information about the lines in question, until the survey was made preliminary to the execution of the deed, about twelve months after the sale, and after the defendant had received possession of the land; and that this controversy has arisen from what transpired at that survey in consequence of a mistake which had been made in laying off the land of Engleman. Leas, it seems, intended to have 120 acres laid off to Engleman. The survey was accordingly made, and the lines marked; the lines A Z, Z X being two of them. But on calculating the quantity of land embraced in the lines, it was ascertained to be only 100 acres. The line A Q was then projected on paper by the surveyor, instead of the lines A Z, Z X, which increased the quantity to 115¼ acres, for which a deed was accordingly executed, but was not recorded until after Leas' death, and indeed after the survey made in consequence of the sale to the defendant. The line A Q was never actually run or marked. The surveyor and Leas seem alone to have been acquainted with or noticed the fact that the unmarked line A Q had been substituted for the marked lines A Z, Z X. Engleman himself 284 *remained under the impression that the latter were the true lines, though the quantity of his purchase was of course known, and though the line A Q was described in his deed as the true line. When, therefore, the parties assembled on the ground to make the survey for the defendant, it was not strange that Engleman should have shown the lines A Z, Z X to the surveyor, and that all parties were agreed as to the fact that they were the true dividing lines. But as soon as the calculation of quantity was made, the mistake was discovered and rectified; and a deed was executed accordingly, and tendered by the plaintiff to the defendant. There is no doubt but that if the defendant before he made his purchase, had applied to Engleman to show him the dividing lines, he would have shown him the lines A Z, Z X, as he did to another person who had come as he supposed to buy the land. But the defendant did not so apply. The defendant's counsel argued that it was the duty of the plaintiff as executor, and the interest of the defendant as purchaser, to inform themselves as to the boundaries of the land before the sale; that the natural way of obtaining the information was to make enquiries of the coterminous proprietors; that by making such enquiries they would have been informed that A Z, Z X were boundary lines; and therefore it should be presumed that such information was received by each of them before the sale. The argument is plausible, but not sound. The premises are not admitted, and the conclusion is a non sequitur. The plaintiff might properly have agreed to sell, and the defendant to buy, the tract at 15 dollars per acre, without knowing the precise locality of all the boundaries. Or if it was their duty or interest first to obtain such information, the fact that they obtained it, if they did so, is susceptible of proof, and should have been proved, rather than be left to depend on mere presumption. 285 The *failure to produce such proof affords a stronger presumption against the defendant than the one relied on in his favor. But surely such a presumption as is relied on, if it be of any weight at all, cannot mount up to that full and clear proof which is required as the foundation of relief against a written contract on the ground of mistake.

I consider this case a plain one, and would not have felt justified in delivering so long an opinion upon it, but for the facts that I differ from the learned judge who pronounced the decree in the court below; that the decree entered at the last term was set aside, and the case reinstated for argument, at the instance of one of the judges of this court, because he entertained doubts as to the correctness of that decree; and that the case has accordingly been argued by counsel with much ingenuity during the present term. It only remains for me to say, that I am for re-entering the decree which was entered and set aside at the last term.

The other judges concurred in the opinion of Moncure, J.

Decree reversed.

286 *Eidson v. Fontaine, Adm'r &c. & al.

July Term, 1852, Lewisburg.

1. **Postnuptial Agreements—Relinquishment of Husband's Right to Wife's Property—Effect*—Case at Bar.**—E being about to marry F. executes a deed, by which he authorizes her during their lives or at her death, to control and dispose of her property in as full and ample a manner as she could do if she were not his wife; and he relinquished to her all right and title to the said property which he might acquire by the marriage. On this deed there is an indorsement of the same date executed by E and F. which says, "It is further understood and agreed upon between us, that should she die first, I am to retain the property and have the use of it during my natural life; but at my death it is to go to the person or persons which it may be her will or desire should have it." The wife may give away or dispose of the property in her lifetime: and the husband is only entitled to a life interest in that which remains at her death.

2. **Executors and Administrators—Suit against—Costs.†**—A suit is instituted against an administrator a few months after his qualification, for distribution, when he had received no assets of the estate: during the progress of the cause he receives assets for which the plaintiff is entitled to a decree: but as the administrator has been in no default, he is entitled to a decree for his costs against the plaintiff.

This was a suit instituted in March 1847, in the Circuit court of Augusta county, by Henry Eidson against Walter H. Fontaine, administrator with the will annexed of Catharine M. Eidson, the wife of the plaintiff, and William Fontaine as his surety. The bill charged that in 1834, the plaintiff being about to be married to Catharine M. Fontaine, a marriage contract was entered into, by which she was authorized to dispose of her property by her last will. That in 1842 she died, after having made her will; and that Walter H. Fontaine had qualified as administrator with the will annexed, with William Fontaine as his surety. That by the marriage agreement the plaintiff is entitled to the use of the said property for his life. That in 1838 287 *the plaintiff and his wife united in selling a tract of land in Goochland county belonging to the wife, at the price of 2000 dollars. That of this purchase money 265 dollars 70 cents had been paid to the plaintiff, which he had secured to be forthcoming to the estate of said Catharine at his death. That the balance of said purchase money, being 1734 dollars 30 cents, was retained by said Catharine, or perhaps loaned by her to her brothers, and at her death constituted a part of her estate. That the plaintiff had never received any part thereof, or the interest thereon. That he is advised he is entitled to the use of this money for his life, or the interest upon it. And he prayed that the administrator might be decreed to pay to the plaintiff the interest which had accrued upon said balance of purchase money; and that he might be compelled to pay over to the plaintiff the principal sum, upon his giving security to have it forthcoming at his death.

The administrator answered the bill, and contested the construction put upon the marriage agreement by the plaintiff. He insisted that the wife had full power to dispose of her property either in her lifetime or at her death; and that the plaintiff was entitled to the enjoyment for his life of such of the property as remained at the death of his wife. That as to the purchase money of the land sold by the plaintiff and his wife, the purchaser paid for it by assigning to Mrs. Eidson a bond on William O. Payne for the sum of 897 dollars 28 cents, and a bond on her brother C. R. Fontaine, for 800 dollars, with its interest up to the date of the conveyance; which two bonds extinguished the whole purchase money, except the sum of 265 dollars 70 cents, which was paid in cash to the plaintiff. That the bond of William O. Payne had long since been paid to the plaintiff, who had executed a deed of trust to secure the sum of 1000 dollars, of which this was a part. And that, as to the other bond, the plaintiff 288 *well knew that Mrs. Eidson had long since given it up to her brother R. C. Fontaine, the obligor. That the defendant had no estate of his testatrix in his hands, nor had he had any since his qualification as administrator, the whole thereof having been in the possession of the plaintiff.

The marriage agreement bears date the 6th of February 1834, and is executed by Henry Eidson alone. It says: "Being about to marry Miss Catharine M. Fontaine, and being desirous that she shall, in future, during our natural lives, or at my decease, or at her decease, have the full power and privilege of disposing of the property both real and personal, which she may now possess, or shall get or possess from her father's estate hereafter, I do by these presents release and relinquish to her, the said C. M. Fontaine, all the right and title which I may or shall take upon me, or shall fall to me by my intermarriage with her; and it is my express wish and intention to give to her entire control and perfect right to dispose of the property heretofore referred to, in as full and ample a manner as she would have if she had not become my wife."

On this deed was an endorsement of the same date, executed by Henry Eidson and Catharine M. Fontaine, which says, "It is further understood and agreed upon between us, that should she die first I am to retain the property and have the use of it during my natural life, but at my death it is to go to the person or persons which it may be her will or desire should have it."

There is another endorsement on the deed, bearing date July the 20th, 1834, signed by Eidson, which says, "It is hereby understood and agreed that the provisions of this contract are not intended to exclude my wife Catharine M. from her right of dower in my estate should she survive me."

*See monographic *note* on "Husband and Wife."

†See monographic *note* on "Executors and Administrators"; also, monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

The will of Mrs. Eidson was admitted to probat in *the County court of Augusta in October 1846, when Walter S. Fontaine qualified as administrator with the will annexed. By it she bequeaths all the estate of which she may die possessed, to be equally divided between all her nephews and nieces that may be alive at her death.

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Fontaine's administration account was settled in the progress of the cause; and it appeared that the only assets which came to his hands was a bond, which was paid off in April 1848, amounting at that time to 148 dollars; and that after crediting him with the expenses of his administration, there remained in his hands the sum of 95 dollars 34 cents, due 1st of April 1848. It also appeared that the bond for 800 dollars on C. R. Fontaine was put into his possession by Mrs. Eidson some time before her death, and that the other property of Mrs. Eidson was in possession of the plaintiff.

The cause came on to be heard in July 1848, when the court held that Mrs. Eidson had the right under the marriage agreement to dispose of her property in her lifetime as she pleased; and that the whole sum of 1736 dollars 30 cents had been disposed of by her as stated in the answer of the defendant, who was in no way accountable therefor. And the decree was, that unless the fund in the administrator's hands was necessary to meet unsatisfied liabilities of his testatrix, he should pay it over to the plaintiff upon his giving bond, &c. And the bill was dismissed in all other respects with costs to the defendant: whereupon the plaintiff applied to this court for an appeal, which was allowed.

Fultz, for the appellant.

There was no counsel for the appellee.

290 *MONCURE, J. I do not concur in the construction placed by the court below on the marriage contract and memorandum thereto subjoined as part thereof in this case, but am of opinion that the memorandum was intended to reserve to the husband, in the event of his surviving the wife, a life estate in all the property of which the jus disponendi is given to her by the contract. Still I am for affirming the decree. The administrator of the wife is not accountable for any property which may have been disposed of by her in her lifetime; such disposition being as binding on him as on her. The claim of the husband for such property, if any, is against the person who has it in possession. The court was therefore right in dismissing the bill, so far as it claimed relief for any such property; and also in decreeing the payment of the administrator's costs, he not being in any default.

DANIEL, J. I think the judge of the Circuit court has given the true construction to the marriage articles entered into between the appellant and his deceased wife, Catharine M. They were carelessly and inartificially drawn, and the effort to interpret their meaning should be freed as far as possible from the restraint of technical rules.

In the body of the instrument, which is signed by the appellant only, he makes, in anticipation, a full surrender and release of all the rights which he might otherwise have acquired in the estate of his intended wife, real and personal, in possession or expectancy, and concedes to her the power to dispose of the same, after marriage, "in as full and ample a manner" as if she had continued a feme sole. Then follows the memorandum, which bears date on the same day with the original instrument, and is signed by both of the parties. It is short, and is in these words: "It is further understood and agreed upon between us, that *should she die first, I am to retain the property and have the use of it during my natural life, but at my death it is to go to the person or persons which it may be her will or desire should have it." I concur with the judge of the Circuit court in thinking that the office of the language employed in the memorandum is fully performed in giving to the husband surviving a life estate in such of the property as remained undisposed of by some act or instrument of the wife operating and taking effect in her lifetime, and which she should dispose of by will or other instrument, to take effect after her death.

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The body of the articles and the memorandum bear date on the 6th February 1834. There is a further memorandum or endorsement of date 20th July 1834, signed by the appellant only, and which is in these words: "It is hereby understood and agreed that the provisions of this contract are not intended to exclude my wife Catharine M. from her right of dower in my estate, should she survive me." It is argued by the appellant in his petition for an appeal, that all the parts of the instrument must be taken together; that by the last memorandum the dower rights of the wife are fully secured to her; that it is equally clear that it was the intention of the parties, as the husband had secured the dower rights of the wife in consideration thereof, that there should be secured to him a life estate in the separate property of the wife: and that while the full benefit of the articles is claimed for the wife against the husband, it is but right that he should have extended to him the benefits of the provisions as against the property of the wife.

It is true that where there is any doubt as to the true import of the language employed by the parties in one part of an instrument, other parts may be looked to and consulted, and may furnish much aid *in disclosing the true motives and intentions of the parties, and in resolving the doubt. But I do not think that there is any reasonable doubt here as to what the parties meant and intended by the agreement and memorandum of the 6th of February 1834. The wife would have been entitled to dower whether the memorandum of the 20th July had been added or not, there being nothing

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in the preceding articles or memorandum from which a purpose on her part to waive or abandon that right can be inferred. With this in view, and looking to the order of time in which the several parts of the instrument were executed (regarding the memorandum of the 20th July in this aspect of the case as part of the instrument), the fair inference is that the first parts of the agreement were made uninfluenced by any agreement on the part of Eidson to enter into such a stipulation as that embraced in the said last mentioned memorandum, and that it was afterwards endorsed out of abundant caution, and to shut out all possible implication that the right of dower was surrendered by anything contained in the marriage articles. In this view I do not see how the said memorandum can reflect any light on the preceding parts of the agreement, or exert any influence on their construction. But there is another, and to my mind a conclusive reason, why the said memorandum should not be looked to as disclosing any motive or consideration to bear on the construction of the instrument favorably for the pretensions of the appellant. It is not stated in the bill or answer when the parties were married, but the fair inference to be drawn from the language of the memorandum is that it was endorsed after the marriage. "The provisions of this contract are not intended to exclude my wife," &c. If so, the endorsement, however it might bind the husband, could neither be regarded as part 293 of the *original contract nor as explanatory thereof, so as to affect injuriously the claims and pretensions of the wife. Tabb v. Archer, 3 Hen. and Munf. 399.

Upon the whole, I see no reason to question the correctness of the interpretation of the contract given by the judge of the Circuit court, or of the decree which he has rendered.

It is true that there was a balance appearing due the appellant on the settlement of the administration account for which he obtains a decree. The administrator, however, was in no default, the suit having been brought within five or six months after his qualification. Costs were, therefore, properly given to the appellee as the party substantially prevailing.

I am for affirming the decree.

The other judges concurred in the opinion of Daniel, J.

Decree affirmed.

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294 *Wise v. Lamb.

July Term, 1852, Lewisburg.

Bonds—Judgment—Injunction—Case at Bar.—L files a bill against W and his assignees, to enjoin two judgments, one for $1200 and the other for $300, recovered upon bonds executed by L to his son, and by his son assigned to W, on the ground of usury. The usury as stated in the bill, amounted to $300, for which the small bond was given. W answered the bill, meeting and denying explicitly all its allegations in relation to the usury. The son was examined as a witness by L and proved the usury as stated in the bill, but his testimony was excepted to by the defendants. No other witness speaks as to the usury. On filing his answer W gave notice that he would move for a dissolution of the injunction at the next term; and accordingly at the next term of the court the motion was made, and the injunction was dissolved as to the principal of the judgment for $1200, but was continued as to the residue. At the next term of the court a motion was made to dissolve the injunction *in toto*, but the court overruled the motion, and directed an issue to try the question of usury; and upon the trial of the issue the verdict of the jury was that the bonds were in fact executed upon a usurious consideration as stated in the bill: And the court thereupon perpetuated the injunction. Upon appeal. HELD:

1st. **Same—Usury—Evidence—Testimony of Obligee.***—The testimony of the son, the obligee in the bonds, was not competent evidence to prove the usury in a controversy between the obligor and assignee.

2d. **Injunction—Motion to Dissolve—Sufficiency of Answer Alone.**†—The answer having fully and explicitly denied the allegations of the bill as to the usury, and there being no competent evidence to prove it, the court should, when the motion was first made, have dissolved the injunction *in toto*.

3d. **Chancery Practice—No Evidence to Support Bill Denied by Answer—Issue Improper.**‡—So when the second motion to dissolve was made, it should for the same reason have been sustained, and if the cause was ready for a final hearing, the bill should have been dismissed; and it was error to direct an issue.

***Bonds—Evidence—Assignor Incompetent Witness.**—In Chapman v. Hiden, 2 P. & H. 97, the principal case and Gilliam v. Clay, 3 Leigh 590, were cited as holding that the assignor is an incompetent witness for the obligor at the suit of the assignee. These cases were said to be seemingly in conflict with Taylor v. Beck, 3 Rand. 316.

See generally, monographic *note* on "Bonds" appended to Ward v. Churn. 18 Gratt. 801.

†**Injunction—Motion to Dissolve—Sufficiency of Answer Alone.**—See monographic *note* on "Injunction" appended to Claytor v. Anthony, 15 Gratt. 518; monographic *note* on "Answers, in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571.

‡**Chancery Practice—No Evidence to Support Bill Denied by Answer—Issue Improper.**—See principal case cited in McFarland v. Douglass, 11 W. Va. 644; Smith v. Beatty, 11 Gratt. 761; *foot-note* to Beverley v. Walden, 20 Gratt. 147; *foot-note* to Smith v. Beatty, 11 Gratt. 752; *foot-note* to Reed v. Cline, 9 Gratt. 136; monographic *note* on "Answers, in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571; monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

Issue Out of Chancery—Discretion of Court—Witnesses Impeached.—See principal case cited in Hord v. Colbot, 28 Gratt. 49, 60, and *foot-note*; Williams v. Blakey, 76 Va. 260; Crebs v. Jones, 79 Va. 386; Fishburne v. Ferguson, 84 Va. 102, 4 S. E. Rep. 574. See also, monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

4th. Same—Issue Improperly Directed—Action of Court.§—The issue having been improperly directed, the injunction should have been dissolved and the bill dismissed upon the final hearing, notwithstanding the verdict of the jury finding the usury as charged in the bill.

The case is fully stated in the opinion of Judge Lee, and it would be both improper and useless to repeat the statement.

295 *Fultz, for the appellant.
Baldwin, for the appellee.

LEE, J. Jacob Lamb filed his bill in the Circuit court of Augusta county, alleging that in the year 1841, being desirous of borrowing money, he applied to a certain Adam Wise of Rockingham county for a loan. That after some negotiation, Wise agreed to lend him the sum of 1200 dollars, upon which he was to pay the interest as it should annually accrue, and for the accommodation he was also to pay the said Wise, in addition to such interest, an usurious premium of 300 dollars. That with a view to cover and conceal the usurious character of the transaction, at the instance of the said Wise he executed two bonds to Jonathan Lamb, the son of the said Jacob, one for the sum of 1200 dollars, bearing interest from its date, which was the 10th of May 1841, and the other for the sum of 300 dollars, of the same date, both payable three years thereafter, the last named without interest; and that said bonds were at the same time assigned by the said Jonathan to the said Wise, though the assignments were untruly dated on the 14th, instead of the 10th. And that with a view still farther to cover up the transaction, the said Wise by agreement executed his bond to the said Jonathan Lamb, instead of advancing the money at the time, and subsequently, with the consent of the said Jacob, discharged the same and took it up. The bill then alleges that there was no other consideration for said bonds, and the whole arrangement thus made was a mere shift and device to evade the statute against usury. It further alleges that Wise assigned said bonds to one David Griffith, who afterwards assigned them to one Elijah Hogshead, who instituted suit upon them in the County court of Augusta. That he had intended to plead usury in said action, but that in consequence
296 of the absence of his *counsel, and of information which had been received that no business would be done at the term during which he should have made this defence, the plea was not put in, and judgments were rendered against him for the amount of both bonds. The bill therefore makes Wise, Jonathan Lamb, Griffith and Hogshead defendants; calls on Wise to answer all the allegations of the bill specially, and prays that the court would render such a decree and afford him such measure of relief as the law and the principles of a court of equity will entitle him to demand.

It appears that an injunction was allowed to the judgment mentioned in the bill, but the order granting the same is not copied into the record, nor does it otherwise appear when the same was allowed.

The defendant Wise answered the bill. He denies that the complainant applied to him for a loan in the year 1841, or that there was any negotiation or communication whatever between them for a loan, or that he had agreed to let him have 1200 dollars on loan, as stated in the bill, the interest thereon payable annually, or that there was any agreement for a usurious premium beyond interest, upon any loan. He alleges that such was not the substance of any contract between them, and that there was no shift or device of the nature stated in the bill, resorted to for the purpose of covering up a usurious transaction. He alleges that before the said bonds were assigned to him by Jonathan Lamb, he had learned both from him and from complainant, that such bonds existed, and that one or both of them proposed that he should purchase them; that he at first declined, though without knowing or suspecting that the bonds were accommodation bonds, or without consideration, but had at length agreed with Jonathan Lamb, whom he looked upon as the bona fide holder of the bonds, to give him 1200 dollars for them; the money to be paid as soon as he could get it, which
297 *would be in a few days, and for which he was to give his own note to Jonathan, bearing interest from its date; the said Jacob Lamb agreeing, for the purpose of enabling his son thus to cash the bonds, to secure their payment by a deed of trust on real property. He denies that a false date was given to the assignments of the bonds, with any improper design, and thinks they were made on the same day on which the deed of trust was executed, which was the 17th of May 1841. He repeats his denial that his purchase of said bonds was, either in form or substance, a loan of money; and avers that if they were without consideration it was unknown to him, and only known to the Lambs; and that the transaction was on his part a fair and bona fide purchase of the bonds at a reasonable discount.

Same—Question of Sound Judicial Discretion—See principal case cited in Miller v. Willis, 95 Va. 351, 28 S. E. Rep. 337; *foot-note* to Mettert v. Hagan, 18 Gratt. 231; Beverley v. Walden, 20 Gratt. 147, 154, and *foot-note*; Powell v. Batson, 4 W. Va. 617; Jarrett v. Jarrett, 11 W. Va. 627.

§**Same—Improperly Directed—Action of Court at Final Hearing.**—See principal case cited in *foot-note* to Smith v. Beatty, 11 Gratt. 752; Vangilder v. Hoffman, 22 W. Va. 8.

Same—Same—Appellate Practice.—See principal case cited in Smith v. Beatty, 11 Gratt. 752, 760, and *foot-note*; Fant v. Miller, 17 Gratt. 205; Vangilder v. Hoffman, 22 W. Va. 8.

See generally, monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 472.

Same—Decree Directing—When Appealable.—See principal case cited in Carter v. Carter, 82 Va. 636; *foot-note* to Reed v. Cline, 9 Gratt. 136.

On filing his answer (to which there was a general replication), the said Wise gave notice of a motion to dissolve the injunction which had been allowed, to be made at the then next term.

The defendants Griffith and Hogshead also severally answered the bill, and gave notice of a motion to dissolve. They say that they have no personal knowledge whatever of the charges contained in the bill; that they bought the bonds respectively for fair consideration, without knowledge of any such equity as that set up in the bill, but believed them to have been executed on a full and fair consideration. The defendant Griffith also states that after the bonds had been assigned to him he called on the complainant and so devised him, and that complainant admitted they were all right, and said they should be paid when they became due. Both defendants put the allegations of the bill in issue, and call for strict proof thereof.

Sundry depositions were taken and filed on behalf of the complainant; and, 298 on the 12th of June 1845, *the defendants moved to dissolve the injunction. This motion was heard on the bill, answers, exhibits and depositions of witnesses: whereupon the court, by an order of that day, dissolved the injunction as to the principal of the judgment for the 1200 dollars, but overruled the motion as to the damages, interest and costs upon that judgment, and as to the whole judgment for the 300 dollars. On the 15th of November 1845, the defendants moved the court to dissolve the injunction also as to the 300 dollars judgment, and as to the damages, interest and costs upon the judgment for 1200 dollars; and this motion having been heard as that at the former term, was overruled by the court; and an issue was then directed to be made up and tried by a jury, to ascertain and determine whether the two bonds in controversy, dated on the 10th of May 1841, were executed upon a usurious consideration, as alleged by the bill. Subsequently this issue was tried by a jury, and a verdict was rendered to the effect that the said bonds were in fact executed upon a usurious consideration, as alleged by the bill. And the cause coming on to be finally heard on the 13th of June 1849, on the papers formerly read, and the verdict of the jury upon the issue that had been directed, the court pronounced its decree perpetuating the injunction as to the judgment for the 300 dollars and costs, and as to the damages, interest and costs upon the judgment for the 1200 dollars, and for costs in favor of the complainant against the defendants, including those incurred on the trial of the issue. And from this decree Wise applied for and obtained an appeal to this court; and complains that the Circuit court erred in overruling the motion to dissolve both at the June term and the November term 1845, and also in directing at the latter term the issue to be tried by a jury. He also alleges that the verdict was defective in not ascertaining the extent of the alleged 299 *usury, and was therefore too vague and uncertain to warrant the decree pronounced by the court; and that said decree was furthermore erroneous in not allowing him the legal interest at least upon the principal sum due.

The depositions of Jonathan Lamb, the obligee and assignor of the two bonds of Jacob Lamb, had been taken and filed in the cause; but the defendants excepted to its being read as evidence in the cause: And it is very clear that it was not competent testimony, this court having expressly decided that in a controversy between the obligor and assignee of a bond on a question of usury, the obligee is not a competent witness to prove the usury. Gilliam v. Clay, 3 Leigh 590. The testimony of Jonathan Lamb being then out of the case, the only testimony before the chancellor at the hearing of the motion to dissolve the injunction in June 1845, was the evidence of the witnesses Long, Crawn and Hill. Long proved merely that the Lambs resided within two or three miles of Wise, and that Jacob Lamb's wife was a cousin of Wise; that he thought Jonathan Lamb was worth little or nothing in 1841; and that he had heard Jacob say, some twelve months previously, that he had sold his homestead to his two sons, Jonathan and David.

Crawn merely proved that in 1841, Jonathan Lamb was regarded as worth little or nothing; that about that time he had sold him a lot of oats, but that he required security for the amount, more, however, because of his supposed unwillingness than his want of ability to pay.

Hill proved that in 1841 and 1842 Jonathan Lamb had little or no property, and was generally scarce of money; that Jacob Lamb, for eight or ten years previously, always had an abundance of property in his possession, but was always hard run for money; and that he would not have thought it probable that Jacob 300 *Lamb could have owed Jonathan in 1841 a bona fide debt of 1500 dollars. He also stated that he had heard Jonathan Lamb's character for truth and honesty spoken of unfavorably.

Now, giving to this testimony its fullest weight and widest latitude for inference, it is impossible to say that it makes out the charge of usury contained in the bill, or overthrows or even shakes the positive, direct and express denial of that charge, and of the facts and elements in which the supposed usury was alleged to consist. In truth it amounted to nothing more than proof of certain circumstances, which, aided by and in connection with other and more pointed and cogent proofs, might tend to make out a case of usury; but which, by themselves and unaided, were exceedingly trivial and of very little weight, and all perfectly reconcilable with the answer of Wise, and the fairness of the transaction that was called in question.

They served to raise, at the most, but a bare suspicion as to the fairness of the transaction. In effect the case presented on the motion to dissolve upon those proofs, was the ordinary one of a bill, all the material allegations of which were met by a full, direct and explicit denial in the answer, and no evidence adduced to sustain them, or to destroy the effect which the law gives to such an answer. Such an answer is not only evidence for the defendant, but it is conclusive in his favor, unless overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other facts and circumstances equivalent in weight to a second witness; and where not so overcome, the court will neither make a decree nor send the case to be tried at law, but will simply dismiss the bill. Story's Eq. Jur., § 1524; Thornton v. Gordon, 2 Rob. R. 719; Beatty v. Smith, 2 Hen. and Munf. 395; Smith v. Brush, 1 John. Ch. R. 459; Lenox v. Prout, 3 Wheat. R. 520; Pryor v. Adams, 1 Call 382; Alam v. 301 *Jourdan, 1 Vern. R. 161; Pember v. Mathers, 1 Bro. Ch. R. 52. In cases of injunction, if, upon hearing the motion to dissolve, the court is of opinion that it was improperly granted, or where the facts on which the plaintiff's equity rests are denied, or the case made by the complainant is not supported, the injunction should be dissolved. 3 Dan. Ch. Pr. 1896; Ches. & O. C. Co. v. Balt. & O. R. R. Co., 4 Gill and John. 1; Livingston v. Livingston, 4 Paige's R. 111; Wakeman v. Gillespy, 5 Paige's R. 112. It is true it is said by Judge Story, in Poor v. Carleton, 3 Sumn. R. 75, that extraordinary circumstances may exist in a particular case which would not only justify but demand, in the exercise of a sound discretion on the part of the court, the continuation of a special injunction, notwithstanding the denial in the answer of the whole merits of the bill. In this case, however, no circumstances of an extraordinary character are to be found, calling for the exercise of the discretion of the court in continuing the injunction against the defendant's motion to dissolve; and I am of opinion they were clearly entitled to a dissolution of the same, both at the June term and at the November term, when their motion to that effect was made and repeated.

And while I cannot perceive any sufficient ground for overruling the motion to dissolve the injunction, I am equally unable to find in the case sufficient reason for the order directing an issue to try the question of usury. It is true that directing an issue to be tried by a jury is said to be a matter of discretion in the court of equity, to be exercised upon due deliberation; and the expense and delay which it involves are only to be incurred where the court, in the exercise of a sound discretion, may think it necessary, except in certain particular cases in which, by statute or practice, it is made a matter of right; as a bill by an heir at law impeaching a will, or (in England) one by a 302 *rector or vicar to try the validity of a modus or composition in lieu of tithes. Short v. Lee, 2 Jac. and Walk. 464, 495. But it is well settled that a mistake in the exercise of the discretion of the court upon this subject, is just ground of appeal. That discretion is to be exercised upon sound principles of reason and justice, and the appellate court must judge whether it has been so exercised in a given case. Stannard v. Graves, 2 Call 369; Nichol v. Vaughn, 5 Bligh. Par. Cas. N. S. 505; Dale v. Roosevelt, 6 John. Ch. R. 255; Townsend v. Graves, 3 Paige's R. 453; Gardner v. Gardner, 22 Wend. R. 526; Belknap v. Trimble, 3 Paige's R. 577, 601. The general rule laid down upon this subject is, that whenever a material matter of fact in the cause is strongly controverted in evidence, the court may properly direct an issue; as where a material fact positively denied by the answer is supported by the evidence of a single witness with corroborating circumstances, the court will give the defendant, if he ask it, an opportunity of trying the question upon an issue. But in such a case the defendant may decline an issue, and the court is then bound to give judgment upon the whole evidence before it. East India Company v. Donald, 9 Ves. R. 275. So where the evidence is conflicting, or there is contradictory evidence between persons of equal credit and equal means of information, and the evidence is so equally balanced that it becomes doubtful which scale preponderates, an issue will be proper. 2 Daniels' Ch. Pr. 1285. There is a class of cases, as has been intimated, in which the court will direct issues, although there be no contradictory testimony, where the parties are invested at common law with certain rights, of which the matter in issue is intended to divest them. Of these are the cases already referred to, of an heir at law seeking to set aside a will by which he is disinherited, and who by practice in 303 England, *and by statute in Virginia, is entitled to an issue devisavit vel non, and of a rector or vicar in England, who, by the practice, is held entitled to an issue to try the validity of a modus or composition set up in lieu of tithes. 3 Daniels' Ch. Pr. 1287; Banks v. Booth, 6 Munf. 385; Van Alst v. Hunter, 5 John. Ch. R. 148; Rogers v. Rogers, 3 Wend. R. 503, 515. But in all others cases, whether an issue should be directed or not, must depend on the sound discretion of the chancellor. Where an important fact is left doubtful by the testimony, the court ought to direct an issue. Marshall v. Thompson, 2 Munf. 412; Bullock v. Gordon, 4 Munf. 450; Nelson v. Armstrong, 5 Gratt. 354. But I apprehend that where the facts upon which the equity of the bill rests are directly denied and controverted by the answer, and the plaintiff's case is wholly unsupported by proof; or if there be evidence on his part, it is wholly insufficient to make out his case against the positive denial of the

defendant, (without considering at all any evidence that may be offered by the defendant,) it is clearly improper to direct an issue. There are, it is true, some few cases to be found in which issues appear to have been directed because the proofs offered by the complainant were not deemed entirely satisfactory to the court. In the case of Moons v. De Bernales, 1 Russ. R. 301, and Kaison v. The Same, Ibid., the evidence offered by the plaintiffs was not sufficient proof of their title to the bales of wool in controversy in the causes, and issues were directed by the master of the rolls. But in these cases the defendant admitted by his answer that he had sold the wools and received the money, and set up no adverse claim, but merely called for proof of plaintiff's title. In the case of Townsend v. Graves, 3 Paige's R. 453, the chancellor, in delivering his opinion, speaks of issues being directed in cases where there was a want of evi-
304 dence. What particular cases *he intended, however, is not explained, and what he said upon the point was entirely obiter. These cases seem to be in direct conflict with the rule as laid down by the Lord Chancellor in Savage v. Carroll, 1 Ball and Beat., 283, 550. He there states it to be, that where there is contradictory testimony in a case that raises a doubt in the mind of the court: that is to say, where the case is fully proved by the party on whom the onus of proof lies, but that proof shaken or rendered doubtful by the evidence on the other side, there the court will direct a reference or an issue to ascertain the fact. But where there is no evidence whatever, to direct an issue would be to hold out an opportunity to a party to supply the defect by fabricated testimony, and introduce mischiefs intended to be guarded against by the rules of the court.

In the case of the New Orleans Gas Light and Banking Co. v. Dudley, 8 Paige's R. 452, it was held that a question of usury arising out of disputed facts, upon the determination of which the complainant's right to relief depended, was a proper case for granting an issue before the testimony in the cause was taken: but this was under the provisions of the statute passed in that state (New York) in 1838, making it the imperative duty of the court to direct an issue upon the application of either party in every case in which an issue of fact suitable for the trial of a jury could be framed. And the chancellor, in delivering his opinion, said that the court, prior to the act of 1838, was not authorized to grant an issue except in a few specified cases, until after the testimony was taken; and then it was not the practice to direct an issue unless there was conflicting evidence so as to create a doubt in the mind of the chancellor, upon some matters of fact. And he added that it might be necessary for the court to direct an issue in that case upon the hearing, if there were such a conflict in testimony as to render it
305 doubtful *whether the transaction referred to (the sale of certain property) was or was not a mere device to obtain an usurious advantage. He referred to the cases of Marshall v. Thompson, 2 Munf. 412; Bullock v. Gordon, 4 Id. 450; Douglass v. McChesney, 2 Rand. 109. In other cases, the failure of the plaintiff's proof, or its insufficiency to overcome the direct denial of the defendant's answer and make out his case, is distinctly considered as not a proper case for an issue. In Pember v. Mathers, 1 Bro. Ch. R. 52, the lord chancellor says, where the defendant in express terms negatives the allegations of the bill, and the evidence is only of one person affirming the allegations so negatived, the court will neither make a decree nor send the case to a trial at law. So where the party seeking specific performance fails to prove the terms of the agreement he relies upon, the court will not direct an issue to ascertain the terms. Savage v. Carroll, 2 Ball & Beat. 451. Nor is a party entitled to an issue or an enquiry to establish a case relied on by his pleading, but omitted in proof. Savage v. Carroll, 1 Ball & Beat. 283, 548. Judge Story lays down the doctrine in almost the same terms as stated by the lord chancellor in Pember v. Mathers, Story's Eq. Jur., § 1528. In 2 Madd. Ch. Pr. 443, the rule is stated to be, that if the defendant plainly and precisely deny an assertion in the bill, and one witness proves it as positively, clearly and precisely as it is denied, no decree for relief can be made. Whatever may be the practice elsewhere as to the cases appropriate for an issue, and in which the discretion of the chancellor is wisely and properly exercised in directing it, there can be little doubt that in Virginia, where the allegations of the bill are expressly and directly denied in the answer, and are wholly unsupported by proof, or supported by the evidence of one witness only, the court should not direct an issue, but should dismiss the bill. Pryor v. Adams,
306 1 Call 382; *Paynes v. Coles, 1 Munf. 396, (Judge Roane's opinion.) And the case of a bill seeking relief against usury constitutes no exception to the rule; and the propriety of directing an issue in such a case depends upon the same considerations which apply in others of whatever character. Whether the object of a bill of that character be to obtain relief upon the principle of Marks v. Morris, or under the third section of the act of 1819, if the alleged usury be denied in the answer, proof is indispensable; and if it be not produced the result is the same as in any other case. All that the court can do, and what it properly should do, is to dissolve the injunction (if one have been allowed) and dismiss the bill. Gilliam v. Clay, 3 Leigh 590. And the proof which is required to avert this result, must be as in other cases, the testimony of two witnesses, or if there be but one, his testimony must be supported by corroborating circumstances. Thornton v. Gordon, 2

Rob. R. 719. In the case of Grigsby v. Weaver, 5 Leigh 197, which was a bill for relief against a contract alleged to be usurious, the date of the loan became a very material matter to determine the question of usury. The defendant had been specially called on to give the information to fix this date. He stated in his answer that he had taken no memorandum and could not speak as to the time: and the plaintiff could bring no witness to prove it. The chancellor directed an issue. Judge Carr, in delivering the opinion of the court, said: "Issues are not directed to enable parties to get a new supply of evidence where they have not enough, but where there is clashing and conflicting evidence leaving the fact in doubt and rendering it necessary to weigh the character and credibility of witnesses."—"In this case," he proceeded, "there is no clashing. The point was to fix usury in the bond of May 1817. To show this usury, the date of the loan must be somehow fixed. The defendant 307 said he *could not speak as to the time, and the plaintiff could bring no witness to speak as to this date. Here there was a clear defect of proof; a failure to establish the very point on which the usury and the quantity of it depended. It is the bounden duty of a plaintiff who calls for the solemn judgment of the court, to furnish that court with something like certainty to rest that judgment upon; he may draw this from the defendant if he can; he may prove it by witnesses; he may establish it by documents; but in some way he must shew it or he fails, and his bill should be dismissed." "This is," he adds, "in my mind, that case; instead of an issue, the bill ought to have been dismissed for defect of proof." Judge Brooke, in his opinion, expressed similar views, and thought the chancellor, instead of directing an issue, should have dismissed the bill. The case of Thornton v. Gordon, 2 Rob. R. 719, was an injunction to stay the sale of property conveyed to secure to a debt alleged to be usurious, and the complainant averred his readiness to make full proof of the allegations of his bill, and disclaimed all benefit of a discovery from the defendant. The defendant filed his answer denying the allegations of the bill. The complainant offered the testimony of but a single witness, unsupported by corroborating circumstances. The court held that to deny the allegations of the bill by his answer, was the privilege of the defendant from his position as defendant, called on to answer and make up an issue, and that the plaintiff could not, by waiving a discovery, deprive him of the benefit of it. That benefit consisted in putting the complainant to proof of his cause by two witnesses or one witness and corroborating circumstances. That not having been furnished, the court was of opinion not that an issue should be directed, but that the injunction should be dissolved and the bill dismissed. And in the case of Read v. Cline's heirs, decided during 308 *the present term of this court, supra 136, the same doctrine held by Judges Carr and Brooke, in the case of Grigsby v. Weaver, was distinctly asserted. That was a bill to set up a lost title bond, and to obtain a decree for a conveyance of the land alleged to have been sold according to its terms. The complainants were put to proof of the allegations of their bill, but the evidence offered was very unsatisfactory as to the facts, whether such a title bond ever existed, or if it did, whether it had been assigned to the ancestor of the complainants, as they claimed, and whether it had been lost, as alleged, and also as to the contents of the bond, and whether the defendant had notice of its existence before his purchase; and the court below directed an issue to ascertain those facts. The defendant appealed, and this court held that as there was no clashing or conflict in the testimony, but simply a failure on the part of the complainants to meet the call made upon them for full proof of the allegations of their bill, and to make out their case, it was not such a case as rendered an issue necessary or proper; and that the court below should have dismissed the bill, instead of directing an issue for the purpose; and it was so decreed here accordingly.

With these views, and upon the authority of the cases which I have cited, I am of opinion that the Circuit court erred in directing the issue by its order of the 15th of November 1845, and that instead of directing such issue it should have dissolved the injunction, and if the case was were ready for final hearing, have dismissed the bill.

But the jury, upon the trial of the issue, have found a verdict affirming that the transaction impeached by the bill was in fact usurious as therein alleged; and the question arises what decree the court should render upon the whole case, including the verdict so found. It may be argued 309 that the defendant, *not having formally and expressly objected to the order directing the issue, nor taken an appeal from it at the time to this court, but having gone to trial of the issue before the jury, may be regarded as having waived all objection to the order for the issue, and that the irregularity, if any, in its direction, has been thus fully cured; that the error of the court, if it did err in directing the issue, was but in the exercise of the discretion with which it was invested, and that the decree granting relief conformably to the verdict should not for this cause be now disturbed. Factum valet, fieri non debet. But I do not concur in this reasoning. The defendant asked for the dissolution of the injunction, to which, as I think, upon the case before the court, he was justly entitled. The court overruled his motion, and proceeded not upon his motion nor that of the complainant, but because it thought it was proper so to do, to direct an issue to try the question of usury. The defendant could but submit

to the order. He was not required to express any objection, and although he might have appealed from it to this court as an order to a certain extent settling the principles of the case, and if erroneous, improperly involving him in the delay, trouble and expense necessarily incident to a trial by jury (as held by this court in the case of Reed v. Cline's heirs.) Yet he was not bound to take his appeal at that time. He had a right, if he chose to await the final hearing of the cause, to take a part in the trial before the jury, or, if he pleased, wholly to abstain from doing so, and take his chance, if the verdict should prove adverse, to obtain redress non obstante veredicto, upon the final hearing of the cause; or, if he failed in the Circuit court, by an appeal to the court of appellate jurisdiction. Whether he took a part or not in the trial of the issue before the jury, does not appear, as the record of that trial is not embraced in the record before us; but
310 *whether he did or did not I think immaterial, as either way, I conceive he lost no right which he could otherwise claim, nor is to be held as acquiescing in the irregular order directing the issue. But this I regard as no longer an open question or a subject of further discussion. In the case of Pryor v. Adams, 1 Call 382, the bill was filed to compel payment of the amount of depreciation on a bond which the complainant had held on the defendant, and of which he had consented to receive and had received payment in depreciated paper money, and had surrendered up the bond upon an express promise which he alleged the defendant made at the time, to pay the depreciation. The defendant in his answer denied the alleged promise. The chancellor held that the allegations of the bill which were denied by the answer had not been proved by the evidence, and dismissed the bill with costs; but he afterwards, during the same term, set aside that decree and directed an issue to determine whether the defendant, at the time the money paid in discharge of the bond in the bill mentioned was received or after, agreed to allow the depreciation. The issue was tried, and the jury found that the defendant had agreed to allow it. The court thereupon decreed that the defendant should pay the amount of the depreciation and the costs, and the defendant appealed. And it was held in the Court of appeals that the complainant having failed to overcome the defendant's denial in his answer and to support the allegations of his bill by proof, the first decree dismissing the bill was right and should be affirmed; and that notwithstanding the verdict for the plaintiff, the order directing the issue and all the subsequent proceedings should be reversed: and it was so decreed accordingly. In the case of Collins v. Jones, 6 Leigh 530, an issue was directed and a verdict was found in favor of the complainants, and relief thereupon decreed.

This court held that the issue was
311 *improperly directed; and that notwithstanding the verdict in favor of the complainant, the decree should be reversed, the injunction dissolved, and the bill dismissed: and it was so decreed accordingly. These cases have never been overruled, nor, so far as I am aware, even questioned in any subsequent case, and I regard them as binding authorities of themselves, and as prescribing a rule having its foundation in just reason and a wise policy; and they seem to me directly to rule this case. I am of opinion, therefore, that the Circuit court erred in decreeing relief to the complainant on the final hearing of the cause; and that it should then have repaired the error previously committed, by dissolving the injunction notwithstanding the verdict, and dismissing the bill.

With regard to the questions of the measure of relief to be afforded in a case of this kind, and the sufficiency of the verdict to authorize the decree pronounced by the court, I deem it unnecessary to express any opinion, as, in the view which I take of the case, neither of those questions properly arises in the cause; the complainant not having shown himself entitled to any relief, or to an issue to try the question of usury when the order for it was made by the court.

I am of opinion that the decree should be reversed with costs to the appellant; that the order directing the issue and the verdict of the jury should be set aside; that the injunction should be wholly dissolved, and the bill dismissed with costs to the defendants in the Circuit court.

The other judges concurred in the opinion of of Lee, J.

Decree reversed.

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312 *Cox and Others v. Thomas' Adm'x.

July Term, 1852, Lewisburg.

(Absent SAMUELS, J.)

Bonds—Penal—Recitals—Case at Bar.—In the penal part of a bond the names of fourteen obligors are inserted, binding themselves in a penalty to T. The condition recites that T has admitted the above bound his deputies in the office of sheriff of G. county for twelve months. Now if the above bound shall well and truly discharge the duties of their respective offices of sheriffs as aforesaid, &c.: the names of the parties who were admitted as deputy sheriffs being omitted. Two of the persons whose names were inserted in the penal part of the bond did not sign it, and one signed it whose name does not appear in the body of the instrument. On a motion by the administratrix of the high sheriff for the default of one of the fourteen who had signed the bond, as deputy sheriff. HELD:

1st. **Same—Same—Same—Estoppel.**—That there being nothing on the face of the bond to indicate that all named in the penalty were not appointed as deputies, and the obligors having sealed and delivered the bond in its present shape, they are estopped from denying the fact.

2d. **Same—Joint Obligors—Liability*—Case at Bar.**—That deputy sheriffs having no joint interest in or entire authority over the whole office, and therefore one not being responsible for the other merely by virtue of the office, they can only be held liable for the acts of each other in consequence of an express undertaking. As therefore they do not and cannot be made to stand as principals in respect to the acts of others, and as the bond makes them by its terms responsible for each other, each one must be regarded as principal, so far as his own acts are involved, and the remaining obligors as his sureties.

3d. **Same—Penal—Case at Bar.**—Though some of the persons named in the penalty did not sign the bond, the parties who did sign it are to be considered as the obligors who are bound and are recited to have been admitted as deputies.

4th. **Same—Same—Signer's Name Not in Penalty—Effect.**—A party signing the bond whose name is not in the penalty, does not vitiate the bond, and he is bound as an obligor.

5th. **Same—Default of Deputy—Evidence—Record.†**—It is not necessary that the administratrix of the high sheriff shall produce the whole record of the cause in which he was subjected to liability for the default of the deputy. It is suffi-
313 cient *to produce so much thereof as shows the fact. And in this case the judgment was sufficient; that and its recitals being *prima facie* evidence against the deputy and his sureties.

6th. **Same—Recitals—Estoppel.‡**—The bond stating that T was high sheriff and that the party proceeded against as deputy was such, it estops the obligors from denying these facts.

7th. **Judgments—Clerical Error—Failure to Object in Lower Court.**—Though the copy of the judgment against the high sheriff in the record, does not show in what court or when it was rendered, that is a mere clerical omission in copying the judgment into the record, and if these facts appear from any other part of the record, it will be held sufficient in the appellate court, when the objection was not made in the court below.

This was a motion in the Circuit court of Grayson county by the administratrix of Jonathan Thomas deceased, late high sheriff of Grayson county, against Samuel Cox, jr., late deputy sheriff for the said Thomas, and eleven others, as obligors in a bond executed by them to Jonathan Thomas. The notice was addressed to these parties, the first as late deputy sheriff, and the others as obligors in a bond executed to Thomas. It recited that on the 4th day of April 1846 a judgment was rendered by the Circuit court of Grayson county in favor of John Mitchell, against the administratrix of Thomas, who was late high sheriff of Grayson county, for the sum of 132 dollars 30 cents, with fifteen per cent. per annum damages thereon, from the 1st day of April 1834 till paid, and costs; which judgment was rendered on account of the default and misconduct of the said Samuel Cox, jr., who was a deputy of the said Jonathan Thomas, in failing to pay over to Mitchell the said sum of 132 dollars 30 cents, levied by him by virtue of two writs of fieri facias, sued out of said court by Mitchell against Esau Worrell. And the notice was, that on the first day of the next term of the said court she should move for a judgment against them for the full amount of the judgment so rendered against her.

314 *The notice was not served on Samuel Cox, jr., but it was served on nine of the other parties, who appeared to defend the motion. On the trial the plaintiff having proved the notice, introduced in evidence the copy of a judgment. This copy, as copied into the record in this court, did not state the court in which it was rendered; but after stating the names of the parties, as John B. Mitchell v. Patience Thomas, adm'x of Jonathan Thomas deceased, late high sheriff of Grayson county, proceeds to recite: "On a motion on a notice for the failure of Samuel Cox, deputy for Jonathan

*Bonds—Joint Obligors—Liability.—Where a bond, upon which several persons are bound, by its terms, makes them responsible for each other, each one must be regarded as a principal, so far as his own acts are involved and the remaining obligors as his sureties. This proposition laid down in the principal case is approved and followed in Caskie v. Harrison, 76 Va. 93.

†Same—Default of Deputy—Evidence—Record.—In the fifth headnote of the principal case it is held that, it is not necessary that the administratrix of the high sheriff shall produce the whole record of the cause in which he was subjected to liability for the default of the deputy. It is sufficient to produce so much thereof as shows the fact. And in this case the judgment was sufficient; that and its recitals being *prima facie* evidence against the deputy and his sureties. The principal case is cited and followed in Glenn v. McAllister, 46 Fed. Rep. 885, which quotes in full the above proposition.

‡Bonds—Recitals in—Estoppel.—For the proposition that, the obligors in a bond are estopped from denying the recitals of their bond, the principal case is cited and approved in the following cases: Cecil v. Early, 10 Gratt. 205, and *note*; Cordle v. Burch, 10 Gratt. 484; Shaw v. McCullough, 3 W. Va. 261; Hoke v. Hokes, 3 W. Va. 563; Bank v. Fleshman, 22 W. Va. 825; McMillan v. Hickman, 35 W. Va. 715, 14 S. E. Rep. 230. See *foot-note* to Monteith v. Com., 15 Gratt. 172; also, monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124; monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801. In this last case it is said at page 809, citing the principal case, it has been held in numerous cases, that where an instrument which shows on its face that it was to be executed by other persons besides those who have executed it, is found in the hands of the party to whom it is made, it will be presumed in the absence of evidence, to have been duly delivered as the deed of those whose names are signed to it.

Judgments—Collateral Attack.—In the principal case it is said, if the court has cognizance of the cause, advantage cannot be taken of an erroneous judgment collaterally; for, although the error be apparent, the judgment remains in force until reversed. For this proposition the principal case is cited and approved in the following cases: Withers v. Fuller, 30 Gratt. 552; Burtners v. Keran, 24 Gratt. 64; Hutcheson v. Priddy, 12 Gratt. 90, and *note*; Allan v. Hoffman, 83 Va. 134, 2 S. E. Rep. 602; Neale v. Utz, 75 Va. 485. See Cook v. Hays, 9 Gratt. 142, and *note*; also, *foot-note* to Cox v. Thomas, 9 Gratt. 323.

Thomas, high sheriff as aforesaid, to pay over to the plaintiff the amount of two writs of fieri facias, issued from the clerk's office of the Circuit court for Grayson county on the 8th day of October 1833, upon judgments obtained in said court in favor of the plaintiff against Esau Worrell, one for," &c.

It further recites that B. R. Floyd, to whom the matters in difference between the parties had been submitted by a rule of court, made at the April term 1844, this day returned his award in these words: "Pursuant to an order of the Circuit court for Grayson county, referring to me a certain matter in controversy," &c.,"having given Samuel Cox notice frequently to produce any offsets he may have had against John B. Mitchell, and he having failed to do so, except those hereinafter mentioned, I do take my award as follows." He then proceeded to award upon the two executions, after allowing a credit of 5 dollars on each, the sum of 132 dollars 30 cents, with fifteen per cent. per annum damages thereon, from the 1st day of April 1834 until paid, and the costs of the notice. This award was confirmed, and a judgment was rendered for the plaintiff against the defendant accordingly.

The plaintiff then offered in evidence a bond, in the penal part of which the 315 names of Samuel Cox, jr., *and thirteen other persons were inserted, binding themselves in a penalty of 90,000 dollars to Jonathan Thomas. The condition of the bond recites, that whereas the above named Jonathan Thomas hath this day admitted the above bound his deputies in the office of sheriff of Grayson county for twelve months. Now if the above bound shall well and truly discharge the duties of their respective offices as deputy sheriffs as aforesaid, &c.; the names of the parties, who were in fact admitted as deputy sheriffs, being omitted, and it not appearing upon the face of the bond who they were. Two of the persons, whose names were inserted in the penal part of the bond, did not sign it, and one signed it whose name does not appear in the body of the instrument. To the introduction of this bond as evidence the defendants objected, on the ground that it was not relevant testimony in the cause, because it did not show the undertaking of the defendants, nor who was appointed the deputy of Thomas, nor for whose default the defendants were responsible. But the court overruled the objection, and admitted the bond as evidence; and the defendants excepted.

The plaintiffs then introduced in evidence the two executions, sued out from the clerk's office of the Circuit court of Grayson by John B. Mitchell against Worrell, with the return thereon by Samuel Cox, jr., as deputy of J. Thomas, "satisfied." And the foregoing being all the evidence in the cause, the court proceeded to give a judgment for the plaintiff. To which judgment the defendants excepted, on the ground that the evidence was insufficient to justify a judgment against them; and they applied to this court for a supersedeas, which was allowed.

There was no counsel for the appellants. Floyd and B. R. Johnston, for the appellee.

316 *ALLEN, J. It is objected in this case that the bond upon which the proceeding was had, is void on account of its uncertainty; or if not, and if all the obligors are to be treated as deputy sheriffs, this proceeding cannot be sustained, because the remedy by notice is given by the statute against the deputy and his sureties, and not against one deputy for the default of another deputy. As to the first question there would seem to be nothing in it. The bond from a deputy to the high sheriff is not a statutory obligation; no particular form is prescribed. We may conjecture from the appearance of the paper that some of the obligors signed as deputy sheriffs, and others as their sureties; or that the bond was drawn originally to be signed by certain persons appointed deputies and others as their sureties; and that the blank spaces were left to be filled up with the names of the deputies for whose acts the others intended to become responsible. However this may be, the paper was executed and delivered as a complete instrument in its present form. Certain persons are named in the penalty as obligors, though all so named do not sign the bond. The condition recites that the obligee hath this day admitted the above bound his deputies in the office of sheriff; and provides for the faithful performance of the duties of their respective offices as such deputies. There is nothing on the face of the bond to indicate that all named in the penalty were not appointed as deputies, and the obligors having sealed and delivered the bond in its present shape, are estopped from denying the fact. The notice is to Samuel Cox, jr., the first person named in the penalty, and the first signer as deputy, and to the others as surviving obligors; treating the first named as principal, for whose default and misconduct in his office of deputy, the representative of the sheriff had been held liable, and proceeding against his co-obligors as sponsors for his acts. If the legal 317 effect of their *undertaking be, that the other obligors become responsible as sureties, the notice may be maintained, although they are not expressly named as sureties in the bond. Deputy sheriffs have no joint interest in, or an entire authority over, the whole office; and therefore there is no case in which one is responsible for the acts of the other, merely in virtue of their offices; there is neither a joint right nor a joint responsibility, and they can only be held liable for the acts of each other in consequence of an express undertaking. As therefore they do not and cannot be made to stand as principals in respect to the acts of others, and as the bond makes them by its terms responsible for each other, each

one must be regarded as principal so far as his own acts are involved, and the remaining obligors as his sureties. This is the rule laid down in the case of Morrow v. Peyton, 8 Leigh 54, and applied to the case of administrators who have a joint and entire authority and control over the whole assets, and who it was conceded from their joint authority would be considered as principals when they united in the act or in some way participated in or sanctioned it. The case of Morrow v. Peyton it is true is in conflict with the principles announced in Kirby v. Turner, 1 Hopkins' Ch. R. 309, in which it was held that as guardians were jointly liable for their joint acts, and each separately for his own acts, their rights were not varied by having given a joint and several bond with a surety, and that they were not by such bond made sureties for each other: the bond of all in such case being considered as the bond of each one, with a surety for the fidelity of all and each. The decision proceeds upon the ground that the bond is a statutory bond; that the law requiring a bond did not change the common law relation of the parties, and therefore that a joint and several bond must have the effect of separate bonds. In Brazier v. Clark, 5 Pick. 318 R. 96, it was held that if two *executors enter into a joint and several bond, both are responsible for all acts done by either during the continuance of the joint executorship. But if one died, and the survivor thereafter committed waste, the estate of the deceased executor should be held discharged. This is a modification of the principle as laid down in Kirby v. Turner.

The common law liability of each on the bond, for the acts of the other during the continuance of the joint executorship as growing out of the contract of the parties, is admitted: but when the survivor succeeded to the whole authority, he alone and those who were securties for him were reponsible. And this construction is given because it could not be supposed the legislature in requiring bond, intended to change the common law liabilities of the executors. To the same effect is the case of Towne v. Ammidown, 20 Pick. R. 535. All these cases are founded upon a construction of the statute requiring these bonds; it being considered that the statute did not change the legal relation of the parties; and although the terms of such a bond might literally import a different legal effect, they should be construed according to the intention of the law, and have effect according to the duties they were meant to enforce.

In Clark & wife v. Williams, 6 Gill. & John. 288, the court held that where executors give a joint and several bond they are jointly and severally responsible, each for the acts of the other. The judge, in delivering the opinion of the court, remarked that they could not adopt the anomalous character attempted to be given to the bond, treating it as the separate bond of each, in which the sureties are bound for both, but the administrators were not responsible for each other.

In Liddersdale v. Robinson, 2 Brock. R. 160, Marshall, Ch. J., decided that where an administration bond is 319 *joint, one administrator is responsible for his coadministrator. And in Green v. Hanberry, 2 Brock. R. 403, the same judge held that on such a bond each was surety for the other, and liable for the whole.

The weight of authority would therefore seem to be in favor of the principle of Morrow v. Peyton, in respect to the bonds of administrators and executors. The authority of this case has been recognized and followed since in other cases determined in this court. And as the legislature has not thought proper to interfere with the rule there laid down, although there has been a general revision of the laws since that decision, it ought not now to be considered as an open question.

But the present is a stronger case for the application of the principle than the cases referred to. The bond is a common law obligation not taken by any legal functionaries, but given upon a contract between the parties. The penalty creates a present debt defeasible by matter subsequent, and all are responsible for that debt if the condition is not performed; and it is difficult to perceive in what mode any party to the bond could defend himself in an action at law for a breach of the condition by any of the parties to it. A plea that it was not the joint bond of all would contradict the terms of the instrument. I think the obligor committing the default is liable as principal, and the co-obligors as his sureties; and such being the legal effect of the bond, the high sheriff had a right to proceed by notice under the statute. Though some of the persons named in the penalty did not sign it, the parties who did sign it are to be considered as the obligors who are bound, and are recited to have been admitted as deputies; and if any have signed who are not named in the penalty, that circumstance does not vitiate the bond or discharge them from its obligation. Luster v. Middlecoff, 8 Gratt. 54; Berry v. Homans' committee, 8 Gratt. 48.

320 *It is argued that no foundation was laid for the introduction of the bond as evidence because the judgment against the high sheriff for the default of the deputy, was not accompanied by the whole record; and no proof was given of the appointment of the high sheriff or his qualification, or of S. Cox as his deputy, nor of the default of the deputy.

It was not incumbent on the appellee to produce the whole record on the trial of the notice; it was sufficient to produce so much thereof as showed that the sheriff had been subjected to a liability for the default of the deputy Cox; White v. Clay, 7 Leigh 68; Wynn v. Harman, 5 Gratt. 157; and this sufficiently appeared upon the record of the judgment exhibited. That recited that the motion against the appellee was on a notice for the failure of Samuel Cox, deputy for Jonathan Thomas, late

high sheriff, to pay over money collected on executions therein described. And although the deputy and the other obligors are not concluded by the judgment and its recitals, it is prima facie evidence against them.

The bond itself estops the obligors from denying the fact that Thomas was sheriff and Samuel Cox was deputy. 1 Greenl. Evi. § 22, 26; Rainsford v. Smith, Dyer's R. 196 a. In Cutler v. Dickinson, 8 Pick. R. 386, a bond given by the administrator to a judge of probat with the usual condition, was offered in evidence. It was objected to because it appeared on examining the records of the probat office, that there was no decree or other evidence of the appointment of the administrator except what resulted from the bond; and according to a case referred to in the argument, the law required probat decrees to be recorded. The court held that the obligors were estopped by the recital in the bond to deny the appointment of the administrator. So parties were estopped from denying that there was such injunction, or judgment or decree
321 *as their bond recites and describes. Allen v. Luckett, 3 J. J. Marsh. R. 165; Stockton v. Turner, 7 Id. 192; Kellar v. Becler, 4 Id. 655. In all those instances the matter recited, and which the parties were estopped by their bond from denying, ought regularly to appear of record.

It is not necessary to carry the principle in this case as far as it was done in the cases cited. If in the case of a mere statutory bond, it should be held that the authority of the officer to take it must be shown, and that the recitals would not be evidence of such fact, the bond here is a common law obligation, and no question as to the authority to take it can arise. I think the court did not err in overruling the objection to the bond and receiving it in evidence.

Nor do I think there was any error in rendering judgment upon the facts as set out in the second bill of exceptions. It is said the notice describes a judgment as rendered by the Circuit court of Grayson on the 4th April 1846, and the judgment given in evidence does not show in what court nor at what time it was rendered. This is a mere clerical omission in copying the judgment into this record. All the proceedings were in the same court, and the judgment was read in evidence without objection. The award incorporated in the judgment, shows it was made under an order entered in the cause depending in the court described in the notice; and as the award which was made the basis of the judgment was dated on the 4th of April 1846, and appears to have been confirmed on the day it was returned, the objection does not seem to have been well founded in fact. The submission to arbitration did not destroy the right of the high sheriff to recover. The award constituted in part the evidence on which the court rendered judgment. The liability of the deputy sheriff was shown by the return on the execution, which was also
322 in evidence; and *from the face of the award it would seem that the submission was for the benefit of the deputy to enable him to produce his credits. The notice to produce credits is stated to have been given to him, and those allowed were exhibited by him. The judgment therefore, in the absence of all proof to the contrary, shows that the defaulting deputy had notice of the proceeding against the representative of his principal and did attend to the defence. Upon the whole, it seems to me there is no error in the judgment of the Circuit court.

The other judges concurred in the opinion of Allen, J.

Judgment affirmed.

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323 *Cox & als. v. Thomas' Adm'x.

July Term, 1852, Lewisburg.

(Absent SAMUELS, J.)

1. **Evidence—Judgments—Prima Facie*—Case at Bar.**—On a notice and motion by the administratrix of the high sheriff against a deputy and his sureties, for the default of the deputy in not paying over money collected on an execution, the judgment recovered by the creditor, showing that it is for such default of the deputy, is *prima facie* evidence against the deputy and his sureties, that the administratrix had been subjected to the liability for the default of the deputy.

2. **Statute of Limitations—Upon Whom Burden of Proof—Case at Bar.**—If the recovery by the creditor against the administratrix of the high sheriff was barred by the statute of limitations, it is for the

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***Evidence—Judgments—Prima Facie.**—For the proposition that, a judgment, recovered by a creditor against the administratrix of the high sheriff, showing that it is for the default of the deputy, is *prima facie* evidence against the deputy and his sureties, the principal case is cited and approved in Carr v. Mead, 77 Va. 160; Board of Supervisors v. Dunn, 27 Gratt. 622, and *note*; Crawford v. Turk, 24 Gratt. 185. See monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

Same—Admissions of Administrator—Admissibility.—In Gilmer v. Baker, 24 W. Va. 87, it is said: "If this statement or admission had been made after Berry had ceased to be administrator of Baker, and out of the course of his official duty, it would not be admissible against his surety. But such was not the fact. It was made while he was administrator and in the discharge of an official act as such administrator. It is made in an answer filed by him in defence of the fund and in the performance of an act by him as administrator. It is a part of the *res gestæ* in connection with the very transaction now in question and was made by him in his official capacity, while in the actual discharge of his duties as administrator. It is, therefore, clearly admissible not only against him but against his sureties as such administrator. 1 Gr. Ev. secs. 174, 178, 179, 180; Cavendish v. Fleming, 3 Munf. 198; Swope v. Chambers, 2 Gratt. 320, 324; *Cox v. Thomas, 9 Id. 323;* Snowball v. Goodricke, 4 B. & Ad. 541."

The principal case is cited in Van Winkle v. Blackford, 33 W. Va. 583, 11 S. E. Rep. 29.

deputy and his sureties to show the fact in the motion against them. The judgment against the administratrix must be presumed to be correct in the absence of all proof to the contrary.

3. **Courts of General Jurisdiction—Judgments—Collateral Attack*—Case at Bar.**—The Circuit court is a court of general jurisdiction, taking cognizance of all actions at law between individuals, with authority to pronounce judgments and to issue executions for their enforcement. Where its jurisdiction is questioned it must decide the question itself: And whenever the subject matter is a controversy at law been individuals, the jurisdiction is presumed from the fact that it has pronounced the judgment; and the correctness of such judgment can be enquired into only by some appellate tribunal.

4. **Same—Same—Conclusiveness as to Jurisdiction—Case at Bar.**—A judgment of a Circuit court upon a notice and motion, in favor of a creditor against a high sheriff or his administratrix, for the default of his deputy in not paying over money collected on an execution which issued from the County court, is conclusive of the jurisdiction of the court, unless reversed on appeal; and its validity cannot be called in question by the deputy or his sureties, on a motion by the high sheriff or his administratrix against them founded on said judgment.

5. **Judgments—Presumption—Case at Bar.**—In such a case if it does not certainly appear that the proceeding by the creditor against the high sheriff commenced in the Circuit court, the court in favor of the judgment, will presume that such proceeding was commenced in the County court and removed to Circuit court, or had been retained in the Circuit court after a reversal of the judgment of the County court; and it is for the deputy and his sureties to produce the whole record to repel the presumption.

324 *This was a proceeding in the same court, and between the same parties, similar to the last preceding case. The notice was for the default of the deputy sheriff, Samuel Cox, jr., in failing to pay over the money received by him upon an execution which issued from the clerk's office of the County court of Grayson, in the name of William Bourn's executor against Charles Bolt and another. The notice was like that in the former case; there was a copy of the judgment against the administratrix of Thomas for the default of the deputy, and the same bond. But the execution of Bourn's executor v. Bolt, and the return thereon, were not introduced as evidence. There were also the same exceptions by the defendant, and a judgment by the court in favor of the plaintiff and against the defendants. To which judgment the defendants applied to this court for a supersedeas, which was allowed.

There was no counsel for the appellants.

Floyd and B. R. Johnston, for the appellees.

ALLEN, J. This is a proceeding by the representative of Jonathan Thomas, late sheriff of Grayson county, to recover from Samuel Cox, his deputy, and his co-obligors in a bond to the sheriff, the amount of a judgment recovered against the administratrix of the sheriff by the surviving executor of William Bourn deceased, on account of the default of the deputy. The proceeding was had upon the same bond referred to in the former case between these parties, and the same objections to the validity of the bond were relied on, and were then disposed of.

In this case it does not appear from the evidence as set out, that the execution with the return of the deputy was produced. The judgment against the administratrix of the sheriff, recites that the notice 325 *against her was to recover money collected by the deputy on an execution which issued out of the County court of Grayson on the 29th day of August 1833, in favor of William Bourn, which came to the hands of Samuel Cox as deputy of Thomas, the high sheriff of the county, who had returned that he had received the amount of the execution. The whole evidence consisted of the notice, the judgment aforesaid, and the bond, the execution of which was proved. And in the absence of all other proof the judgment furnished prima facie evidence against the deputy and his sureties of the facts therein recited, and showed that the representative of the sheriff had been subjected to a liability for the default of the deputy, as in the notice alleged.

Nor is there anything to show that the recovery of the creditor against the sheriff or his administratrix, was barred by the statute of limitations. It does not appear when the proceeding was instituted against the representative of the sheriff, or what defence was made to the notice. It was sufficient for the defendant in error to make out a prima facie case entitling her to recover. If the statute of limitations or any other matter would have constituted a valid defence, the proof should have come from the plaintiffs in error. The judgment against the administratrix must be presumed to be correct in the absence of all proof to the contrary.

The last objection to the recovery is of a more serious character. It appears upon the face of the judgment that the execution

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***Courts of General Jurisdiction—Judgments—Collateral Attack.**—Upon this question see the principal case cited and approved in the following cases: Cardoza v. Epps, 2 Va. Dec. 187; Andrews v. Avory, 14 Gratt. 229, and *note*; Gibson v. Beckham, 16 Gratt. 327, and *note*; Ballard v. Thomas, 19 Gratt. 20, 21, and *note*; Cline v. Catron, 22 Gratt. 394; Lancaster v. Wilson, 27 Gratt. 630, and *note*; *foot-note* to Pulaski County v. Stuart, 28 Gratt. 872; Woodhouse v. Fillbates, 77 Va. 321; Richardson v. Seevers, 84 Va. 268, 4 S. E. Rep. 712; Lawson v. Moorman, 85 Va. 887, 9 S. E. Rep. 150; Lemmon v. Herbert, 92 Va. 656, 24 S. E. Rep. 249; Moch v. Va. F. & M. Co., 10 Fed. Rep. 708; Dize v. Lloyd, 36 Fed. Rep 651; Kreglo v. Fulk, 3 W. Va. 79; Twiggs v. Chevallie, 4 W. Va. 480; C. & O. R. Co. v. Patter, 9 W. Va. 655; Patton v. Merchants' Bank, 12 W. Va. 607; Keystone Bridge Co. v. Summers, 13 W. Va. 506; Leach v. Buckner, 19 W. Va. 43; Wandling v. Straw, 25 W. Va. 700, 702.

See monographic *note* on "Judgments."

upon which the money was collected issued from the County court of Grayson, and the judgment was rendered by the Circuit court. By § 48 of act 1 Rev. Code 542, the creditor is authorized to recover by motion in the court from which the execution issued, the amount collected, with interest at the rate of fifteen per centum per annum from
326 the return day *of the execution until paid. The question then arises whether the judgment, supposing it to have been pronounced on a notice commenced in the Circuit court, was a mere nullity originally. In the case of the Marshalsea, 10 Coke 76 a, it was resolved that when a court has jurisdiction of a cause, but proceeds erroneously, no action lies against the party who sues, or the officer who executes the precept of the court. But, if the court had no jurisdiction, the whole proceeding is coram non judice, and actions will lie against them without any regard to the precept. If the court has cognizance of the cause, advantage cannot be taken of an erroneous judgment collaterally; for although the error be apparent, the judgment remains in force until reversed. Drury's case, 8 Coke 141 b; Tarlton v. Fisher, Doug. R. 671. The only question then would seem to be whether the subject matter was within the jurisdiction of the court; if it was, if the jurisdiction of the court extended over that class of cases, it was the province of the court to determine for itself whether the particular case was one within its jurisdiction. The Circuit court is a court of general jurisdiction, taking cognizance of all actions at law between individuals, with authority to pronounce judgments and to issue execution for their enforcement. The jurisdiction of the court to take cognizance of all controversies between individuals in proceedings at law, need not (as in the case of courts of restricted and limited jurisdiction), appear on the face of the proceedings. Where its jurisdiction is questioned it must decide the question itself. Nor is it bound to set forth on the record the facts upon which its jurisdiction depends. Wherever the subject matter is a controversy at law between individuals, the jurisdiction is presumed from the fact that it has pronounced the judgment: And the correctness of such judgment can be enquired into only by some appellate tribunal. The execution
327 which *would issue on the judgment in the case under consideration, would not disclose to the officer the nature of the proceedings on which the judgment was founded. There was no necessity to set forth in the judgment on what evidence it was rendered; and being a judgment for a pecuniary recovery which the court had general jurisdiction to render, the sheriff would have been bound to execute it, and the execution would have been his justification. In Grignon's lessee v. Astor, 2 How. U. S. C. R. 319, it is said "that the true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered; whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description." Of that description is the Circuit court, and its decision in controversies at law is evidence of itself to show jurisdiction and its lawful exercise. The subject matter being within the jurisdiction of the court, it is immaterial by what form it is exercised; they do not affect the jurisdiction of the court. Thus it is said in the case of the Marshalsea, if the Court of common pleas holds plea in an appeal of death, and the defendant is attainted, it is coram non judice. But if the same court in a plea of debt award a capias against a duke, which by law does not lie against him, and that appear in the writ itself, although the writ be against law, yet as the court has jurisdiction of the cause, the sheriff arresting by force of the writ is excused: So also if the Court of common pleas holds plea in debt without original, it is not void, for they are judges of those pleas, and it cannot be said the proceeding is coram non judice. So
328 here the judges *of the Circuit court are judges of pleas against sheriffs, whether carried on by action at common law or by notice under the statute; though in a given case, they may err in determining on their jurisdiction. In the case of Prigg v. Adams, 2 Salk. R. 674, in an action for false imprisonment, the officer justified under a ca. sa. on a judgment of the Court of common pleas, upon a verdict of five shillings upon a cause of action arising in Bristol. The plaintiff replied an act of parliament creating a court in Bristol, and declaring that if any person brought any such action in any court at Westminster, and it appeared upon trial to be under 40 shillings, no judgment should be entered upon it; and if entered it should be void. Yet the court held it only voidable, and sustained the plea. The principle of that case is decisive of this. There, although the act of parliament declared the judgment void, yet as a court having jurisdiction of the subject matter had rendered it, though the error appeared on its face, it could be corrected only in an appellate tribunal. The case of Prigg v. Adams is cited and relied on by President Tucker in Fisher v. Bassett, 9 Leigh 119; and the same principle was affirmed in that case: the court holding that as the General court had jurisdiction to grant letters of administration, although the state of facts was not such as to give the court jurisdiction to grant administration in the particular case, yet the grant was not a void but only a voidable act. The judgment in this case must be considered as conclusive for another reason: Both parties appeared, and the defendant either submitted to the jurisdiction, or it was decided against him. In such case

President Tucker, in Fisher v. Bassett, observes, that the question whether the general jurisdiction of the court over matters of that description embraced the particular case having been decided by its judgment, can never be raised again except by proceedings in error.

329 *The objection to the validity of the judgment is not well founded for another reason: It does not certainly appear that the proceeding commenced in the Circuit court. It may have been instituted in the County court and removed to the Circuit court, or have been retained in the Circuit court upon a reversal of a judgment of the county court. The court in favor of the judgment would if necessary be bound to presume that such was the fact, and it was the duty of the other side to have produced the whole record to repel such presumption, if he intended to raise the question. I think there is no error in the judgment, and that it should be affirmed.

MONCURE and LEE, Js., concurred in Judge Allen's opinion.

DANIEL, J., concurred in affirming the judgment.

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330 *Greer v. Greers.

July Term, 1852, Lewisburg.

Deeds—Case at Bar.—Two deeds are made by an old man shortly before his death, by which he conveys the whole of his property, which he had not before disposed of, to one of his sons. HELD:

1st. **Same—Legal Capacity—Principle Applicable to Case at Bar.***—That the principle which has been applied to last wills, in respect to the state of mind and degree of capacity sufficient to made a valid devise or disposition of property, is equally applicable to the case of this grantor.

2d. **Legal Capacity—Test.**†—The grantor not laboring under a total or temporary deprivation of reason, he was of legal capacity to make a valid disposition of his property, if he was capable of recollecting the property he was about to dispose of, the manner of distributing it, and the objects of his bounty.

3d. **Contracts—Mental Weakness.**‡—Although the grantor or testator may labor under no legal incapacity to do a valid act or make a contract, yet if the whole transaction taken together with all the facts, mental weakness being one of them, shows that the particular act was not attended with the consent of his will and understanding, it is void.

This was a suit in equity, instituted in the Circuit court of Scott county by Noah and Moses Greer, sons of Shadrach Greer, to set aside two deeds made by their father a short time before his death, by which he conveyed his estate, which he had not previously given to his children, to his son Isaac Greer. The grounds on which it was sought to set aside the deeds, were, incapacity on the part of the grantor, and

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Deeds—Legal Capacity—Principle Applicable.—See principal case distinguished in Arnold v. Arnold, 11 W. Va. 462.

See generally, monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564.

†*Legal Capacity—Test.*—In Miller v. Rutledge, 82 Va. 867, it is said: "It is laid down in Minor's Ins., p. 572, on the authority of repeated decisions of this court, that: 'Mere weakness of the understanding is no objection to a man's disposing of his own estate. Courts cannot measure people's capacities, nor examine into the wisdom and prudence of their property dispositions. If a man be legally *compos mentis*, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his actions. The *test* of *legal capacity* is said to be that the party is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the objects of his bounty. But, of course, the particular act must be attended with the consent of his will and understanding.' *Greer v. Greers*, *9 Gratt. 332-3;* Samuel v. Marshall, 3 Leigh 567; Beverley v. Walden, 20 Gratt. 147. This extract is literally more appropriate to wills than to contracts. But the rule is the same as respects both." In accord with this proposition, the principal case was also cited in Nicholas v. Kershner, 20 W. Va. 256.

For the proposition that mere weakness of the understanding is no objection to a man's disposing of his own estate, see the principal case further cited in Porter v. Porter, 89 Va. 122, 15 S. E. Rep. 500; Fitzgibbon v. Barry, 78 Va. 755; Fishburne v. Ferguson, 84 Va. 111, 4 S. E. Rep. 575; *foot-note* to Beverley v. Walden, 20 Gratt. 147.

Disposition of Property — Capacity — Consent.—Where a legal capacity is shown to exist, that the party had sufficient understanding to clearly comprehend the nature of the business, that he consented freely to the special matter about which he was engaged, and no fraud or undue influence is shown to have been used to bring about the result, the validity of the disposition cannot be impeached, however unreasonable or imprudent or unaccountable it may seem to others. It is not the propriety or impropriety of the disposition, but the capacity to make it, and the fact that it was freely made with the full assent of the grantor, that must control the judgment of the court. This proposition of the principal case was approved in Matthews v. Crockett, 82 Va. 399; Smith v. Elliott, 1 P. & H. 347; Jarrett v. Jarrett, 11 W. Va. 627. See, in accord, the principal case cited in Pusey v. Gardner, 21 W. Va. 480.

Undue Influence—Definition.—The principal case was cited in Simmerman v. Songer, 29 Gratt. 24, Carter v. Carter, 82 Va. 641, and *foot-note* to Parramore v. Taylor, 11 Gratt. 220, as approving the definition of "undue influence" laid down in Jarman on Wills, p. 29. This definition is set out in a *foot-note* to Parramore v. Taylor, 11 Gratt. 220. See the principal case also cited with approval in Delaplain v. Grubb, 44 W. Va. 624, 30 S. E. Rep. 206.

Same.—As to undue influence; the influence resulting from affection and attachment, or the mere desire of gratifying the wishes of another, if the free agency of the party is not impaired, does not affect the validity of the act. See principal case cited for this proposition in Forney v. Ferrell, 4 W. Va. 742; Orr v. Pennington, 93 Va. 272, 24 S. E. Rep. 928.

‡*Contracts—Mental Weakness.*—In accord with the proposition laid down in the last headnote, see the principal case cited in C. & O. R. Co. v. Mosby, 98 Va. 94, 24 S. E. Rep. 916.

fraudulent practices on the part of Isaac Greer. To give all the facts of this case, would be to write a volume, and would be a very useless consumption of time and occupation of space; as it is well said by the judge who delivered the opinion of the court: "The facts in one case can but rarely serve to illustrate or elucidate
331 *another." The facts are sufficiently stated in the opinion to exhibit the principles upon which the cause was decided. Before the hearing of the cause, the bill had been dismissed as to Moses Greer.

Upon the hearing of the cause, the court below set aside the deeds, and directed accounts: whereupon Isaac Greer applied to this court for an appeal, which was allowed.

Samuel Logan and Patton, for the appellant.

Floyd and Baxter, for the appellees.

ALLEN, J., delivered the opinion of the court.

The bill in this case is filed to set aside two deeds executed by Shadrach Greer to his son Isaac Greer. They are assailed upon two grounds: First, that by reason of extreme old age and disease, his memory and judgment were so much impaired as to disqualify him from making a valid disposition of his property by deed or will; and second, that the appellant procured the deeds from him by the exercise of undue influence over a mind weakened by the infirmities of age and sickness. Upon the hearing of the cause, issues were directed to ascertain whether at the time of executing the deeds the grantor was of sound mind and capable of executing such deeds. 2d. Whether the deeds were procured to be executed by fraud. After an ineffectual effort to try the issues, the court perceiving from the time consumed that it would be impracticable to dispose of them within any reasonable period, and believing that there was no real conflict of testimony making the intervention of a jury essential, and the parties moreover agreeing that the court should decide the whole case without the intervention of a jury, set aside the issues. The case being thereafter fully matured, the court proceeded to hear it,
332 *and to pronounce the decree from which the appeal was taken.

It was determined in the case of Samuel v. Marshall, 3 Leigh 567, that if the evidence on a question of fact, though various and conflicting, be such as ought to satisfy the chancellor's conscience as to the truth of the case, he need not direct an issue to try the fact. In this case there was no such conflict of testimony as to the facts put in issue by the pleadings, as to render the aid of a jury indispensable; and under the authority referred to, the court, even without the consent of parties, would have been justified in setting the issues aside.

The deeds in this case contain an entire disposition of the estate of the grantor, and stand in the place of, and seem to have been regarded by the grantor in the nature of a testamentary disposition of his property. The principle which has been applied to last wills in respect to the state of mind and degree of capacity, sufficient to make a valid devise or disposition of property, is equally applicable to the case of this grantor. Mere weakness of understanding is no objection to a man's disposing of his estate. "A man of mean understanding, yea, though he incline to the foolish, is not prohibited to make a testament." Swinburne 127, 8. "Courts cannot measure the size of people's capacities, nor examine into the wisdom and prudence of men in disposing of their property." Jarman on Wills 52. In Shelford on Lunacy, p. 37, it is said: "A person being of weak understanding, so he be not either an idiot or a lunatic, is no objection in law to his disposing of his estate. Courts will not measure the extent of people's understanding and capacities. If a man be legally compos mentis, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his actions." It
333 not being *pretended that the grantor here was non compos mentis, laboring under a total or temporary deprivation of reason, there can be no question of his legal capacity to make a valid disposition of his estate, if, in the language of Washington, J., in Stevens v. Vanclieve, 4 Wash. C. C. R. 262, "he was capable of recollecting the property he was about to dispose of, the manner of distributing it, and the objects of his bounty," and if the particular act was attended with the consent of his will and understanding. For although the person may labor under no legal incapacity to do a valid act or make a contract, yet if the whole transaction, taken together with all the facts, mental weakness being one of them, showed that consent, the very essence of the act, was wanting, it would be void. Stewart v. Lispenard, 26 Wend. R. 255. Of this description was the case of Samuel v. Marshall and wife.

As to undue influence; the influence resulting from affection and attachment, or the mere desire of gratifying the wishes of another, if the free agency of the party is not impaired does not affect the validity of the act. Where a legal capacity is shown to exist, that the party had sufficient understanding to clearly comprehend the nature of the business, that he consented freely to the special matter about which he was engaged, and no fraud or undue influence is shown to have been used to bring about the result, the validity of the disposition cannot be impeached, however unreasonable or imprudent or unaccountable it may seem to others. It is not the propriety or impropriety of the disposition, but the capacity to make it, and the fact that it was freely made with the full assent of the grantor, that must control the judgment of the court. It would be a useless consumption of time to enter upon a careful analysis of the great mass of testimony contained in this voluminous record. Almost every case of this kind must depend on the peculiar cir-
334 cumstances *attending it. The facts

in one case can but rarely serve to illustrate or elucidate another. By the consent of parties, the judge below was substituted in the place of the jury; he had heard much of the evidence in the fruitless attempt to try the issues, and was well qualified from his long acquaintance with the inhabitants of the county to weigh properly the weight of the testimony. A decree pronounced under such circumstances upon the facts of the case, is entitled to the highest respect. But the force of that decree in regard to the questions really involved in the issue, is somewhat impaired from the fact, that the judge in the opinion filed, expresses the belief that the deeds were executed upon a secret trust to secure the property from the grasp of certain creditors of Jesse, one of the sons of the grantor, and with the expectation that the appellant would distribute the property according to the provisions of his wills, the last of which had been executed a short time before these deeds. The judge details at length the facts, from which he inferred the motive of the grantor in making the deeds. Such a motive, if the facts justified the inference, would seem to evince a degree of intelligence, utterly inconsistent with the position upon which the decree rests, the incompetency of the grantor. On a careful review of the whole testimony, we are of opinion that it fails in establishing such a degree of imbecility as to show that the grantor was incompetent to make a perfectly valid disposition of his estate by deed or will. The evidence, so far as facts bearing on the question of competency are deposed to, proves that the grantor was a man of much vigor of mind, notwithstanding his advanced age. That although there were occasions on which it appeared his memory was slightly impaired, yet the solid powers of his understanding remained unaffected. The proof shows that he superintended and directed the preparation
335 of the deeds; *that his mind and memory were sufficiently sound to enable him to understand and fully comprehend the business he was engaged in; and there is no evidence whatever to prove that any undue influence was exercised to induce him to execute the conveyances.

The court is therefore of opinion that the decree of the Circuit court is erroneous. Reversed with costs. And this court proceeding, &c., bill dismissed with costs.

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336 *Young's Adm'r & Bowyer v. McClung & als.

Same v. Same.

Bowyer v. Hughart & al.

July Term, 1852, Lewisburg.

1. **Injunction—Defect in Title to Land—Removal—Dissolution of Injunction—Case at Bar.**—Pending a bill for an injunction to a judgment, and for the rescission of a contract for the purchase of land, on the ground of an incumbrance and defect of title, vendor removes the incumbrance and procures the title. The injunction is properly dissolved, but without damages, and with costs to the plaintiff.

2. **Decree for Sale of Land—Fraud—Case at Bar.**—The title having been obtained by a suit by the assignee of the purchase money, in which a conveyance was decreed; after the decree, but before the conveyance is made, a son of the vendor files a bill in another court, in which he falsely and fraudulently alleges that he had paid off the incumbrance on the land, and retained the lien, and with the fraudulent connivance of the vendor, who is insolvent, obtains a decree for the sale of the land to satisfy his pretended lien; and the land is sold and the sale confirmed. HELD:

   1st. **Same—Same—Effect—Case at Bar.**—That the conveyance having been made in pursuance of a contract entered into long before the commencement of the suit by the son of the vendee, and in obedience to a decree made before the commencement of that suit, the deed had relation back to the date of the contract, or at least to the date of the decree directing it; and therefore the decree and sale in the son's suit is inoperative against the title of the vendee, and gives him no equity for an injunction and rescission of the contract.

   2d. **Same—Same—Same—Same.**—That the suit of the son having been commenced and prosecuted, and the decree obtained under circumstances of suggestion of falsehood and suppression of truth, of imposition practised on the court in which it was rendered, and of confederacy and collusion with the father, the vendor, the decree may, and must, if necessary for the protection of the vendor and his assignee, be held to be wholly inoperative as to them.

   3d. **Judicial Sales—Defect in Title—Confirmation—Effect*—Case at Bar.**—But the purchaser under the decree in the son's suit having been conusant of the proceedings in the suit by the vendee to enjoin the purchase money, and of the assignee to procure the title, and being in fact bound
337 as surety for that purchase *money, and having purchased and permitted the sale to be confirmed without objection, is not entitled to be relieved from his purchase, or from paying his purchase money, though he acquires no valid title to the land purchased by him.

3. **Practice.**—The whole facts of a case appearing from the records of other ended causes exhibited by plaintiff with his bill, the court may pass upon it upon a demurrer to the bill, without requiring the defendant to set out his defence in an answer.

***Judicial Sales—Defect in Title—Confirmation—Effect.**—For the proposition that, a purchaser of land from a commissioner of the court, having permitted the sale to be confirmed without objection, is not entitled to be relieved from his purchase, or from paying the purchase money, though he acquires no valid title to the land purchased by him, the principal case is cited and approved in the following cases: Daniel v. Leitch, 13 Gratt. 212; Watson v. Hoy, 28 Gratt. 710, and *note*; Long v. Weller, 29 Gratt. 351, and *note*; Easley v. Barksdale, 75 Va. 286; Thomas v. Davidson, 76 Va. 343; Hurt v. Miller, 95 Va. 41, 27 S. E. Rep. 831; Capehart v. Dowery, 10 W. Va. 143; Fleming v. Holt, 12 W. Va. 156; Hyman v. Smith, 13 W. Va. 772.

See monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

4. **Injunction—Defect in Title of Land—Dissolution of Injunction—Costs—Case at Bar.**—Though a plaintiff coming properly into court to enjoin a judgment on account of defects in the title of the land for the purchase of which the debt was contracted, is entitled, upon the removal of the objections, to have the injunction dissolved without damages, and to have his costs; yet if he had another case depending where the same questions were pending, and where he could have had the relief asked for, by a proceeding in that case, he will not be allowed his costs.

On the 20th December 1825, George Hughart purchased of Daniel Boardman a certain tract of land lying in what was then a part of Greenbrier county, but is now a part of Fayette county, for the consideration of 200 dollars, of which one-fourth was paid, and three bonds, for 50 dollars each, were executed.

A deed was executed in the name of Daniel Boardman, to George Hughart by Joseph F. Caldwell, who assumed to be authorized, jointly with one Lewis Stuart, to act as attorney for said Boardman. The deed was recorded in Greenbrier county on the 21st December 1825.

On the 20th December 1825 George Hughart executed to Joseph F. Caldwell a deed of trust upon the land to secure the three bonds of 50 dollars each of unpaid purchase money, which was recorded in the county of Greenbrier on the same day. One of the bonds was paid; the two others payable three and four years from date, were unpaid at the date of the transactions next hereinafter mentioned.

On the 9th day of February 1828 George Hughart contracted to sell the said
338 property to Mathias G. *Young, for the sum of 500 dollars, payable as follows: One wagon and apparatus at 100 dollars, 100 dollars to be paid on the 1st May 1828, 100 dollars on the 9th February 1829, 100 dollars on the 9th February 1830, and 100 dollars on the 9th February 1831. And Hughart entered into a written agreement with Young, binding himself to guarantee a right in fee simple to the lands, at the receipt of the third payment for said land.

The wagon and apparatus were delivered; the payment of 100 dollars made on the 1st May 1828; and bonds executed for the three remaining payments, which bonds were assigned by George Hughart to William McClung.

When the bond, payable on the 9th February 1829, had fallen due, McClung brought suit upon it in the County court of Greenbrier, and recovered judgment against Young. Executions was issued thereon, and a delivery bond given by Young, which was forfeited.

In the month of January 1830, Young filed his bill in chancery in the Superior court of Greenbrier county, against George Hughart, William McClung, Lewis Stuart, Joseph F. Caldwell, Daniel Boardman and Hugh Ferry. In that bill, the facts above stated are set forth, except the defect in Hughart's title, which does not seem to have been then known to the plaintiff. In addition thereto, the plaintiff alleges that, at the time of the sale, George Hughart deceived him as to the extent of the boundaries of the land, and especially by representing it to embrace a valuable coal bank, which was afterwards discovered to belong to James McLaughlin and Hugh Ferry. That the land which was sold for 200 acres, fell short in quantity 25 or 30 acres. That he was also deceived by George Hughart as to the title of the land, which he supposed to be vested in him by legal conveyance, and to be free of encumbrance: whereas
339 he had since ascertained *that the land was encumbered, as already stated, under the deed of trust given by George Hughart. That George Hughart was insolvent or fast approaching that condition; and, by reason of his having assigned Young's bonds, was unable (as he requested might be done) to transfer them to the agents of Boardman in liquidation of the lien under the deed of trust. The bill prays an injunction to the judgment upon plaintiff's bond, compensation for the loss of the coal bank and deficiency in quantity of the land, indemnity against Boardman's lien for purchase money, and in case that indemnity cannot be obtained, a rescission of the contract of purchase, and to have his payments already made, refunded to him. An injunction was awarded.

A second bill was filed in the Greenbrier Circuit court between the same parties, which was sworn to by Young on the 13th January 1831. It sets out substantially the same facts as in the first bill, with these additions: that McClung had instituted suit and recovered judgment on the bond due 9th February 1830, and was prosecuting the same against Young's property, and that Young apprehended he would pursue the same course with the remaining bond which was to mature on the 9th February 1831. With this bill was filed the titled bond or contract of sale from George Hughart to Young.

George Hughart filed an answer to this bill, which was sworn to 18th February 1831.

He admits the facts of the sale, the payments, and the assignment of the bonds to McClung. He admits the existence of the lien for the purchase money yet unpaid to Boardman, but avers that Young had notice of it. He denies that he practiced any deceit upon Young as to the limits of the land or the coal bank; denies that he is insolvent or approaching that condition, and denies that Young requested him
340 to transfer *the bonds to the agent of Boardman. He denies the right of Young to any relief in equity, and declares his intention to make a good title free of encumbrance, according to his contract.

A supplemental bill was filed by Young in the same cause, at what date does not appear, in which he alleges as a fact discovered since the commencement of this suit, the entire absence of title in Hughart at the time of Hughart's sale to him, inas-

much as he derived title only from the sale and conveyance of Caldwell, one of two joint agents; and he then alleges the death of Boardman, and also the death of Lewis Stuart, to whom jointly with Caldwell Boardman had given the power of attorney; and prays that his contract of purchase be rescinded, and the purchase money refunded.

William McClung filed an answer, which was sworn to on the 11th January 1840.

He admits the assignment of the bonds to himself, which he asserts that he received without knowledge of any objections on the part of Young; questions the fact of Young's alleged ignorance at the time of his purchase, referring to the answer of George Hughart on that subject; insists on the implied notice to him from the record of deeds; insists that the title from Boardman to George Hughart, if not well conveyed by Caldwell, has been confirmed by the implied acquiescence of Boardman since that time; and avers that the lien in favor of Boardman by the trust deed has been fully paid off and discharged. The evidence of the payment is filed, and is as follows:

"Charles Hughart paid to me as the agent of Daniel Boardman, the amount of three bonds executed by George Hughart to Daniel Boardman for 50 dollars each; the said bonds being part of the purchase money of the tract of land of 200 acres on the turnpike road in the county of Fayette, adjoining the lands of Richard F. Tyree. To secure the payment of said bonds, 341 *said George Hughart executed a trust deed on said land; the whole purchase money was 200 dollars; and the three bonds paid by Charles Hughart was the balance remaining unpaid; and on the payment being made by Charles Hughart, I endorsed a receipt on the trust deed which was delivered to said Charles Hughart; the amount paid was about 170 dollars, and paid, I think, about October 1836.

John A. North.

October 17th, 1842.

A cross bill was filed in this cause, at what date does not appear, by William McClung, referring to the foregoing proceedings, and seeking to get in the title outstanding in Boardman's heirs or devisees. He files with it a copy of the deed executed by Caldwell in the name of Boardman to George Hughart; and proposes to file the power of attorney, which is not done. He alleges that Daniel Boardman died leaving devisees and heirs at law who are nonresidents. He prays that Young and George Hughart may be made parties defendants, together with the widow and devisees and heirs at law of Daniel Boardman, and that a decree may be made directing a conveyance of the title from Boardman and those claiming under him.

On the 19th day of October 1842, a decree was made by the court that John McPherson, who was appointed a commissioner for that purpose, should execute a deed of conveyance, with special warranty to George Hughart, in behalf of the representatives and heirs of Daniel Boardman; that George Hughart should convey with general warranty to Young; and that upon the execution of these deeds the injunction granted to Young should be dissolved without damages. The decree also gave Young his costs against George Hughart and McClung, and gave McClung his costs against George Hughart.

After this time Mathias G. Young 342 filed a bill in the *same court, which is sworn to on the 1st day of April 1845, and upon which it seems the injunction was reinstated. The bill restates substantially and refers to all the proceedings heretofore detailed, with the following matters in addition. It states that, in conformity with the decree of the 19th October 1843, Joel McPherson as commissioner did convey the title of Boardman's heirs to George Hughart by deed dated 11th January 1843; and George Hughart conveyed to Young by deed dated 16th March 1843. It states further that prior to the execution of the said deeds in conformity with said decree, one Charles Hughart, the son of the said George, through whose hands the money due to Boardman had been paid to John A. North, filed a bill in chancery in the Superior court of Fayette county against his father, the said George, and Joseph F. Caldwell: that in the said bill the said Charles alleged that he had himself advanced the money to pay off that lien, and retained the trust deed as a security: that he claimed the right of substitution to the original cestui que trust for the money so advanced: that, at the April term of said Fayette Superior court in 1844, a decree was rendered in favor of Charles Hughart, directing a sale of said land for his benefit: that, on the 11th July 1844, the sale was made by the sheriff of Fayette under the said decree, and John Bowyer became the purchaser; and that the sale was confirmed at the September term of said court in 1844.

The bill alleges further that George Hughart, who was a party defendant to this suit of Charles Hughart, and duly served with process, fraudulently neglected to defend the same, but permitted the bill to be taken for confessed, and his title to be thus sold to a third person; whilst, by furnishing the receipt of John A. North in the suits pending in question, already described, he induced the court to believe that the lien was removed, and to decree a dissolution of the injunction 343 *granted to Young on that account.

That by this means Young was to be compelled to pay the purchase money to McClung, assignee of George Hughart, whilst the title of George Hughart for the land was to be conveyed to a third person, John Bowyer, the purchaser, under the decree obtained by Charles Hughart. And against this wrong the present bill of Young asked relief; charging that George Hughart was utterly insolvent, and unable to repay what he had already received of Young, and praying a rescission of the contract. This

last mentioned bill is filed against George Hughart and William McClung. It is stated that the injunction was reinstated therein; but the further proceedings do not appear in the record.

During the pendency of these various suits in Greenbrier Superior court, a suit had been instituted in the Superior court of Fayette county, arising out of the same transactions.

On the 2d of April 1836, John Bowyer and Mathias G. Young filed a bill in chancery in the Superior court of Fayette county against George Hughart, William McClung, Daniel Boardman, Lewis Stuart and Joseph F. Caldwell. This bill is almost identical with the first bill filed in the Superior court of Greenbrier, and refers to the proceedings in Greenbrier as exhibits to be filed.

But, in addition to these proceedings, it alleges, as the ground of an application to the court in Fayette county, that McClung had proceeded (notwithstanding the injunction in Greenbrier) to bring suit in the Superior court of Fayette county against Mathias G. Young upon the third bond, which fell due on the 9th February 1831; that he had recovered judgment thereon; and that Young had executed thereon a forthcoming bond with John Bowyer as security, which had been forfeited and judgment rendered thereon at the last preceding term of the said court.

344 *Against this judgment the plaintiffs prayed to be relieved upon the same grounds of equity as those relied on in the original bill in Greenbrier.

An amended or supplemental bill was afterwards filed in this cause, in which the claim for relief on account of the deficiency of land, or at least on account of the boundaries thereof not embracing the coal bank is abandoned. The bill, however, insists upon all the other grounds of relief asserted in the suits in Greenbrier; it then traces the history of the suits in Greenbrier up to the final decree of the 19th October 1842, and details the history of the suit brought in Fayette by Charles Hughart to be substituted for Daniel Boardman in the deed of trust from George Hughart, up to the confirmation of the sale in September 1844.

William McClung filed his answer to these bills, in which he sets up and relies upon the same defence substantially as that contained in his answer to the bills in Greenbrier down to the date of that answer. But he alleges, further, the order of the Greenbrier court of the 19th October 1842, and the execution of the deeds in pursuance thereof by Joel McPherson as commissioner, to George Hughart, and by George Hughart to Mathias G. Young; and relies upon these proceedings as a conclusive bar to the plaintiffs' further prosecution of their suit.

The deeds from Joel McPherson and George Hughart are filed as exhibits with this answer.

On the 3d of September 1846 the death of the plaintiff Young was suggested on the record; and the defendant McClung demurred to the amended and supplemental bill.

On the 3d of April 1848 the cause came on for a final hearing. The suit was discontinued as to Mathias G. Young, not having been revived by his representative, and as to Young the injunction was dissolved and the bill dismissed.

345 *The court then proceeded to consider the case as to the plaintiff Bowyer, and sustained the demurrer, dismissed the bills, and ordered that the defendant McClung should recover his costs of the plaintiff.

The record of the suit of Charles Hughart against George Hughart and Joseph F. Caldwell in the Superior court of Fayette county, was filed in this cause. In that case one of the defendants Caldwell, answered that he had no interest in the case, being a bare trustee. The other defendant, George Hughart, suffered the bill to be taken as confessed. No other person was made defendant to the proceeding, and the application of William McClung to be admitted as a defendant was opposed by the plaintiff and denied by the court. There was no evidence to support the allegations of the bill. The payment of the money to North as agent for Boardman, was proved by the following endorsement on the deed of trust:

October 14th, 1836.

Received of George Hughart, by the hand of Charles Hughart, 169 dollars 50 cents, the amount now due on the within deed of trust. (The balance having been heretofore paid.)

Given under my hand the day above written.

John A. North,
Att'y for Daniel Boardman's Ex'ors.

It was upon this evidence, in the absence of any defendant interested to oppose the claim, and under these circumstances, that Charles Hughart was enabled to obtain from the court the decree in his favor. The decree and the proceedings therein are already sufficiently detailed.

On the 22d of January 1849, Joel Edins, administrator of Young and John Bowyer, presented to the judge of the Circuit

346 court of Fayette county a petition *or bill of review, praying that the decree made on the 3d day of April 1848 in the case in that court, in which Young in his lifetime and Bowyer were plaintiffs, and McClung and others were defendants, might be reviewed and corrected: that the injunction awarded them in that case might be reinstated until the cause should be finally heard; and that they might have the relief prayed for in their supplemental bill, or such other relief as the nature of the case demanded. And they made the record in said cause a part of their petition and bill of review. The petition was granted; and the cause came on to be heard on the 3d of April 1849, when the court was of opinion that the injunction was prematurely dissolved without the suits being re-

vived against the administrator of Mathias G. Young deceased, or a rule taken against the said administrator to show cause why the said injunction should not be dissolved unless so revived. And it was therefore decreed that the said decree be reversed and annulled, with the costs of the petition; and by consent the cause was revived in the name of Edins, administrator of Young; and by like consent and for reasons appearing to the court it was transferred to the Circuit court of Greenbrier county to be further proceeded in to a final decree.

Prior to the decree of the 3d of April 1848, made in the above mentioned cause, viz: in the month of March 1847 Edins, as administrator of Young and John Bowyer, filed their bill in the Circuit court of Greenbrier county against William McClung and George Hughart's administrator, detailing all the transactions and legal proceedings up to that time substantially as hereinbefore given, and praying for an injunction against McClung, and a decree to have so much of the purchase money as Young had paid to George Hughart refunded. To this bill McClung demurred.

On the 23d of October 1849, the two 347 causes of *Young's administrator, and Bowyer against McClung and others came on to be heard together, when the court sustained the demurrers of the defendant McClung to the amended and supplemental bill in the first and to the bill in the last cause, dissolved the injunctions, and dismissed the bills with costs.

In November 1849, John Bowyer filed his bill in the Circuit court of Fayette county, in which he recapitulated so much of the statement hereinbefore made as was necessary for an understanding of his case, and exhibited therewith the records of all the causes before mentioned. He alleged in addition that he became the purchaser of said land at the sale for the benefit of Charles Hughart for the sum of 256 dollars 66 cents, payable in installments of 86 dollars 22 cents each, at six, twelve and eighteen months respectively; that he gave his bonds with security for these several installments, payable to the then sheriff of Fayette county, John Guinn; that suits were afterwards instituted on these bonds in the name of the said John Guinn for the use of Charles Hughart, and judgments recovered thereon, one against Hiram Hill, plaintiff's surety, and two against plaintiff himself; that executions had been issued, forthcoming bonds given and forfeited; and that he had determined to resist the collection of the same for two reasons:

1st. On account of the entire defect of title, to be derived under the decree in favor of Charles Hughart, for want of proper parties, and for want of jurisdiction in the court by which it was rendered. And 2d. On account of the fraud and dishonest combination between Charles Hughart and George Hughart, by means of which the decree was obtained.

Plaintiff further alleges the death of George Hughart; that he died notoriously insolvent, and the administration of his estate by Charles Hughart; and he made the said Charles, both in his own 348 right, and as *administrator of the said George and the said John Guinn, parties defendants to the bill.

The bill prayed for an injunction against the said judgments until the hearing of the cause, and for a perpetual injunction against the judgments recovered for the benefit of Charles Hughart, and against any further proceedings upon the decree in his favor under which the sale was made; that said decree might be pronounced fraudulent and void; that the land in question might, at a proper time, be decreed to be sold for the satisfaction of the judgment against the plaintiff, for the purchase money due from Young; and that the court would grant other and general relief. An order, granting the injunction against all further proceedings upon the three judgments and the executions thereon, was granted on the twentieth November 1849.

On the 16th day of May 1850, the defendant Charles Hughart filed his answer. He admits the pendency of the suits mentioned in the bill, relies on the validity of the proceedings therein, and denies the plaintiff's right to question them. He denies that he could be in any wise affected by the suits of Young v. Hughart, McClung et als.; insists that he did procure the money to pay off the deed of trust, at his father's instance, to the agents of Boardman; that he was to retain and did retain the deed of trust and bonds for his own indemnity; and that he had never been repaid his advances.

He further insists, that as the title was conveyed by order of Greenbrier Superior court, by Joel McPherson, commissioner, to George Hughart on the 11th July 1843, which was during the pendency of the suit of Charles Hughart to enforce his lien, it was competent for the Fayette Superior court to decree the sale of that title in the latter suit; but that whether a good title could be made under that decree to the plaintiff or not, is immaterial; that he the 349 said Charles was not *a warrenter of the title; that the plaintiff bought at his own risk; that the maxim of caveat emptor applied to him, and he was not entitled to equitable relief. He admits the insolvency of his father George Hughart deceased. He denies all fraud. And he denies and pleads to the jurisdiction of the court.

On the 10th day of September 1850 the following decree was rendered: "Upon the motion of the defendant Hughart, it is ordered that the injunction hereinbefore awarded to the plaintiff restraining the collection of the judgments at law in the bill mentioned, be and the same is hereby dissolved.

On the petition of the plaintiffs respectively, this court granted them appeals from the decrees of the 3d of April 1848 in the first, and of the 23d of October 1849

in the first and second causes, and of the 10th of September 1850 in the third cause.

Johnson and Johnston, for the appellants.
Price, for the appellees.

LEE, J., delivered the opinion of the court.

It appears to this court that the several grounds of objection successively taken by the intestate of the appellant Edins, and upon which he sought to arrest the collection of his bonds for the purchase money of the land bought of George Hughart and assigned to the appellee McClung, prior to the decree of the 19th of October 1842, on the original bill of the said Young against George Hughart and others, and the cross bill filed in that cause by the appellee McClung, were either unsupported by proof or successfully removed by the measures adopted by the parties interested, as disclosed by the record of said cases. The loss of a portion of the land, including a valuable coal bank, by reason of an outstanding paramount title, was wholly unsupported by proof; and in fact the equity 350 *set up in the original bill upon that foundation was not relied upon by the said Young in his supplemental bill. The encumbrance which it was charged rested upon the land by reason of the vendor's lien for the unpaid balance of purchase money due to the said Boardman from George Hughart, Young's vendor, was effectually removed by the payment of that balance by the said Charles Hughart for and in the name of his father, to John A. North, the agent of the said Boardman, in October 1836. And the difficulty which had been interposed, founded upon the defective character of the conveyance from Joseph F. Caldwell, as the agent and attorney in fact of the said Boardman, for the land in controversy to George Hughart, was met by the cross bill filed by William McClung convening the said Young, George Hughart and the executors and heirs at law of the said Boardman (who had in the mean time departed this life) before the court, with a view to obtain by its decree a new and perfect conveyance of the legal title to the land from the heirs of the said Boardman to the said George Hughart, and through him to vest the same in the said Young. And all the questions which had been raised by the said Young in his original and amended and supplemental bills touching his obligation to complete the contract for the purchase of the said land from the said George Hughart, and to pay the bonds given by him for the purchase money therefor, which had been assigned to the said McClung, must be regarded certainly, as between the said Young on the one hand and the said George Hughart and McClung on the other, as finally and forever settled and adjudicated by the decree of the 19th of October 1842. That decree affirmed that the alleged loss of part of the land, including the coal bank, by reason of an outstanding paramount title thereto, was not sustained by proof; and that if it had been proven, it was 351 a claim sounding *purely in damages, and not the subject of relief in a court of equity; and that the clouds which rested upon the title to the land by reason of the matters alleged in the bills had been removed, and that a good title could then be had to the same, for which due provision was thereby made.

It further appears to this court whether the appellant Bowyer, the surety of the said Young in the forthcoming bonds given by him upon the judgments upon his three bonds, for the purchase money of the said land, assigned to the said McClung, not being a party in either of the causes in which the decree of the 19th of October 1842 was pronounced, was or was not bound by that decree, is a question not material to be decided in these causes; because if it be affirmed that the said appellant Bowyer did not so stand in privity with his principal Young, by virtue of such his suretyship as aforesaid, as to be concluded by the decree of the 19th of October 1842, even in the two cases commenced and prosecuted by him conjointly with Young, and after his death with his administrator, who were concluded by that decree, yet it appears that the original and supplemental bills of the said Bowyer and Young, filed in the Circuit court of Fayette, and subsequently transferred to the Circuit court of Greenbrier, and the original bill filed by the appellants Bowyer and Young's administrator, in the Circuit court of Greenbrier in March 1847 (which constitute the two cases in those names now in judgment), exhibit copies of the proceedings of the case of the said Young, and the cross bill of McClung, which resulted in the decree of the 19th of October 1842, and also of the case of Charles Hughart against the said George Hughart and Joseph H. Caldwell, and they are expressly made part and parcel of these cases. Thus the court on the hearing of these causes, on the 23d of October 1849, had all the proceedings in 352 the *other causes before it expressly made part of these causes by the appellants Bowyer and Young themselves, presenting all the facts and circumstances of the whole case, and was called upon to decide as between Young and Bowyer on the one hand, and George Hughart and McClung on the other, the same questions which had been determined by the decree of October 1842, between the latter and the said Young, together with another question presently to be noticed upon the same state of facts and proofs, though presented in a somewhat different state of pleadings; and if the court was right in its adjudication of those questions by its decree of the 19th of October 1842, as in the opinion of this court it was, it did not err in coming to the same conclusions in the decree of the 23d of October 1849. It is true these causes were heard in part upon a demurrer to the amended and supplemental bills in the one case, and a demurrer to the original bill in the other; and it may be said that those

bills upon their own allegations showed ample equity, and a proper case for relief, and that the demurrers therefore should have been overruled and the defendants put to answer as to the facts. But considering the allegations of these bills in the connections which they themselves establish with the other causes, and as illustrated by all the facts and circumstances of the whole controversy thus invoked into these causes, it appears to this court that the whole case might have been as safely and correctly passed upon by the court, and the legal effect of those facts and circumstances as accurately perceived and determined as if the same had been presented to the court by full answers, stating all the facts again in terms.

Thus in effect it appears to this court that after the decree of the 19th of October 1842, there remained for discussion between these parties but the single question presented by the claim of Charles 353 Hughart, to *be substituted to the rights of Boardman and his lien upon the said land, by virtue of the payment made by him to North, the agent of Boardman, of the balance of the purchase money due from George Hughart in October 1836. And it appears to this court that this claim of the said Charles Hughart was without any just foundation whatever; that the said payment made by him to North was for and in the name and behalf of his father, the said George Hughart, and for the very purpose of satisfying the debt due to the said Boardman, and extinguishing the lien which he might otherwise assert upon the land; and thus facilitate the collection of the bonds of Young, which had been assigned by his father to the said McClung. And that therefore no lien was created by subrogation or otherwise in favor of the said Charles Hughart, upon the said land, by reason of such payment, at least against the said Young, the purchaser, and McClung, the holder of the bonds assigned by the said George Hughart. And thus as the said Young could successfully resist any attempt on the part of the said Charles Hughart to set up any such lien, the mere claim on his part did not constitute any sufficient ground for the interference of the court of equity to stay the collection of the purchase money.

It further appears to this court that this claim of the said Charles Hughart to a lien upon the said land for the amount of purchase money paid by him to North, was in no sort established as against the said Young and the said McClung, nor in any degree strengthened by the bill filed by him against the said George Hughart and the said Joseph H. Caldwell to assert said lien, and the decree pronounced in his favor for sale of the land, on the 4th of April 1844. To this cause the said Young and McClung were no parties, and they could not be bound by the acts or omission of the said George Hughart after 354 the sale of the *land by him to the said Young, and after his assignment of Young's bonds to McClung, or by the decree which the said Charles Hughart was thereby enabled to obtain. The record of this decree as against them, could only serve to prove the fact that such decree had been rendered and the legal consequences of that fact, and was not evidence of its legal antecedents or the facts or rights in virtue of which it was pronounced. It was as it respects them, res inter alios acta. And thus it created no other or better equity in favor of the said Young upon which to resist the collection of the purchase money claimed by McClung, than did the naked and unfounded claim of Charles Hughart unaided by a bill or a decree. It is true it does appear that the deed from the commissioner Joel McPherson to the said George Hughart, and that from the latter to the said Young for the land in question, were both executed after the institution of the suit of the said Charles Hughart and during its pendency; and it may be said that the said Young quoad that suit must be regarded as a pendente lite purchaser, and as taking the land subject to the decree to be pronounced in that cause. But it is to be observed that although these deeds were made after the suit of Charles Hughart had been commenced, they were executed in virtue of contracts made long anterior, passing the equitable title, and of a decree of a court of competent jurisdiction giving effect to and enforcing those contracts, and that that decree directing those deeds to be executed, was pronounced before the institution of said suit, assuming, although the record does not show the precise time, that the bill of the appellant Bowyer and the answer of Charles Hughart thereto, correctly state that Charles Hughart's bill was filed in November 1842. It may therefore, with great reason and justice, be insisted that the deeds to George Hughart and Young, when executed, had relation back to 355 the dates of the *respective contracts in virtue of which they were decreed, or at least to the date of the decree, and that the said Young is not therefore to be affected by the consequences attending a purchase pendente lite in other cases, but is to be held entitled in equity to protection against any claim set up on that principle under Charles Hughart's decree.

But there is another view in which, as it appears to this court, the said Young could successfully resist any pretensions set up against said land by virtue of Charles Hughart's decree. Charles Hughart's suit was, as disclosed by the facts in evidence in these cases, commenced and prosecuted, and the decree obtained, under such circumstances of suggestion of falsehood and suppression of truth, of imposition practised on the court by which it was rendered, and of confederacy and collusion with the defendant George Hughart, that the said decree may and must of necessity, for the protection of the rights of Young and McClung, be held wholly inoperative and ineffectual as to them. George Hughart, in

his answer to Young's first Greenbrier bill, admits that there was a balance of purchase money due from him to Boardman, but states his wish and intention to discharge it in due time, so as to secure a good title to the complainant, and repels the charge made in the bill that he had ever intimated a contrary intention; and he denies that Young had ever requested him to pass over his bonds for the benefit of Boardman. Charles Hughart, in his answer to Bowyer's bill, admits that he was instrumental in aiding his father to pay off the debt due Boardman, and he took from North a receipt endorsed on the deed of trust purporting that the money had been received of George Hughart, transmitted through or by the hands of Charles Hughart. It is clear that he knew of the pendency of the suits in Greenbrier, and that the object of paying the money to
356 North was *to settle the difficulty by reason of this outstanding balance of purchase money, and show his father entitled to a clear title to the land; and this object he actively aided to accomplish. For upwards of six years after he had acquired his alleged right by substitution, and until after the object of getting rid of the Greenbrier suits and relieving his father from any liability on his assignment of the bonds to McClung had been accomplished by the decree of the 19th of October 1842, or until such a liability had become of no consideration by reason of the insolvency of the said George Hughart, he remains, as far as is disclosed by the records in these cases, perfectly silent upon the subject of his supposed claim; but very shortly after this decree was rendered he files his bill alleging that the payment made by him was on his own account, at the request of his father, but with an agreement that he was to hold the deed of trust for his indemnity. To this bill he makes neither the executors of Boardman, to whom the debt would have been payable if not paid, and to whose rights he claimed to be entitled by subrogation, nor his heirs at law, in whom the legal title to the land still remained, nor the said Young, the purchaser in possession, nor the said McClung, the assignee of Young's bonds, parties defendants, though the only persons really interested; those whom only he did name as defendants, George Hughart and Joseph Caldwell having no interest whatsoever that could prompt them to make any defence. Of the history of the whole affair and of the facts showing the propriety of making the persons named parties defendants in the cause, it cannot be supposed for a moment he was not fully conusant. Indeed he does not deny in his answer knowledge of any of them. George Hughart, though conusant of all the facts, makes no answer or disclosure in the cause. Though he had taken the benefit in the Greenbrier
357 *cases of the payment to North as a payment made by himself with money transmitted by or through Charles Hughart, and serving to extinguish the debt and the lien on the land, and though he could have shown who the parties really interested were, yet he remains profoundly silent, and the said Charles Hughart is enabled to obtain a decree for the amount of his claim and for a sale of the land. But considering all the facts and circumstances disclosed by the record attending the institution and prosecution of that suit, it appears to this court that the claim of the said Charles Hughart to a lien on said land could not in good faith be preferred, that it was without just foundation, that there was concealment of facts which he ought to have disclosed and suggestion of matters not founded in truth, that there was concert of action and collusion between him and the said George Hughart, and that the persons really interested who should have been made parties were improperly omitted; and that, therefore, the decree thus obtained cannot in equity and good conscience be permitted to affect any who might be aggrieved and defrauded thereby; but must be, whenever and wherever necessary to protect the rights of the said Young and McClung, held invalid and ineffectual. That a decree obtained by fraud, imposition or collusion, will be held ineffectual and relieved against for the benefit of those who were defrauded, is a doctrine well sustained by authorities. Richmond v. Tayleur, 1 P. Wms. 734; Barnesly v. Powel, 1 Ves. sen. 119; Reigal v. Wood, 1 John. Ch. R. 402; Bradish v. Gee, 1 Amb. R. 229, 1 Madd. Chy. 300. And in the case of Gifford v. Hort, 1 Sch. & Lef. 386, it was declared by the lord chancellor to be a fraud and imposition upon the court to fail to bring parties known to be interested before the court, and that a decree under such circumstances would not have any effect to defeat the rights of such parties.
358 *Thus it appears to this court that the said Young had full and ample means of defence against any claim that might be set up to or against the land purchased by him of George Hughart, founded on the decree of Charles Hughart, whenever and in whatever form preferred; and that the mere possibility that some such unfounded claim might be set up constituted no sufficient ground for the interference of the court to delay the collection of the purchase money, which had been assigned to the said McClung.

It further appears to this court that notwithstanding the decree in favor of Charles Hughart for the sale of said land may and must be held invalid and ineffectual as against Young and McClung, for the reasons which have been assigned, yet it by no means follows that the same is in like manner to be held void as against the appellant Bowyer; but that whether he can now be relieved against the consequences of his own voluntary act in purchasing said land at the sale under that decree, by reason of the character imputed to Charles Hughart's suit, is a question admitting of and requiring a different consideration. In England it seems that

where lands are decreed to be sold by the Court of chancery, the court in most instances undertakes to sell a good title, and therefore it is common to make a reference, to see if a good title can be made to the purchaser; and he will not be compelled to take one that is defective. Marlow v. Smith, 2 P. Wms. 198; Shaw v. Wright, 3 Ves. R. 22; Coffin v. Cooper, 14 Ves. R. 205; Coop. Rep. 138; Sugden on Vend. 105, § 21; 113, § 47; Daniels' Chan. Pr. 1455. In Virginia the course has been different. Here, as to all judicial sales, the maxim caveat emptor strictly applies. The court undertakes to sell only the title, such as it is, of the parties to the suit, and it is the duty of the purchaser to ascertain for himself whether the title of these parties may not be impeached or su-
359 perseded by *some other and paramount title; and if he have just grounds of objection for want or defect of title, he should present them to the court before the confirmation of the report of the sale. Threlkelds v. Campbell, 2 Gratt. 198; Worsham v. Hardaway, 5 Gratt. 60. The same rule would seem to be recognized in Maryland. Brown v. Wallace, 4 Gill. and John. 479; Ridgly v. Gartrell, 3 Har. and McH. 440; The Monte Alleger, 9 Wheat. R. 644; Finley v. U. S. Bank, 11 Wheat. R. 304. And it is not only the duty of the purchaser to look to the title of the parties in the cause, but also to see that all who have an interest in the property and whose rights ought to be bound by the decree, have been made parties, and have been so concluded by the decree under which he buys. Brown v. Wallace, 4 Gill. and John. 479, opinion of Bland, chancellor; S. C., 2 Bland's Ch. R. 585, 600; Bonnett v. Hamill, 2 Sch. and Lef. 577. The Court of chancery employs its officer to investigate titles, but does not warrant them. Toulmin v. Steere, 3 Meriv. R. 223, Lord Chancellor Eldon's opinion. Now if the maxim caveat emptor should apply in the ordinary case of a judicial sale in which the purchaser might or might not have knowledge of the facts not disclosed in the case in which the decree was rendered, but which might be necessary to determine who should be the proper parties, and whether any and what title would pass by the sale, it should certainly be applied with still greater stringency where it appears that the purchaser must have had conusance of all the facts and circumstances within the particular case and without, which were necessary to determine the operation and effect of the decree. If ordinarily a clear and strong case should be made to entitle a purchaser to relief against his contract under a judicial sale, after the report of sale has been confirmed by the court, the appellant Bowyer would seem to be
360 urgently called *on to make out such a case here. It is insisted that he does make out such a case by showing that the decree under which he bought was obtained by fraud and collusion, and is therefore void; and he alleges that he was ignorant at the time of his purchase of the fraudulent character of the said decree, and has only since discovered that he can acquire no title under said purchase; and thus it is intended to be inferred why he did not object to the commissioner's report of the sale. It appears that Charles Hughart's decree was rendered on the 4th of April 1844; the sale was made on the 11th of July 1844, and on the 2d September 1844 was reported to the court, together with the bonds of Bowyer and his sureties for the purchase money, and in the regular course of business was confirmed without objection on the part of Bowyer, and a deed directed to be made to the purchaser, and leave given the complainant to withdraw and collect the bonds. The said Bowyer had become the surety of the said Young in forthcoming bonds on all of the three judgments recovered against him by the said McClung, and thus had become liable for the whole of the unpaid purchase money for the land, with interest and costs. As far back as October 1835, he knew of the pendency of the two injunction bills which had been filed by Young in the Circuit court of Greenbrier, to stay proceedings on the two judgments recovered against him in that county, and to obtain relief against the contract made by him for the purchase of the land of George Hughart; for in that month the bill filed by him and Young conjointly, in the Circuit court of Fayette county, is prepared and sworn to, for the purpose of staying proceedings on the third judgment, the Fayette judgment, upon the grounds and equities therein set up; and in that bill he refers to the two Greenbrier injunctions and the proceedings therein, and makes them part
361 thereof. *An injunction is obtained on that bill to the Fayette judgment; and the case is then suffered by Young and Bowyer to sleep upon the docket of the Fayette court until after the decree of the 19th of October 1842, dissolving the injunctions and dismissing the bills in the Greenbrier case. The grounds of equity set up in the Fayette injunction bill were the same as those alleged in the Greenbrier bills; and after they had been dismissed, and the supposed equities which they set up had failed, the said Young and Bowyer then filed a supplemental bill to their original bill in the Fayette court, setting up, as a new ground for relief against the contract for the purchase of the land, the alleged claim of Charles Hughart to a lien, and the decree which he had obtained for the sale of the land, the purchase thereof by the said Bowyer, and the confirmation of the sale. It is plain that the reason why the Fayette case of Young and Bowyer was suffered to sleep on the docket from April 1836, until after the decree of the 19th of October 1842 on the Greenbrier case, was that the parties were awaiting the decision in that case of the same questions and liabilities involved in the Fayette bill. Bowyer was liable for the whole debt as

surety; he knew of the pendency of the Greenbrier bills, the object of which was to rescind the contract, and in effect thus relieve him of all liability; the land was in Greenbrier county till the formation of the county of Fayette, and until the same event, it may be inferred that both Bowyer and Young were citizens of Greenbrier county, and that they continued for some time after citizens of Fayette; the counsel prosecuting Bowyer and Young's bill in Fayette county, appears to be the same counsel who was prosecuting Young's injunction bills in Greenbrier; Bowyer was awaiting the decision in these, by which his liability might be wholly discharged; and under all the circumstances it 362 would seem impossible *to believe that he was not during the pendency of those cases kept duly advised by the counsel in all the cases, his own with the rest, of their progress, and upon their determination of the facts and circumstances which brought about so adverse a result, and which it might be expected would be followed by a similar result in the Fayette case, setting up the same equities and pretensions. It is not certainly shown, and can be but matter of inference, that Bowyer was apprised of the pendency of Charles Hughart's suit prior to the decree; but it is certain that he was apprised of the suit and the decree before and at the time of the sale of the land by the sheriff. And it has been shown that he must have been fully advised of all the facts and circumstances bearing upon Charles Hughart's claim and the state of the title to the land, by which he would be fully enabled, upon a proper examination of Charles Hughart's case, to ascertain the futility of his pretensions, the want of the proper parties to the cause, and the fraudulent character of his whole proceeding. Yet though deeply interested, because the decree subjected to sale the very land to which alone he could look for indemnity against his liability as surety of the said Young, in a debt then amounting, with interest and costs, to 600 dollars perhaps or upwards, he applies for no injunction, nor takes any other measure to arrest the sale, but encourages it by becoming a bidder, and at length becomes the purchaser himself, at the reduced price of 258 dollars 66 cents, and for that amount in installments he gives bonds and security, as required by the decree; the sale is reported to the court, and in the regular course of business confirmed by the court, without objection on his part upon any ground whatever. Shortly after this has been done, the said Young and Bowyer file their supplemental bill in the Fayette case, setting up the supposed loss and 363 *eviction of the land under Charles Hughart's decree and the purchase by Bowyer, and praying the court totally to rescind the contract between Young and George Hughart, to enjoin perpetually the judgment in that court for a part of the purchase money, and to decree in favor of Young for the amount which he had already paid upon the contract: and this was followed at intervals by two new original bills filed in the Greenbrier court, praying new injunctions to the two Greenbrier judgments, the first by Young in his own name, the other by Bowyer, and the appellant Edins as administrator of the said Young, who had in the mean time departed this life, and as alleged by Bowyer totally insolvent; and asking the same relief as in the supplemental bill filed in Fayette.

Now, the question at once presents itself, why did not Bowyer, if he was aware of the pendency of Charles Hughart's suit, take some steps to arrest a case, the object of which was to subject to another but unfounded claim, the very land to which alone he could look for indemnity against the heavy liability which he had incurred as surety for Young, who was wholly insolvent? Or if he was ignorant of the pendency of this suit prior to the rendition of the decree, why did he not seek by an injunction or otherwise to prevent a sale of the land till he could have an opportunity of contesting Charles Hughart's claim? Or having failed to adopt a measure of that kind, why did he encourage the sale by becoming a bidder, buy in the land himself, and suffer the sale to be confirmed by the court without objection of any kind? The ready and satisfactory answer, rendered altogether probable by the circumstances disclosed by the records, is that Bowyer did not deem it advisable or expedient to prevent a decree and a sale of the land, or a confirmation of the sale. He had become liable for the whole debt, amounting, with interest and costs of 364 various suits, to *upwards of 600 dollars. Young was in insolvent circumstances if living at the time of Charles Hughart's decree, or if dead, had died as Bowyer alleges, utterly insolvent (Bowyer says Young died before Charles Hughart's decree was pronounced, and assigns that as one reason why resistance was not made to the proceeding; but this must be incorrect, because, after the confirmation of the sale, a bill was filed in the name of Young in the Greenbrier court, and sworn to on the 1st of April 1845, so that the death of Young must have occurred between that date and the 3d of September 1846, when it was suggested on the record): all the grounds of equity previously set up against the enforcement of the contract had failed, as adjudicated by the Greenbrier decree, and it was no doubt expected that it would be followed by a similar decree in the Fayette case; and Bowyer must have seen or thought he saw in Charles Hughart's decree the material of a new and perfect equity, which might be set up against the enforcement of said contract, and a rescission thereof operating a release of his liability, so long in vain pursued, at length by this means likely to be accomplished. To arrest Charles Hughart's proceeding, or prevent a sale or its confirmation by the court, would of course destroy this nascent

equity in the germ. He carefully abstains from doing either; and after the supposed new equity had become fully matured by the final decree confirming the sale and directing a deed to be made for the land, he loses little time in coming forward and setting it up, conjointly with Young as a complete answer to the claim for the purchase money, and for the completion of the contract. That ground of relief proves equally unavailing with those previously relied on, and upon its utter failure, as pronounced by the decree of October 23d, 1849, and immediately thereafter, to wit, on the 24th of November 1849, and 365 upwards of five years after the *confirmation of the sale under Charles Hughart's decree, he turns around and files this bill, seeking to be relieved from his purchase of the land at that sale. This bill was sworn to on the day before the decree of the 23d of October 1849, but seems to have been evidently prepared in anticipation of the result which it announced.

It appears therefore, to this court, considering the conduct of the parties and all the circumstances disclosed in these cases, that the appellant Bowyer was not only informed of the history and progress of the Greenbrier cases, but that he was also most probably apprised of the pendency of Charles Hughart's bill and of its nature and objects; or if ignorant of these before the decree was pronounced, yet that he was made aware of that decree in full time to have taken measures to protect himself against it; and failing in so doing, and bidding in the land himself, if he desired to assail the decree and avoid its effect as to himself, it was his duty to bring the subject before the court upon the return of the report of the sale at the latest, and to seek his discharge from his purchase on the ground that he could get no title; at that time, being in possession, as it appears to this court, of all the facts and circumstances which would be required to expose the fraudulent character and utter futility of Charles Hughart's pretensions. And it further appears to this court, that no new matter not known to the said Bowyer at that time or which he might not most readily have learned by proper enquiry, has since come to his knowledge, excepting that disclosed by the decree of the 23d of October 1849, pronouncing the utter insufficiency and failure of the new equity erected upon the decree of Charles Hughart, to serve the purpose of offering effectual resistance to the completion of the contract and the payment of the purchase money. That whoever were or might 366 have been deceived and *defrauded by that decree, the appellant Bowyer was not of the number; and that there has been on his part, if no active participation in the proceedings in Charles Hughart's suit, at least such passive acquiescence in the same, and such readiness manifested to turn them to account if they could be rendered available, to defeat McClung's claims and relieve him of his liability, and such a standing by during their consummation by the sale and its confirmation, with a full knowledge of the facts and circumstances of the whole case, amounting to the grossest laches, if not premeditated with a particular view to the use that might be made of them, as must deny him the aid of a court of equity in the form now invoked; that he has not made out such a case as should induce a court of equity to depart from the rule applying the principle of caveat emptor to all judicial sales, and denying relief against a purchase upon whatever ground of defect or want of title where the facts were or might have been known to the purchaser; but he suffers the sale to be confirmed without making them known to the court or raising any objection; and that however unfounded were the pretensions of Charles Hughart, yet that between him and Bowyer, the court should not interfere, but leave them to their rights and remedies at law; and that Bowyer must be held here to abide by the results of the venture made by him voluntarily and with his eyes open, in buying the very land that constituted the sole subject of his indemnity against his liability as surety for the said Young.

And it further appears to this court that the failure of the commissioner to make the deed to the appellant Bowyer conformably to the decree confirming the sale in the case of Charles Hughart, and of the court to put him in possession of the land, constitutes no sufficient ground to stay the collection of said Bowyer's bonds for the purchase money. He does not seek to 367 *rest the relief he asks on this ground.

He repudiated the purchase as he alleges, when he discovered that he could not get a good title under the decree. It does not appear that he ever demanded a deed, or even that he was willing to receive one for the land from the commissioner, and give the required lien for the purchase money; but the contrary is to be inferred from the allegations of his bill. But it was not the intention of the court by its order, to make the execution of the deed a condition precedent to the payment of the bonds for the purchase money, nor did the terms of the sale make it such. The court directed the commissioner to make a deed and to require a lien on the land for the purchase money, and gave leave to the complainant himself to withdraw the purchaser's bonds and collect them. He was not therefore to be delayed in the receipt of the money decreed him by the failure of the officer of the court to obey its order by making the deed to the purchaser; and if he failed or neglected to perform that duty, it was the purchaser's business to apply to the court to compel him by attachment or otherwise. As to the possession of the land, no order was asked for by Bowyer to place him in possession, and none therefore made by the court. He was left to obtain possession by legal process, or if necessary, by an application to the court to enforce its decree if possession were improperly held by any one bound by it.

But the court is of opinion that inasmuch

as Young and Bowyer had the right at the time they filed their bill in the Fayette court praying an injunction to the Fayette judgment, to apply to a court of chancery to stay the collection of the purchase money till the difficulties in relation to the title to the land should be removed, and as those difficulties were not removed and the said George Hughart placed in a situation to make to Young a good title until after the Fayette bill had been filed, the court, 368 in dissolving the injunction *in that case, should have declared such dissolution to be without damages, as had been done by the decree of the 19th of October 1842, as to the Greenbrier judgments. And for the same reason the said Young and Bowyer would have been entitled to recover the costs of the Fayette suit except that inasmuch as at the time they filed their bill in that case to obtain the injunction, there was a case or cases pending in the Greenbrier court brought by Young, involving the same controversy and setting up the same equities, they could have obtained the injunction they sought upon application to that court by petition, supplemental bill or otherwise, and it was a needless and improper multiplication of suits and of costs to institute a new and distinct suit in the Fayette court; but that though for this reason they were not entitled to recover the costs of the Fayette suit, yet costs should not have been decreed against them, but the bill in that case should have been dismissed without costs to either party.

As to the decree of the 3d of April 1848, it appears that it was in fact reversed and annulled by the decree of the same court (the Fayette court), pronounced on the 3d of April 1849, upon a petition of review filed by Bowyer and Young's administrator under the law then in force; so that nothing remains for this court to review in the decree of the 3d of April 1848, and it is unnecessary to express any opinion in regard to it.

The court is therefore of opinion that the said decree of the 23d of October 1849 is erroneous in omitting to declare the dissolution of the injunction in the case first named (that commenced in Fayette and transferred to the Greenbrier court) to be without damages, and also in decreeing the costs of that suit to the appellee McClung; and that to that extent it must be reversed with costs to the appellants, and a decree pronounced declaring such dissolution of said in- 369 junction *to be without damages, and dismissing the bill in that case without costs in the Circuit court to either party; and that in all other respects the said decree be affirmed.

And the court is further of opinion that there is no error in the order of the Circuit court made on the 10th of September 1850, in the case of the appellant Bowyer against the said Charles Hughart and John Guinn dissolving the injunction that had been previously allowed, and that the same be affirmed with costs to the appellees.

MONCURE, J., dissented.

The decree in the first and second causes was as follows:

The court is of opinion that there is error in the said decree of the 23d of October 1849, in failing to express and declare that the dissolution of the injunction awarded in the cause first named, by the Circuit court of Fayette county, on the 2d day of April 1836, should be without damages; and also in this, that said decree awards to the said McClung his costs expended in that cause; this court being of opinion that as the complainants had just right to go into the Court of chancery to stay the enforcement of the judgment recovered in the Circuit court of Fayette county until the difficulties touching the title to the land purchased of George Hughart by the said Young should be removed, and those difficulties having only been removed after they had commenced their suit and obtained their injunction, the dissolution of the same should have been without damages; and that for the same reason, they would have been entitled to recover their costs in that suit, except that in the opinion of this court, a new original suit was unnecessary for the purpose of obtaining an injunction to the 370 Fayette *judgment, there being already at that time a cause pending in the Circuit court of Greenbrier, instituted by the said Young, setting up the same equities alleged in the Fayette bill, and involving the whole controversy concerning said land, and in which an injunction to the Fayette judgment might have been obtained until the settlement of the controversy, upon proper application by petition, supplemental bill, or otherwise; but though not entitled to recover costs in the Fayette case, yet that the costs of the defendants, or either of them, should not have been decreed against them. And the court is of opinion that there is no other error in the said decree of the 23d day of October 1849.

And the court is further of opinion, that the decree of the 3d of April 1848, having been in fact reversed and annulled by the order and decree of the same court (the Circuit court of Fayette county), pronounced on the 3d of April 1849, upon a petition of review previously filed and allowed, there remains in said decree of the 3d of April 1848 nothing for this court to review.

Therefore, it is adjudged, ordered and decreed, that the said decree of the 23d of October 1849, so far as it relates to the cause first named (that removed from the Circuit court of Fayette to the said Circuit court of Greenbrier), be reversed and annulled, and that the appellee William McClung do pay to the appellants their costs by them, in the prosecution of their appeal aforesaid, in this court expended. And this court, proceeding to pronounce such decree as the said Circuit court ought to have rendered, touching and concerning the said cause first named, it is adjudged, ordered and decreed, that the said injunction, awarded therein on the 2d day of April 1836, be and the same is hereby dissolved, but without damages,

and that the bill in said cause be dismissed, but without costs to either 371 *party. And it is further adjudged, ordered and decreed, that said decree of the 23d of October 1849 be in all other respects affirmed.

And it is further adjudged, ordered and decreed, that as to the said decree of the 3d of April 1848 the said appeal be dismissed.

Which is ordered to be certified to the said Circuit court of Greenbrier county.

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372 *Armstrong's Heirs v. Walkup & Others.

July Term, 1852, Lewisburg.

1. **Guardian and Ward—Compensation*—Case at Bar.**—A guardian of infants is entitled to compensation for their support, though he may have promised their friends that he would not make any charge for it, and in fact kept no accounts against them.
2. **Same—When Error to Make Joint Decree in Favor of Several Infants.**—It is error to make a joint decree in favor of several persons who have been wards of the defendant's testator, where one of them is an infant; though the decree be made with the consent of the next friend of the infant.
3. **Guardian and Ward—Payments to Guardian—Liability to Third Persons.**—A payment made to the husband of one of three wards, who is the guardian of another of them, though intended to be a payment to all, is not to be credited against the third ward, who is then an adult, she not having authorized him to receive it, but is to be credited against the husband and wife and his ward.
4. **Same—Accounts Must Be Stated Separately.**—The accounts of the three wards should be stated separately from the commencement, or at least from the time when their expenses differed in amount.

This was a suit in the Circuit court of Greenbrier, instituted by Josiah J. Walkup and Ann Eliza his wife, Sarah Jane Elliott and Elizabeth M. Elliott, the last being an infant suing by her guardian and next friend J. J. Walkup, against the administrators with the will annexed and heirs of John Armstrong, who had been the guardian of the female plaintiffs, for the settlement of his guardian accounts. The accounts were referred to a commissioner, who in 1850 made a report, bringing down the account to that time, and presenting alternate statements. And there was also an account of the administration upon Armstrong's estate by the administrators.

The heirs of Armstrong excepted to the first statement of the guardian's account because he was not allowed anything for the support and education of his wards; and they excepted to both statements 373 because *he was charged with compound interest after his death, and because the account was not credited with 1279 dollars 9 cents, as of the 9th of October 1847 paid by the administrators to the plaintiff Walkup for the wards. They also excepted to the administration account on several grounds, one of which was, that the administrators were allowed credit for the payment of debts of inferior dignity to that of the plaintiffs.

The plaintiffs excepted to the commissioner's second statement, because, in that statement, the guardian was allowed compensation for the support and education of his wards. It appears that Armstrong, having no children of his own, took these children, who were then quite young, to live with him. There is some evidence, too, that he repeatedly said that he did not intend to make any charge against them for their support and education; and an uncle of the plaintiffs, who was examined as a witness, stated that he was prepared and should have taken the children with him to Ohio upon the death of their mother, but for the promise of Armstrong that he would keep them without charge; and it appears that although they lived with him, one of them until her marriage and the others until his death in 1846, he did not keep any account of their expenses, but treated them as if they had been his own children.

In May 1850 the cause came on to be heard, when the court held that the second statement of the commissioner's report was correct in making an allowance to the guardian for the support and education of his wards, and overruled the exception of the plaintiffs to this statement, and sustained the first exception of the defendants to the first statement. The exceptions to both statements, because interest was compounded after the death of Armstrong, and for failing to credit in that account the sum of 1279 374 dollars 9 cents paid by *the administrators, were also sustained. And the first exception of the heirs of Armstrong to the administration account was overruled, because, though it is true the debts due from the guardian has preference over all other debts, yet as the plaintiffs could resort to the real estate of the guardian for satisfaction of their claim, the court would substitute the creditors who could only resort to the personalty, to the right of the plaintiffs against the real estate, should they have satisfaction out of the personal estate. It is unnecessary to notice the other exceptions. The report was therefore recommitted to be reformed according to the principles of the decree.

In 1851 the commissioner returned his report reformed according to the principles

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The principal case is cited in Holland v. Trotter, 22 Gratt. 139.

***Guardian and Ward—Compensation.**—For the proposition that, a guardian of infants is entitled to compensation for their support, though he had promised their friends that he would not make any charge for it, and in fact had kept no account against them, the principal case is cited with approval in the following cases: Hurst v. Hite, 20 W. Va. 205; Hauser v. King, 76 Va. 787. In this case it was held that the creditors of a committee of a lunatic could subject his right to compensation for board, to the payment of their claim. See the principal case cited in *foot-notes* to Sayers v. Cassell, 23 Gratt. 525; Rea v. Trotter, 26 Gratt. 585. See generally, monographic *note* to "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

of the decree of the court, to which there were no exceptions. By the first statement of this report the balance found due to the plaintiffs was 3599 dollars 29 cents of principal and 1009 dollars 77 cents of interest, with interest on the principal from the 26th of May 1849. By the second statement there was due to them 1031 dollars 65 cents of principal and 397 dollars 38 cents of interest, with interest on the principal from the same date. And there was due from the administrators of Armstrong on account of the personal estate 1365 dollars 27 cents, with interest on 1205 dollars 10 cents, a part thereof, from the 9th of October 1850.

In October 1851 the cause came on again to be heard, when the court, being satisfied that the opinion before expressed in favor of allowing the guardian for the support and education of his wards, was incorrect, was of opinion to adopt the first statement in the amended report; and the plaintiffs waiving the necessity of taking separate accounts against the guardian, and consenting to take a joint decree for the amount due, it was decreed that the sum of 4602 dollars 6 cents, with interest on 3599 375 dollars 29 cents, part *thereof, should be paid to them. And in part discharge of this sum, there was a decree against the administrators of Armstrong for the amount reported in their hands. And it was further decreed that unless the residue of the debt, interest and costs decreed to the plaintiffs was paid to them within two months, the sheriff of the county should proceed to sell so much of the lands of which Armstrong died seized as would pay that residue. From this decree the heirs of Armstrong applied to this court for an appeal, which was allowed.

Wm. Smith and McPherson, for the appellants.

Price and Caperton, for the appellees.

SAMUELS, J. This cause stands upon exceptions to reports of the account between John Armstrong and the female complainants, late his wards, and of the account between Andrew Beard and Joseph Beard, administrators with the will annexed of John Armstrong, deceased, and the estate of the decedent.

The guardianship accounts are stated in alternative forms, exhibiting different results, from a difference in the charges entering into those accounts: One is marked "first statement;" the other "second statement."

The first exception by defendants to the report marked "first statement," is because credit on the guardianship account is withheld from Armstrong's estate for the support and education of the wards during Armstrong's guardianship. This exception is met by complainants, by alleging that Armstrong promised to support and educate his wards without charge. There is proof in the record tending to show that Armstrong did so promise; yet as he was under no previous obligation to support and educate them at his own expense, a promise to do so was made without 376 *consideration, and would not be binding on him. The office he held made it his duty to take care of the persons and property of his wards, and to provide for their support and education out of the profits of their estate. A mere promise to persons having no authority to contract on the subject, and for no consideration, does not affect the rights of the guardian to have compensation. Hooper v. Royster, 1 Munf. 119. I am of opinion the exception should have been sustained.

The third exception is because 1279 dollars 9 cents, paid to complainant J. J. Walkup by Armstrong's administrators, is not credited to the estate against the wards as of the 9th of October 1847, when it was paid. This exception places in a clear light the error committed in stating the account jointly throughout, between all the female complainants on one side, and Armstrong's estate on the other. A correct mode would have been to state the account of each ward separately, either from the beginning or from the time when the claims of the wards ceased to be the same in amount. This payment to Walkup should be credited as of the day it was made, and applied to only such of the claims as he had authority to receive. It does not appear that he had authority to receive the money due complainant Sarah Jane Elliott: by crediting this payment on the aggregate of all the debts, her claim is improperly reduced in amount.

Defendant's first exception to the amount of the administration on Armstrong's estate, presents a question of no importance to them. Although the assets in the hands of the administrators should have been applied to pay debts in the order of their dignity, yet as the debts of the first dignity exceed the amount of the personal estate, and also bind the lands in the hands of the heirs, the creditors whose debts of inferior dignity have been paid, could, if not paid, have subjected the real assets by a bill to 377 marshal assets, or *otherwise; and as the land descended to defendants is bound for all the debts so far as they appear in the record, it is immaterial to defendants in what order they are paid.

Defendants' 2d, 3d, 4th and 5th exceptions are taken with so little precision, that it is difficult if not impossible to understand what is objected to; moreover, it does not appear upon what proof the entries excepted to were made. These exceptions were properly overruled.

Complainants' exceptions to the report marked "second statement," have been overruled by the decision already made on defendants' first exception to the guardianship account.

The court erred in giving a joint decree in favor of all the complainant's for the aggregate of all their debts against defendants, notwithstanding it is stated to have been done by consent of complainants. Elizabeth Margaret Elliott was an infant and therefore incapable of giving consent; nor

could her next friend give such consent for her. Under this joint decree, complainants J. J. Walkup or Sarah Jane Elliott might receive the whole amount thereof, and thus the infant be left with no further security for her debt than that afforded by the individual responsibility of the party so receiving it.

I am of opinion to reverse the decree for the errors indicated, and to affirm it in all other things.

The other judges concurred.

The decree was as follows:

The court is of opinion that the Circuit court erred in not allowing the estate of John Armstrong deceased, a reasonable credit for his expenditures in the support and education of his wards, so as not to exceed the profits of their estate in his 378 hands as guardian. *And in this, that after the claims of the female complainants ceased to be identical as to amounts, the accounts were still stated as joint only; and in this, that the sum of 1279 dollars 9 cents, paid to complainant Josiah J. Walkup, October 9th, 1847, was credited against the aggregate of all the claims under complainants, instead of crediting it against that of Walkup and wife, and that of his ward, which alone he had any authority to receive; and in this, that a joint decree was rendered in favor of all the complainants for the aggregate of all their demands, instead of rendering a separate decree in favor of Elizabeth Margaret Elliott, the infant, for her separate portion of the money due. And the court is further of opinion that there is no other error in the decree appealed from. Therefore it is adjudged, ordered and decreed, that so much of the decree as is herein declared to be erroneous be reversed and annulled, and that the appellants recover of the appellees the costs of appellants expended in the prosecution of their appeal here; and that in all other things the said decree be affirmed; and that the cause be remanded to the Circuit court for further proceedings to be had according to the principles of this decree.

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379 *Hudson v. Kline.

July Term, 1852, Lewisburg.

1. **Injunctions—Against Judgments—Remedy at Law*—Set-Off.**—In an action at law the defendant is prevented by unavoidable accident from setting up offsets which he held against the plaintiff, these offsets being in no way connected with the debts sued upon. He has however a plain remedy at law for the recovery of his claims. HELD: He is not entitled to enjoin the judgment and set up his offsets against it, but must pursue his remedy at law for their recovery.
2. **Same—Same—Claim Recoverable in Equity—Set-Off.**—If the claims which he holds against the plaintiff at law, are only recoverable in equity, still he is not entitled to enjoin the judgment, and to have them set off against it.
3. **Chancery Practice—Failure of Bill to State Equity—Effect.†**—If a bill does not state a case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction by the defendant in his pleadings.
4. **Rule of Court—Disregard of—Appeal.**—The disregard by a Circuit court of a rule adopted by itself for the regulation of the practice there, is not a ground of appeal.

This was a bill in the Circuit court of Kanawha, by Robert F. Hudson, to enjoin two judgments recovered against himself and two others as his sureties, by Daniel H. Kline. The bill charged that Kline had sued the plaintiff and his sureties, in two bonds executed by them to him, one for 800 dollars and the other for 1200 dollars. That Kline was largely indebted to the plaintiff on several different accounts, which he sets out in the bill, one of which was for a quantity of metal furnished to Morris & Co., upon the undertaking of Kline to pay for it, to the amount of 2139 dollars 61 cents. That the plaintiff, about the commencement of the term at which Kline recovered his judgments, went to the court-house and employed counsel to defend the suits, and set off his claims against the bonds so far as they were legal offsets. That he had 380 spoken to counsel and was to *meet him the next morning for the purpose of preparing his defence; but that on that night he was taken very ill at the hotel where he lodged, so much so as to confine

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*Equity Practice—Relief against Judgments—Remedy at Law.—In an action at law the defendant was prevented by an unavoidable accident from setting up offsets, which he held against the plaintiff, these offsets being in no way connected with the debts sued upon; and to which he has a plain remedy at law, *held*, he will not be allowed to enjoin the judgment and set up his offsets against it, but must pursue his remedy at law for their recovery. For this proposition see the following cases, citing and approving the principal case: Goolsby v. St. John, 25 Gratt. 153, and *note*; Barnett v. Barnett, 83 Va. 511, 2 S. E. Rep. 733; Brown v. Chapman, 90 Va. 176, 17 S. E. Rep. 855; Vance v. Snyder, 6 W. Va. 31; Bias v. Vickers, 27 W. Va. 466; Kanawha & O. Ry. Co. v. Ryan, 31 W. Va. 367, 6 S. E. Rep. 925; Faulconer v. Stinson, 44 W. Va. 549, 29 S. E. Rep. 1012. See principal case cited in *foot-note* to the following cases: Slack v. Wood, 9 Gratt. 40; Byrne v. Edmonds, 23 Gratt. 200; Allen v. Hamilton, 9 Gratt. 255; also, monographic *note* on "Jurisdiction."

†Same—Failure to State Equity in Bill—Effect.—For the proposition that, if a bill does not state a case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction by the defendant in his pleadings, the principal case is cited and approved in the following cases: Armstrong v. Pitts, 13 Gratt. 243, and *note*; Jones v. Bradshaw, 16 Gratt. 361; Green v. Massie, 21 Gratt. 362, and *note*; Salamone v. Keiley, 80 Va. 94; Graveley v. Graveley, 84 Va. 151, 4 S. E. Rep. 218; Buffalo v. Pocahontas, 85 Va. 225, 7 S. E. Rep. 238; Trout v. Trout, 86 Va. 299, 9 S. E. Rep. 1121; Boston, etc., Co. v. Carman, etc., Co., 94 Va. 101, 26 S. E. Rep. 390; Vanbibber v. Beirne, 6 W. Va. 173; Morehead v. De Ford, 6 W. Va. 321; Slack v. Jacob, 8 W. Va. 655; Surber v. McClintic, 10 W. Va. 247; *foot-note* to Beckley v. Palmer, 11 Gratt. 625.

him to his bed and render him wholly unfit for business. That his illness continued to increase, which made it necessary that he should be taken home, where he had been confined to his bed ever since. That his counsel had asked for a continuance of the causes on the ground of plaintiff's illness, and his consequent inability to prepare his case and get ready for trial; but the application was opposed by Kline and rejected by the court.

Kline answered the bill, denying his liability to the plaintiff on the grounds stated in the bill.

The cause came on in November 1851, on a motion to dissolve the injunction, when the same was dissolved, without prejudice to any rights or remedies at law or ordinary relief in equity, to which the plaintiff might be entitled for and on account of any of the matters set forth in his bill. From this decree Hudson applied to this court for an appeal, which was allowed.

Parks and Price, for the appellant.
Fry, for the appellee.

MONCURE, J., delivered the opinion of the court.

The question first presented for our decision in this case is, whether a court of equity had jurisdiction to enjoin the judgments obtained at law by the appellee against the appellant and his father and brother, on the grounds stated in the bill.

The claims asserted in the bill as setoffs to the judgments being independent of and unconnected with the claims on which the judgments were obtained would not at common law have been good setoffs in a suit at law upon the latter; and not 381 *being mutual (the former being separate and the latter joint), would not, in such a suit, have been good setoffs under the statute of setoff which was in existence when the new Code took effect. Nor would they have been good setoffs in equity, either before or since the said statute, unless upon the ground of the intervention of some peculiar equity, such as the insolvency of the party against whom they were asserted. Story's Eq. Jur., § 1434, 1437; Gilliat v. Lynch, 2 Leigh 493, and cases cited by Judge Green, p. 504, 5. But by the new Code, p. 654, § 4, it is provided, that "although the claim of the plaintiff be jointly against several persons, and the setoff is of a debt not to all, but only to a part of them, this section shall extend to such setoff, if it appear that the persons, against whom such claim is, stand in the relation of principal and surety, and the person entitled to the setoff is the principal." Under this provision the claims asserted in the bill, or most of them, would have been good setoffs in the suits at law in which the judgments were obtained, and which were instituted after the Code took effect. But the appellant alleges in his bill that he was prevented by unavoidable accident from pleading his setoffs at law, and therefore seeks to have the benefit of them in equity. The allegation is not denied in the answer, and, on a motion to dissolve, must be taken to be true. All or nearly all the claims asserted as setoffs in the bill, if well founded, are recoverable by action at law; and such as may not be are recoverable by suit in equity. It was said, in the petition for the appeal and the argument of the case, that if the appellant be left to his remedy at law, the statute of limitations will be a bar to his claims. Without meaning to admit that the fact, if so, would make any difference, it is sufficient to say that the fact in this case appears to be otherwise.

All the said claims, except that for the 382 metal *furnished William Morris & Co., arose within five years before the judgments were rendered; and though some of the items of the account for metal bear date a few months more than five years before, yet it is expressly averred in the bill that the metal was sold on a credit of 12 and 18 months, which would make the account due and the cause of action thereon accrue within five years before the judgments were obtained. It is not alleged in the bill that the appellee is insolvent, but the fact appears to be otherwise. Nor is the intervention of any other circumstance alleged as ground for equitable interposition than the accident before mentioned.

The only question, therefore, is whether the appellant, having a plain remedy at law, or in equity, for the recovery of his claims well founded, can have the appellee's judgments enjoined until the said claims can be established in order that they may be setoff against the said judgments, merely upon the ground that the appellant was prevented by accident from pleading the claims as setoffs at law. We are of opinion that he cannot. The statutes of setoff, "having been passed for the benefit of defendants, are not compulsory; but a defendant may waive his right of setoff, and bring a cross action for the debt due to him from the plaintiff." Babington on Setoff, p. 3, 6 Law Libr. The same author says, that "where the defendant, at the time of pleading, is not prepared to prove his cross demand, it is not prudent for him either to plead or give notice of setoff; for if, at the trial, he should attempt to prove his cross demand and fail in doing so, he cannot afterwards maintain an action for the amount." Id.

When a defendant is prevented by accident, surprise or other cause from proving his setoff, the practice is to withdraw it in order that the judgment may not be a bar to an action for the amount. And a de- 383 fendant who, *under such circumstances, should suffer a judgment to be obtained against him without withdrawing his setoff, would no more be entitled to relief in equity against the judgment on the ground of accident or surprise, than a plaintiff would be entitled to like relief on a like ground, who failed to suffer a nonsuit. Suppose a defendant fails to plead his setoff, or having pleaded, withdraws because he cannot prove it; and after judgment rendered against him discovers evidence sufficient to sustain his claim, which he

could not by reasonable diligence have discovered before, would a court of equity enjoin the judgment until he could establish his claim in order that it might be set off against the judgment? Would he not, on the contrary, have to resort to his action at law for the recovery of his claim? And does not the same principle apply to this case? The appellee has been in no default. He has had no agency, fraudulent or otherwise, in preventing the appellant from pleading the setoffs at law. If he had had, that would probably have been a good ground for a court of equity to interpose and enjoin the judgments, until the cross demands could be established and set off against them. But he resorted to his plain actions of debt, on two plain bonds of the appellant and his sureties, and by due diligence obtained his judgments. Why should he be enjoined from enforcing those judgments by execution, until the appellant can establish cross demands which are entirely unconnected with the judgments, and for which plain remedies at law or in equity exist? True, the appellant had an election of remedies. The statute of setoff gave him a cumulative remedy; and he has been prevented by inevitable accident from availing himself of the statutory remedy. But this has been the result of his misfortune, if misfortune it be, and not the act of the appellee; and his common law remedy, which is a plain and simple one, re-
384 *mains to him. Should he not be left to that remedy, as he would have been if he had elected not to plead his setoffs, or having pleaded, had elected to withdraw them? Should he be permitted, instead of resorting to that plain common law remedy, to come into a court of equity, enjoin judgments on plain bonds, the justice and obligation of which are not denied, until various complicated and disputed cross demands can be litigated and determined, and to have those demands decided by a forum different from that to which the decision of most if not all of them properly belongs? It has been a favorite policy in this state, especially of late, not to afford relief in a court of equity to a party who has a plain remedy at law, except in cases of concurrent jurisdiction. In all other cases, he must avail himself of his legal remedy. If, without his default, he be deprived of all remedy at law, equity may relieve him; but if any legal remedy remain to him, though he may have lost by his misfortune, and without the fault of his adversary, other concurrent legal remedies, he must resort to his remaining legal remedy. This policy is illustrated by the cases cited by the counsel for the appellee, especially Cabell v. Roberts, 6 Rand. 580; Collins v. Jones, 6 Leigh 530; Faulkner's adm'r v. Harwood, 6 Rand. 125; Haden v. Garden, 7 Leigh 157; Allen v. Hamilton, supra 255; to which may be added Slack v. Wood, supra 40. The precise question under consideration seems never before to have been adjudicated by this court. In the case of Morgan v. Carson, 7 Leigh 238, the plaintiff in equity alleged that he was prevented by surprise from pleading setoff at law. This court decided the case against him on the ground that the allegation of surprise was not proved; and of course it was not necessary to decide whether, if proved, it would have entitled him to equitable relief. Judge Carr, however, added (by way of exclusion of a conclusion), that he did not think the
385 *excuse alleged in the bill for the failure to make defence at law, would have been sufficient to sustain the jurisdiction, even if it had been proved, which it was not. The case was assumpsit on a quantum meruit, for work and labor done, and was altogether unfit for a court of equity. If the learned judge had been of opinion that where a defendant in a suit at law is prevented by accident from pleading setoff, he is entitled to relief in equity against the judgment, notwithstanding he has a plain remedy by action at law, he would have sustained the jurisdiction in the case referred to. But he was of opinion that the matter of the setoff must be of such a nature as to give the court of equity jurisdiction otherwise than on the ground of surprise. That case came on for final hearing, and the question was whether a court of equity could give any relief at all. If it had been proper to enjoin the judgment, that would have given the court jurisdiction of the case, without reference to the nature of the claim. In regard to the cases cited by the counsel for the appellant in this branch of the case, viz: Foushee v. Lea, 4 Call 279; Hord v. Dishman, 5 Id. 279; Ross v. Pynes, 3 Id. 490; Ambler v. Wyld, 2 Wash. 36; Knifong v. Hendricks, 2 Gratt. 212, it is sufficient to say that the parties who complained of the judgments at law in those cases, would have been entirely without remedy but for the interposition of a court of equity.

But the counsel for the appellant contends that as no exception to the jurisdiction of the court was taken in the answer, it was the duty of the court to decide the case on its merits; and in support of that position he relies on the provision in the Code, p. 648, § 19, which provides that "when the declaration or bill shows on its face proper matter for the jurisdiction of the court, no exception for want of such jurisdiction shall be allowed, unless it be taken by plea in abatement; and the plea shall
386 *not be received after the defendant has demurred, pleaded in bar, or answered to the declaration or bill," &c. The former law declared that "after answer filed no plea in abatement to the jurisdiction of the court, no exception for want of jurisdiction shall ever afterwards be made; nor shall the court ever thereafter delay or refuse justice, or reverse the proceedings for want of jurisdiction, except," &c. 1 Rev. Code 1819, p. 214, § 86. Notwithstanding the strong language of that law, this court, in Pollard v. Patterson's adm'r, 3 Hen. & Munf. 67, unanimously decided that the statute meant to embrace those cases only in which the bill showed on its face proper

matter for the jurisdiction of equity, and the exception had to be taken by plea; and that the omission to plead gave equity no power to decree in favor of the plaintiff, if the case appeared upon the face of the bill to be a mere legal question. The construction of the statute adopted in that case has ever since been followed. Stuart v. Coalter, 4 Rand. 74; Hickman v. Stout, 2 Leigh 6; Morgan v. Carson, 7 Id. 238. The last case was similar in its nature to this. The defendant made no objection to the jurisdiction of the court of chancery, but in his answer defended himself upon the merits. The case was heard, and a final decree made, upon the merits; and yet the decree was reversed because it appeared on the face of the bill that the court had no jurisdiction. The case of Van Lew v. Bohannan, 4 Rand. 537, has been sometimes considered as an authority to show that if a defendant in his answer defends himself on the merits without objecting to the jurisdiction of the court, he thereby waives such objection, and jurisdiction may be taken of the case. But in that case the defendant in his answer admitted facts which, if they had appeared to the court of law, would have there produced a different result; and the court had nothing to do but, on the admissions in the answer, to 387 perpetuate *the injunction. It was not like a case in which the matters set up in the bill are controverted by the answer, and must be litigated and determined in the court of chancery before relief can be given.

The provision in the new Code seems not to have been intended to make any change in the law as it was in the Code of 1819, and according to the construction put upon it in the case of Pollard v. Patterson's adm'r. That provision expresses what the law of 1819 implied, and uses words which were not in that law, but convey a meaning which that law was construed to import. Those words were, "When the bill shows on its face proper matter for the jurisdiction of the court, no exception for want of jurisdiction shall be allowed," &c. In the case under consideration, the bill did not show upon its face proper matter for the jurisdiction of the court. It asserted claims cognizable only at law, and for the recovery of which a plain legal remedy existed; or, if any of them were cognizable in equity, they were entirely unconnected with the judgments sought to be enjoined; and no ground was stated which could give the court jurisdiction of the case as an injunction suit. It was proper, therefore, to dissolve the injunction on the ground that on the face of the bill the court had no jurisdiction to award it.

It was further contended by the counsel for the appellant that the appellee had no right to make the motion to dissolve at the time at which it was made, as his answer had been filed in the paper, but not at rules or in court, only two days before the motion was made. If there is not sufficient equity on the face of the bill to support the injunction, the defendant may apply at once, and without any answer, for a dissolution. 2 Rob. Pr. 241 and cases cited; also Slack v. Wood, supra 40. Where there is sufficient equity on the face of the bill, an answer must be filed by the defendant; 388 *after which a motion to dissolve may be made at any time; at least there is nothing in the law of the land to prevent it. By rules of court an answer to an injunction bill is generally required to be filed within a certain time after the execution of the subpœna, or the defendant is not allowed to move a dissolution until a certain time has elapsed after the answer is filed. But these rules are subject to the discretion of the court to which they belong, and if disregarded by such court, its decree cannot on that ground be reversed. Of them the appellate court can take no judicial cognizance. It does not, however, appear in this case when the subpœna was executed.

For the foregoing reasons, and without expressing any opinion on the merits of the claims asserted in the bill, we are for affirming the order of the Circuit court, with costs to the appellee.

Decree affirmed.

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389 *Bean & Another v. Simmons.

July Term, 1852, Lewisburg.

1. **Chancery Practice—Answer—Time of Filing***—It is the right of a defendant in equity to file his answer at any time before a final decree is made in a cause.
2. **Same—Same—Same—Case at Bar.**—Where the court had received the case when submitted for decision, had examined the papers and settled the terms of a decree deciding the principles of the cause, though it was an interlocutory decree, and a decree had been prepared and considered by the court and directed to be entered in the order book, but before it had been entered and on the same day it was directed to be entered, a defendant tendered his answer: HELD: The defendant was then entitled to file his answer.
3. **Same—Same—Same**—QUÆRE: Whether if the

*__Chancery Practice—Answer—Time of Filing.__—In the statute providing that at any time, before final decree, a defendant *may* be allowed to file his answer, the term "may" is imperative and means "must" or "shall." As authority for this proposition, the principal case was cited in Welsh v. Solenberger, 85 Va. 444, 8 S. E. Rep. 91; Radford v. Fowlkes, 85 Va. 828, 8 S. E. Rep. 817 (citing also Bowles v. Woodson, 6 Gratt. 81; Preston v. Heiskell, 33 Gratt. 48); Buford v. North Roanoke, etc., Co., 90 Va. 423, 18 S. E. Rep. 914. See also, monographic *note* on "Answers, in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571.

This construction comes under the general rule, that the word "may" when used in a statute means "must" or "shall" in cases where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the power shall be exercised. The principal case was cited for this proposition in Bank v. County, 28 W. Va. 291; Turner v. Smith, 18 Gratt. 838; Elliott v. Hutchinson, 8 W. Va. 459. See also, in accord, Bolling v. Mayor, 3 Rand. 580.

decree had been entered in the order book and the orders had been signed by the judge, the defendant would have been entitled, at the same term, or at any time previous to the final hearing of the cause, to file his answer.

This was a bill filed in the Circuit court of Hardy county by Valentine Simmons against Adam Bishop, William Seymour and others, to subject a piece of ground in the town of Morefield, sold by Simmons to Bishop, to satisfy a balance of the purchase money. An account was directed to ascertain the amount of purchase money still due; and that account having been taken and returned, the cause was put into the hands of the judge at the April term of the court in 1848, and the decree had been prepared, and was ready to be entered, bringing on the cause to be heard upon the bill taken for confessed as to all the defendants, when Seymour asked leave to file his answer, which was refused by the court. The subsequent proceedings are stated in the opinion of the court. Upon the application of Bean and Seymour, an appeal was allowed.

390 *J. W. F. Allen, for the appellants. There was no counsel for the appellees.

LEE, J., delivered the opinion of the court.

The decree pronounced in this cause on the 24th of April 1848, on the hearing of the case on the bill and amended bills taken as for confessed as against all the defendants, exhibits and depositions filed, required the defendant Bishop to pay to the complainant the amount claimed in the bill, with interest and costs, within sixty days, and on his failure so to do, directed a sale of the land in the bill and proceedings mentioned for satisfaction thereof, by a commissioner named for that purpose. The amount not having been paid within the time specified, the commissioner sold the land as directed, and reported his sale to the court; and the court by its final decree, pronounced on the 23d of September 1848, confirmed the report, and directed the proceeds of the sale to be paid over to the complainant; and gave a further decree against the defendant Bishop, personally, for a balance found to remain unsatisfied by the sale of the land. After the decree of the 24th of April 1848 had been prepared, considered by the court, and directed to be entered in the order book, the defendant Seymour tendered an answer, prepared after the decree had been rendered, (that is directed to be entered,) in which he contests the complainant's right to recover in the case at all, and also claims preference for the deed of trust under which he claimed over the lien set up by the complainant. The court, however, refused to permit him to file his answer, and the decree recited that the cause was heard as on the bills taken for confessed as to him as well as the other defendants. And after the final decree was pronounced, the defendants, Bean and Seymour, obtained an appeal to this court.

The act of the 7th of March 1826, 391 altering proceedings *in the courts of chancery, (Supp. Rev. Code 1819, p. 130,) authorizes a complainant to bring his cause to a hearing after subpœna served on the defendant, and no answer, plea or demurrer filed within four months (afterwards reduced to two months,) thereafter, without a decree nisi served on the defendant; but provides, "that the defendant may, at any time before final decree, be allowed to file his answer, or plead or demur, but the cause shall not be sent to rules, or continued therefor, unless upon good cause shown." And the question arises as to the construction of the terms, "may be allowed to file an answer," &c. in this proviso; whether they are to be regarded as imperative, and as conferring an absolute right, which the court cannot withhold; or whether the court may exercise a discretion upon the subject, giving leave to file an answer after the four months, or refusing it according to the circumstances of the case.

The general rule in the construction of statutes is, that the term "may," when used in a statute, means "must" or "shall," in cases where the public interest and rights are concerned, and where the public or third persons have a claim de jure that the powers shall be exercised. 7 Bacon's Ab. (Gwil. Ed.) 451, title "Statute" I; Drage v. Brand, 2 Wils. R. 377; Roles v. Rosewell, 5 T. R. 535; Newberg Turnpike Company v. Miller, 5 John. Ch. R. 113; Bolling v. Mayor of Petersburg, 3 Rand. 563, 580. And considering the subject to which the power conferred by the provisio in question of allowing an answer to be filed, notwithstanding the expiration of the four months (or two months) of subpœna served, and that it involves what may be considered the natural right of every defendant in a cause to make his defence, the court has no hesitation in saying, that the term "may" in this proviso is imperative, and to be construed as meaning "must" or "shall," and that the 392 court has *no discretion to refuse to permit an answer to be filed when tendered within the time limited by the act, if otherwise proper to be received. And the remaining question is, when does this time expire? When shall it be said there is "a final decree" within the meaning of the proviso, after which the defendant cannot claim to file his answer? In this case, it seems that the court had received the case when submitted for decision, had examined the papers, and settled the terms of the decree, and a decree had been prepared and considered by the court, and directed to be entered in the order book; but before it had been entered, and on the same day it was directed to be entered, the answer was tendered. And without intending to decide whether if the decree had been entered in the order book and signed by the judge, but during the same term the defendant had asked leave to file an answer, or whether if he had tendered his answer at the next term of the court, before the final decree confirming the report of sale was pronounced,

he ought or ought not to have been permitted to file it, yet the court is of opinion, that in the exact circumstances of this case, and the decree not having been entered in the order book, the defendant was entitled to file his answer, the complainant not objecting to it for insufficiency, or indeed for any cause, but the court refusing leave to file it, because it regarded it as tendered too late.

It may be urged that this construction of the act referred to will be productive of much inconvenience, by permitting parties unduly to delay making their defence until after a cause has been heard by the court, and the decree settled and prepared, and nothing remaining, except to enter it in the order book. But it is not often perhaps that a party will be willing to run the risk of such delay in preparing his defence; and whatever may be the inconvenience,
393 the *court can only construe the statute as it is, leaving the remedy, if any be required, to the legislature.

Without therefore deciding any other question in the cause, the court is of opinion that the Circuit court erred in refusing leave to the appellant Seymour to file his answer when tendered, and that for that cause the decree must be reversed with costs to the appellants, and the cause remanded to the said Circuit court, with directions to permit the said Seymour to file his answer, and for further proceedings therein to be had.

Decree reversed.

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394 *Henderson v. Henderson's Ex'x.

July Term, 1852, Lewisburg.

(Absent ALLEN, J.)

Judgment—Satisfaction of—Parties.*—A bill is filed to subject lands to the satisfaction of a judgment after the death of the debtor, and charging fraud in certain conveyances by the debtor to his son. The son having conveyed some of the lands to third persons, all such persons must be made parties to the cause.

This was a bill filed in September 1835, in the Circuit court of Wood county, by Richard H. Henderson, executor of Alexander Henderson of Dumfries, against George W. Henderson and the administrator of Alexander Henderson, late of Wood county. The plaintiff claimed to be a creditor of Alexander Henderson of Wood county by judgment recovered against him in 1824; and he sought to set aside certain conveyances of real and personal estate, made by Alexander Henderson of Wood to his son George W. Henderson in 1825 and 1826. In his bill, after setting out his judgment and the deeds, and the insolvency of Alexander Henderson of Wood at his death, he charged that these deeds were intended to hinder and delay his creditors, and especially the plaintiff; and George W. Henderson was called upon to say whether he had sold the land conveyed to him by his father, and if he had, when and to whom he had conveyed it, and who was the then owner. And the prayer of the bill was, that the conveyances might be set aside, and that the defendant George W. Henderson might be required to account for the value of the property with interest and profits, and for general relief.

George W. Henderson answered the bill, averring that he had purchased the
395 property and given full *value for it. And in answer to the enquiry whether he had sold the land conveyed to him by his father, he stated, that after making considerable improvements on one of the tracts, he in 1830 exchanged it with his uncle Archibald Henderson for other lands; and in 1833 he sold and conveyed another tract to Joseph Tomlinson, and that Tomlinson afterwards conveyed it to his daughter, the wife of the defendant; and he filed with his answer the deeds to and from himself.

In the progress of the cause the plaintiff Richard H. Henderson died, and the suit was revived in the name of his executrix, Orra M. Henderson.

The cause came on to be heard in March 1848, when the court held that one moiety of the lands conveyed by Alexander to George W. Henderson by the deeds of the 5th and 7th of December 1825, were bound by the judgment against the grantor therein. And it was decreed, that unless George W. Henderson, on or before the 1st day of the next June, paid the balance due on the judgment, that a commissioner appointed by the decree should after, &c., sell at public auction one moiety of the said lands upon a credit, &c. And an issue was directed to ascertain whether the deeds of the 5th and 7th of December 1825, and a bill of sale of the 1st of April 1826, for the slave and other property therein mentioned, were voluntary conveyances, and therefore void; or whether or not they were for an inadequate consideration, and fraudulent and void: or if for a valuable consideration, then what was the true value of each of the tracts of land in the said deeds mentioned, and the true consideration paid therefor by George W. Henderson. And also to ascertain the true value of the slave and other personal property mentioned in the bill of sale aforesaid, and the consideration paid therefor. George W. Henderson applied to this court for an appeal from this decree, which was allowed.

396 *Price and McPherson, for the appellant.

Fry, for the appellee.

SAMUELS, J. I am of opinion the Circuit superior court of law and chancery for Wood county should have rendered no decree in the case until it had caused the persons holding the titles to the lands sought to be charged, to be made parties to the suit. As a moiety of their lands if subjected to the lien of complainants' judgment, can only be so subjected after apply-

*See principal case cited in Cronise v. Carper, 80 Va. 681. See also, monographic *note* on "Judgments."

ing the personal estate of Alexander Henderson, if any, to the part payment thereof, these persons have a direct interest in the questions connected with the personal property. It was improper therefore, to decide in regard to the personal property in their absence. And moreover the decree in regard to the land would be wholly inoperative against those who held the titles but who are not parties to the suit.

The decree should be reversed with costs to the appellant, and the cause remanded with directions to make parties such persons as hold titles to the land conveyed by Alexander Henderson to George W. Henderson by the deeds bearing date the 5th and 7th days of December 1825, and for further proceedings to be had therein.

The other judges concurred.

The decree was as follows:

The court is of opinion that the Circuit court of Wood county erred in rendering any decree affecting the real or personal property sought to be charged without having before it as parties the persons holding titles to the lands conveyed by Alexander Henderson to George W. Henderson by the deeds bearing date the 5th and 7th of December 1825. It is therefore adjudged, ordered and de-
397 creed that the said decree be *reversed and annulled, that the appellant recover of the appellee his costs expended in this court, to be levied of the assets in her hands to be administered; and the cause is remanded to the Circuit court of Wood county with directions to cause the persons above mentioned to be made parties, and for further proceedings to be had therein.

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398 *Stephenson v. Taverners.

July Term, 1852, Lewisburg.

1. **Principal and Surety—Principal Dead—Rights of Surety—Bill Quia Timet—Parties.***—A surety, whose principal is dead, may file a bill *quia timet* against the creditor and the executor of the debtor, to compel the latter to pay the debt so as to exonerate the surety from responsibility. He may enforce for his exoneration any lien of the creditor on the estate of his principal, and may bring any suit in equity which the creditor could bring, for a settlement of the administration account on the estate of the deceased, and for the administration of the assets, whether legal or equitable; but the creditor must be a party that he may receive the money when it is recovered.

2. **Creditors' Bill—Marshaling†—Administration of Assets—Parties‡—Amending Bill.§**—A bill to marshal assets and for their administration, should be on behalf of the plaintiff and all other creditors, and the heirs and devisees of the testator should be parties. But if the proper parties are not made, the bill should not be dismissed; but the plaintiff should have leave to amend and make the proper parties, unless a decree for an account had been made in some other creditor's suit having the same object.

3. **Same—Consolidation of Suits.‖**—If several suits are pending by different creditors, the court will order the proceedings in all the suits but one to be stayed, and will require the several parties to

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***Principal and Surety—Rights of Surety.**—No principle in equity jurisprudence is better settled than that a surety is entitled to enforce every security for the debt which the creditor has against the principal debtor; and therefore a mortgage or other security taken by the creditor must be dealt with in good faith and held in trust, not only for the creditor's security, but for the surety's indemnity. And this right of the surety stands not upon contract, but upon principles of natural justice. Penn v. Ingles, 83 Va. 71, citing the principal case, and Meade v. Grigsby, 26 Gratt. 612. But the surety can enforce for his exoneration only such security as the creditor has against the principal. Barton v. Brent, 87 Va. 390, 13 S. E. Rep. 29, citing the principal case.

In Neal v. Buffington, 42 W. Va. 329, 26 S. E. Rep. 178, the principal case was cited to the point that before the surety has paid anything on the debt of his principal he is entitled, the debt being due, to come into equity, by bill *quia timet* against the creditor and debtor and compel the debtor to make payment so as to exonerate himself from responsibility. On the subject of Bills Quia Timet, see monographic *note* on "Bills Quia Timet" appended to Devries & Co. v. Johnston, 27 Gratt. 805. As to the rights of sureties, see the principal case also cited in William & Mary College v. Powell, 12 Gratt. 391.

In Watson v. Wigginton, 28 W. Va. 575, the court, speaking through GREEN, J., said: "In no case, which I have seen, has the right of a surety to come into a court of equity to compel the creditor to make his debt out of the principal debtor been laid down more strongly and in a more unqualified manner than by JUDGE MONCURE in *Stephenson v. Taverners, 9 Gratt. 404 et seq.*, and I must say, that I should, as at present advised, be disposed to qualify his language somewhat; but I do not deem it necessary to do so as its adoption would not vary the conclusion, which must, I think, be reached in this case; and perhaps a thorough investigation of the subject might show, that his language ought not to be qualified." The principal case was distinguished in this same opinion at page 577.

†**Marshaling Assets.**—In McCrum v. Lee, 38 W. Va. 595, 18 S. E. Rep. 761, the principal case was cited, among others, to the point that a court of equity, in a proper case, will compel a creditor having a lien on two parcels of property so to enforce it as not to injure the rights of him who has a lien on but one of them.

‡**Creditors' Bill—Administration of Assets—Parties.**—A creditor has a right to bring a suit for his claim against his deceased debtor's estate but he should bring it for himself and the other creditors. Ewing v. Ferguson, 33 Gratt. 558, citing the principal case. See monographic *note* on "Creditors' Bills" appended to Suckley v. Rotchford, 12 Gratt. 60.

§**Chancery Practice—Amending Bill.**—See principal case cited in Holland v. Trotter, 22 Gratt. 139; *footnote* to Parrill v. McKinley, 9 Gratt. 1; Yates v. Law, 86 Va. 123, 9 S. E. Rep. 508. For further information, see monographic *note* on "Amended Bills" appended to Belton v. Apperson, 26 Gratt. 207.

‖**Creditors' Bill—Consolidation of Suits.**—See the principal case cited with approval in Sexton v. Patterson, 1 Va. Dec. 556; Harvey v. Steptoe, 17 Gratt. 304; Saunders v. Griggs, 81 Va. 515; Paxton v. Rich, 85 Va. 381, 17 S. E. Rep. 531; Beach v. Woodyard, 5 W.

come in under the decree in said suit, so that only one account of the state may be necessary.

4. **Same—Separate Suit—Costs.**¶—A creditor, who with knowledge that there has been a decree for an account in another creditor's suit, brings a separate suit, for his own claim, will be compelled to pay the costs.

5. **Same—Decree for Account—Effect.****—A decree in one creditor's suit for an account, operates a suspension of all other pending suits of creditors; and they must come in under the decree.

6. **Same—Several Suits Pending—Order of Making Decree.**††—When several creditors' suits are pending, the decree may be made in the cause first ready for a hearing, though that is not the first suit brought.

This was a suit instituted in May 1845, in the Circuit court of Wood county by John Stephenson against Thomas and Franklin Taverner. The bill charges that Charles R. Baldwin, late of the county of Wood, died in 1839. That he was indebted by account to Stephenson, Neale & Co., of which firm the plaintiff was a 399 *partner, for several hundred dollars. That by his will he appointed the plaintiff and Thomas Taverner, the latter of whom was his father in law, his executors, both of whom qualified as such: That Thomas Taverner took almost exclusive charge of the estate, and performed almost every executorial act that was done without consulting the plaintiff, many if not all of which acts were irregular; and for a detail of which he referred to a bill filed in the same court and then depending by J. J. Jackson against said Taverner. That Taverner in managing said estate had made it out insolvent. That Baldwin in his lifetime, had purchased a lot in Parkersburg of M. E. Holliday, for which he executed his note, with the plaintiff and S. C. Shaw as his sureties, in the sum of 155 dollars and 75 cents, payable on the 1st of September 1839; that this note had been assigned to J. F. Snodgrass, and by him was assigned in May 1841 to Franklin Taverner, the son of Thomas Taverner; and he charged that this was in fact a payment of the note by his coexecutor Thomas Taverner. That such was plaintiff's understanding, and thus the matter stood until December 1843, when a writ was served upon him in the name of Holliday suing for the benefit of Burnett, Withers & Co., demanding this debt. That Franklin Taverner was active in transacting the business for his father, and plaintiff has no doubt the note was taken from Snodgrass in good faith at the time as paid; and that this subsequent proceeding was a pretence; the firm of Burnett, Withers & Co., not being known in that country.

The plaintiff further charged that Thomas Taverner had sold the testator's land in Ohio, made settlements with the court, and done divers other acts without the plaintiff's concurrence, and had not given him any commission; had not permitted plaintiff to retain his own debt as he had a right to do, and had preferred creditors without plaintiff's concurrence, and to his injury. 400 *That plaintiff reluctantly consented to the sale of the real property mentioned in Jackson's bill, which Baldwin had purchased of Snodgrass in the town of Parkersburg, but that he understood the terms of the sale wholly different from Taverner. The plaintiff understood the sale to be subject to the vendor's lien: that the estate was to be credited with the proceeds of sale and the purchaser was to state the property subject to the incumbrance: on any other supposition the price was grossly inadequate, and the sale for cash utterly indefensible. That the will of Baldwin which subjected all his estate to the payment of his debts and authorized his executors to sell, constituted that estate equi-

Va. 233; Bell v. List, 6 W. Va. 474. See principal case distinguished in Barger v. Buckland, 28 Gratt. 868; Patterson v. Eakin, 87 Va. 54, 12 S. E. Rep. 144. See monographic *note* on "Creditors' Bills" appended to Suckley v. Rotchford, 12 Gratt. 60.

¶**Creditor's Bill—Separate Suit—Costs.**—If a creditor with knowledge that there has been a decree for an account in another creditors' suit brings a separate suit for his own claim, he will be compelled to pay the costs. Laidley v. Kline, 23 W. Va. 565, citing the principal case, and Kent v. Cloyd, 30 Gratt. 555. See also, monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

****Creditor's Bill—Decree for an Account—Effect.**—The settled rule, in respect to a creditors' suit for the administration of assets of a deceased debtor, is that a decree for an account of outstanding debts operates a suspension of all other pending suits of creditors, who must come in under the decrée which is treated as a decree in favor of all the creditors. Paxton v. Rich, 85 Va. 381, 7 S. E. Rep. 581; Kent v. Cloyd, 30 Gratt. 561; Hurn v. Keller, 79 Va. 418; Beverly v. Rhodes, 86 Va. 417, 10 S. E. Rep. 572; Woodyard v. Polsley, 14 W. Va. 219; Laidley v. Kline, 23 W. Va. 571; Craig v. Hoge, 95 Va. 281, 28 S. E. Rep. 317, all citing the principal case. And it is only where a decree for an account of debts against the estate of a decedent is made in a suit for the administration of the assets, that the pendency of the suit operates a suspension of all other pending suits of creditors having the same object in view. Robinson v. Allen, 85 Va. 724, 8 S. E. Rep. 835, citing the principal case. Until a decree for an account, each creditor has control of his own suit, and he may dismiss it, if he thinks proper. Piedmont, etc., Ins. Co. v. Maury, 75 Va. 512; Craig v. Hoge, 95 Va. 281, 28 S. E. Rep. 317, both citing the principal case.

See monographic *note* on "Creditors' Bills" appended to Suckley v. Rotchford, 12 Gratt. 60.

Same—Same—Statute of Limitations.—In Craufurd v. Smith, 93 Va. 630, 23 S. E. Rep. 235, the principal case was cited to the point that, in a creditors' suit, when a decree is entered to take an account of the debts against the estate of the decedent, the statute of limitations ceases to run against the creditors of the estate. See principal case also cited in *foot-note* to Ewing v. Ferguson, 33 Gratt. 548; Paxton v. Rich, 85 Va. 381, 7 S. E. Rep. 581. See also, in accord, Harvey v. Steptoe, 17 Gratt. 290, and *foot-note*.

††**Creditors' Bill—Several Suits Pending—Order of Making Decree.**—See principal case cited with approval in Robinson v. Allen, 85 Va. 724, 8 S. E. Rep. 835. See also, monographic *note* on "Creditors' Bills" appended to Suckley v. Rotchford, 12 Gratt. 60.

and that the bill in said cause be dismissed, but without costs to either 371 *party. And it is further adjudged, ordered and decreed, that said decree of the 23d of October 1849 be in all other respects affirmed.

And it is further adjudged, ordered and decreed, that as to the said decree of the 3d of April 1848 the said appeal be dismissed.

Which is ordered to be certified to the said Circuit court of Greenbrier county.

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372 *Armstrong's Heirs v. Walkup & Others.

July Term, 1852, Lewisburg.

1. **Guardian and Ward—Compensation*—Case at Bar.**—A guardian of infants is entitled to compensation for their support, though he may have promised their friends that he would not make any charge for it, and in fact kept no accounts against them.
2. **Same—When Error to Make Joint Decree in Favor of Several Infants.**—It is error to make a joint decree in favor of several persons who have been wards of the defendant's testator, where one of them is an infant; though the decree be made with the consent of the next friend of the infant.
3. **Guardian and Ward—Payments to Guardian—Liability to Third Persons.**—A payment made to the husband of one of three wards, who is the guardian of another of them, though intended to be a payment to all, is not to be credited against the third ward, who is then an adult, she not having authorized him to receive it, but is to be credited against the husband and wife and his ward.
4. **Same—Accounts Must Be Stated Separately.**—The accounts of the three wards should be stated separately from the commencement, or at least from the time when their expenses differed in amount.

This was a suit in the Circuit court of Greenbrier, instituted by Josiah J. Walkup and Ann Eliza his wife, Sarah Jane Elliott and Elizabeth M. Elliott, the last being an infant suing by her guardian and next friend J. J. Walkup, against the administrators with the will annexed and heirs of John Armstrong, who had been the guardian of the female plaintiffs, for the settlement of his guardian accounts. The accounts were referred to a commissioner, who in 1850 made a report, bringing down the account to that time, and presenting alternate statements. And there was also an account of the administration upon Armstrong's estate by the administrators.

The heirs of Armstrong excepted to the first statement of the guardian's account because he was not allowed anything for the support and education of his wards; and they excepted to both statements 373 because *he was charged with compound interest after his death, and because the account was not credited with 1279 dollars 9 cents, as of the 9th of October 1847 paid by the administrators to the plaintiff Walkup for the wards. They also excepted to the administration account on several grounds, one of which was, that the administrators were allowed credit for the payment of debts of inferior dignity to that of the plaintiffs.

The plaintiffs excepted to the commissioner's second statement, because, in that statement, the guardian was allowed compensation for the support and education of his wards. It appears that Armstrong, having no children of his own, took these children, who were then quite young, to live with him. There is some evidence, too, that he repeatedly said that he did not intend to make any charge against them for their support and education; and an uncle of the plaintiffs, who was examined as a witness, stated that he was prepared and should have taken the children with him to Ohio upon the death of their mother, but for the promise of Armstrong that he would keep them without charge; and it appears that although they lived with him, one of them until her marriage and the others until his death in 1846, he did not keep any account of their expenses, but treated them as if they had been his own children.

In May 1850 the cause came on to be heard, when the court held that the second statement of the commissioner's report was correct in making an allowance to the guardian for the support and education of his wards, and overruled the exception of the plaintiffs to this statement, and sustained the first exception of the defendants to the first statement. The exceptions to both statements, because interest was compounded after the death of Armstrong, and for failing to credit in that account the sum of 1279 374 dollars 9 cents paid by *the administrators, were also sustained. And the first exception of the heirs of Armstrong to the administration account was overruled, because, though it is true the debts due from the guardian has preference over all other debts, yet as the plaintiffs could resort to the real estate of the guardian for satisfaction of their claim, the court would substitute the creditors who could only resort to the personalty, to the right of the plaintiffs against the real estate, should they have satisfaction out of the personal estate. It is unnecessary to notice the other exceptions. The report was therefore recommitted to be reformed according to the principles of the decree.

In 1851 the commissioner returned his report reformed according to the principles

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The principal case is cited in Holland v. Trotter, 22 Gratt. 139.

*__Guardian and Ward—Compensation.__—For the proposition that, a guardian of infants is entitled to compensation for their support, though he had promised their friends that he would not make any charge for it, and in fact had kept no account against them, the principal case is cited with approval in the following cases: Hurst v. Hite, 20 W. Va. 205; Hauser v. King, 76 Va. 787. In this case it was held that the creditors of a committee of a lunatic could subject his right to compensation for board, to the payment of their claim. See the principal case cited in *foot-notes* to Sayers v. Cassell, 23 Gratt. 525; Rea v. Trotter, 26 Gratt. 585. See generally, monographic *note* to "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

of the decree of the court, to which there were no exceptions. By the first statement of this report the balance found due to the plaintiffs was 3599 dollars 29 cents of principal and 1009 dollars 77 cents of interest, with interest on the principal from the 26th of May 1849. By the second statement there was due to them 1031 dollars 65 cents of principal and 397 dollars 38 cents of interest, with interest on the principal from the same date. And there was due from the administrators of Armstrong on account of the personal estate 1365 dollars 27 cents, with interest on 1205 dollars 10 cents, a part thereof, from the 9th of October 1850.

In October 1851 the cause came on again to be heard, when the court, being satisfied that the opinion before expressed in favor of allowing the guardian for the support and education of his wards, was incorrect, was of opinion to adopt the first statement in the amended report; and the plaintiffs waiving the necessity of taking separate accounts against the guardian, and consenting to take a joint decree for the amount due, it was decreed that the sum of 4602 dollars 6 cents, with interest on 3599 375 dollars 29 cents, part *thereof, should be paid to them. And in part discharge of this sum, there was a decree against the administrators of Armstrong for the amount reported in their hands. And it was further decreed that unless the residue of the debt, interest and costs decreed to the plaintiffs was paid to them within two months, the sheriff of the county should proceed to sell so much of the lands of which Armstrong died seized as would pay that residue. From this decree the heirs of Armstrong applied to this court for an appeal, which was allowed.

Wm. Smith and McPherson, for the appellants.

Price and Caperton, for the appellees.

SAMUELS, J. This cause stands upon exceptions to reports of the account between John Armstrong and the female complainants, late his wards, and of the account between Andrew Beard and Joseph Beard, administrators with the will annexed of John Armstrong, deceased, and the estate of the decedent.

The guardianship accounts are stated in alternative forms, exhibiting different results, from a difference in the charges entering into those accounts: One is marked "first statement;" the other "second statement."

The first exception by defendants to the report marked "first statement," is because credit on the guardianship account is withheld from Armstrong's estate for the support and education of the wards during Armstrong's guardianship. This exception is met by complainants, by alleging that Armstrong promised to support and educate his wards without charge. There is proof in the record tending to show that Armstrong did so promise; yet as he was under no previous obligation to support and educate them at his own expense, a promise to do so was made without 376 *consideration, and would not be binding on him. The office he held made it his duty to take care of the persons and property of his wards, and to provide for their support and education out of the profits of their estate. A mere promise to persons having no authority to contract on the subject, and for no consideration, does not affect the rights of the guardian to have compensation. Hooper v. Royster, 1 Munf. 119. I am of opinion the exception should have been sustained.

The third exception is because 1279 dollars 9 cents, paid to complainant J. J. Walkup by Armstrong's administrators, is not credited to the estate against the wards as of the 9th of October 1847, when it was paid. This exception places in a clear light the error committed in stating the account jointly throughout, between all the female complainants on one side, and Armstrong's estate on the other. A correct mode would have been to state the account of each ward separately, either from the beginning or from the time when the claims of the wards ceased to be the same in amount. This payment to Walkup should be credited as of the day it was made, and applied to only such of the claims as he had authority to receive. It does not appear that he had authority to receive the money due complainant Sarah Jane Elliott: by crediting this payment on the aggregate of all the debts, her claim is improperly reduced in amount.

Defendant's first exception to the amount of the administration on Armstrong's estate, presents a question of no importance to them. Although the assets in the hands of the administrators should have been applied to pay debts in the order of their dignity, yet as the debts of the first dignity exceed the amount of the personal estate, and also bind the lands in the hands of the heirs, the creditors whose debts of inferior dignity have been paid, could, if not paid, have subjected the real assets by a bill to 377 marshal assets, or *otherwise; and as the land descended to defendants is bound for all the debts so far as they appear in the record, it is immaterial to defendants in what order they are paid.

Defendants' 2d, 3d, 4th and 5th exceptions are taken with so little precision, that it is difficult if not impossible to understand what is objected to; moreover, it does not appear upon what proof the entries excepted to were made. These exceptions were properly overruled.

Complainants' exceptions to the report marked "second statement," have been overruled by the decision already made on defendants' first exception to the guardianship account.

The court erred in giving a joint decree in favor of all the complainant's for the aggregate of all their debts against defendants, notwithstanding it is stated to have been done by consent of complainants. Elizabeth Margaret Elliott was an infant and therefore incapable of giving consent; nor

could her next friend give such consent for her. Under this joint decree, complainants J. J. Walkup or Sarah Jane Elliott might receive the whole amount thereof, and thus the infant be left with no further security for her debt than that afforded by the individual responsibility of the party so receiving it.

I am of opinion to reverse the decree for the errors indicated, and to affirm it in all other things.

The other judges concurred.

The decree was as follows:

The court is of opinion that the Circuit court erred in not allowing the estate of John Armstrong deceased, a reasonable credit for his expenditures in the support and education of his wards, so as not to exceed the profits of their estate in his 378 hands as guardian. *And in this, that after the claims of the female complainants ceased to be identical as to amounts, the accounts were still stated as joint only; and in this, that the sum of 1279 dollars 9 cents, paid to complainant Josiah J. Walkup, October 9th, 1847, was credited against the aggregate of all the claims under complainants, instead of crediting it against that of Walkup and wife, and that of his ward, which alone he had any authority to receive; and in this, that a joint decree was rendered in favor of all the complainants for the aggregate of all their demands, instead of rendering a separate decree in favor of Elizabeth Margaret Elliott, the infant, for her separate portion of the money due. And the court is further of opinion that there is no other error in the decree appealed from. Therefore it is adjudged, ordered and decreed, that so much of the decree as is herein declared to be erroneous be reversed and annulled, and that the appellants recover of the appellees the costs of appellants expended in the prosecution of their appeal here; and that in all other things the said decree be affirmed; and that the cause be remanded to the Circuit court for further proceedings to be had according to the principles of this decree.

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379 *Hudson v. Kline.

July Term, 1852, Lewisburg.

1. **Injunctions—Against Judgments—Remedy at Law*—Set-Off.**—In an action at law the defendant is prevented by unavoidable accident from setting up offsets which he held against the plaintiff, these offsets being in no way connected with the debts sued upon. He has however a plain remedy at law for the recovery of his claims. HELD: He is not entitled to enjoin the judgment and set up his offsets against it, but must pursue his remedy at law for their recovery.
2. **Same—Same—Claim Recoverable in Equity—Set-Off.**—If the claims which he holds against the plaintiff at law, are only recoverable in equity, still he is not entitled to enjoin the judgment, and to have them set off against it.
3. **Chancery Practice—Failure of Bill to State Equity—Effect.†**—If a bill does not state a case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction by the defendant in his pleadings.
4. **Rule of Court—Disregard of—Appeal.**—The disregard by a Circuit court of a rule adopted by itself for the regulation of the practice there, is not a ground of appeal.

This was a bill in the Circuit court of Kanawha, by Robert F. Hudson, to enjoin two judgments recovered against himself and two others as his sureties, by Daniel H. Kline. The bill charged that Kline had sued the plaintiff and his sureties, in two bonds executed by them to him, one for 800 dollars and the other for 1200 dollars. That Kline was largely indebted to the plaintiff on several different accounts, which he sets out in the bill, one of which was for a quantity of metal furnished to Morris & Co., upon the undertaking of Kline to pay for it, to the amount of 2139 dollars 61 cents. That the plaintiff, about the commencement of the term at which Kline recovered his judgments, went to the court-house and employed counsel to defend the suits, and set off his claims against the bonds so far as they were legal offsets. That he had 380 spoken to counsel and was to *meet him the next morning for the purpose of preparing his defence; but that on that night he was taken very ill at the hotel where he lodged, so much so as to confine

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*Equity Practice—Relief against Judgments—Remedy at Law.—In an action at law the defendant was prevented by an unavoidable accident from setting up offsets, which he held against the plaintiff, these offsets being in no way connected with the debts sued upon; and to which he has a plain remedy at law, *held*, he will not be allowed to enjoin the judgment and set up his offsets against it, but must pursue his remedy at law for their recovery. For this proposition see the following cases, citing and approving the principal case: Goolsby v. St. John, 25 Gratt. 153, and *note*; Barnett v. Barnett, 88 Va. 511, 2 S. E. Rep. 733; Brown v. Chapman, 90 Va. 176, 17 S. E. Rep. 855; Vance v. Snyder, 6 W. Va. 31; Bias v. Vickers, 27 W. Va. 466; Kanawha & O. Ry. Co. v. Ryan, 31 W. Va. 367, 6 S. E. Rep. 925; Faulconer v. Stinson, 44 W. Va. 549, 29 S. E. Rep. 1012. See principal case cited in *foot-note* to the following cases: Slack v. Wood, 9 Gratt. 40; Byrne v. Edmonds, 23 Gratt. 200; Allen v. Hamilton, 9 Gratt. 255; also, monographic *note* on "Jurisdiction."

†Same—Failure to State Equity in Bill—Effect.—For the proposition that, if a bill does not state a case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction by the defendant in his pleadings, the principal case is cited and approved in the following cases: Armstrong v. Pitts, 13 Gratt. 243, and *note*; Jones v. Bradshaw, 16 Gratt. 361; Green v. Massie, 21 Gratt. 362, and *note*; Salamone v. Kelley, 80 Va. 94; Graveley v. Graveley, 84 Va. 151, 4 S. E. Rep. 218; Buffalo v. Pocahontas, 85 Va. 225, 7 S. E. Rep. 238; Trout v. Trout, 86 Va. 299, 9 S. E. Rep. 1121; Boston, etc., Co. v. Carman, etc., Co., 94 Va. 101, 26 S. E. Rep. 390; Vanbibber v. Beirne, 6 W. Va. 173; Morehead v. De Ford, 6 W. Va. 321; Slack v. Jacob, 8 W. Va. 655; Surber v. McClintic, 10 W. Va. 247; *foot-note* to Beckley v. Palmer, 11 Gratt. 625.

him to his bed and render him wholly unfit for business. That his illness continued to increase, which made it necessary that he should be taken home, where he had been confined to his bed ever since. That his counsel had asked for a continuance of the causes on the ground of plaintiff's illness, and his consequent inability to prepare his case and get ready for trial; but the application was opposed by Kline and rejected by the court.

Kline answered the bill, denying his liability to the plaintiff on the grounds stated in the bill.

The cause came on in November 1851, on a motion to dissolve the injunction, when the same was dissolved, without prejudice to any rights or remedies at law or ordinary relief in equity, to which the plaintiff might be entitled for and on account of any of the matters set forth in his bill. From this decree Hudson applied to this court for an appeal, which was allowed.

Parks and Price, for the appellant.
Fry, for the appellee.

MONCURE, J., delivered the opinion of the court.

The question first presented for our decision in this case is, whether a court of equity had jurisdiction to enjoin the judgments obtained at law by the appellee against the appellant and his father and brother, on the grounds stated in the bill.

The claims asserted in the bill as setoffs to the judgments being independent of and unconnected with the claims on which the judgments were obtained would not at common law have been good setoffs in a suit at law upon the latter; and not 381 *being mutual (the former being separate and the latter joint), would not, in such a suit, have been good setoffs under the statute of setoff which was in existence when the new Code took effect. Nor would they have been good setoffs in equity, either before or since the said statute, unless upon the ground of the intervention of some peculiar equity, such as the insolvency of the party against whom they were asserted. Story's Eq. Jur., § 1434, 1437; Gilliat v. Lynch, 2 Leigh 493, and cases cited by Judge Green, p. 504, 5. But by the new Code, p. 654, § 4, it is provided, that "although the claim of the plaintiff be jointly against several persons, and the setoff is of a debt not to all, but only to a part of them, this section shall extend to such setoff, if it appear that the persons, against whom such claim is, stand in the relation of principal and surety, and the person entitled to the setoff is the principal." Under this provision the claims asserted in the bill, or most of them, would have been good setoffs in the suits at law in which the judgments were obtained, and which were instituted after the Code took effect. But the appellant alleges in his bill that he was prevented by unavoidable accident from pleading his setoffs at law, and therefore seeks to have the benefit of them in equity. The allegation is not denied in the answer, and, on a motion to dissolve, must be taken to be true. All or nearly all the claims asserted as setoffs in the bill, if well founded, are recoverable by action at law; and such as may not be are recoverable by suit in equity. It was said, in the petition for the appeal and the argument of the case, that if the appellant be left to his remedy at law, the statute of limitations will be a bar to his claims. Without meaning to admit that the fact, if so, would make any difference, it is sufficient to say that the fact in this case appears to be otherwise.

All the said claims, except that for the 382 metal *furnished William Morris & Co., arose within five years before the judgments were rendered; and though some of the items of the account for metal bear date a few months more than five years before, yet it is expressly averred in the bill that the metal was sold on a credit of 12 and 18 months, which would make the account due and the cause of action thereon accrue within five years before the judgments were obtained. It is not alleged in the bill that the appellee is insolvent, but the fact appears to be otherwise. Nor is the intervention of any other circumstance alleged as ground for equitable interposition than the accident before mentioned.

The only question, therefore, is whether the appellant, having a plain remedy at law, or in equity, for the recovery of his claims well founded, can have the appellee's judgments enjoined until the said claims can be established in order that they may be setoff against the said judgments, merely upon the ground that the appellant was prevented by accident from pleading the claims as setoffs at law. We are of opinion that he cannot. The statutes of setoff, "having been passed for the benefit of defendants, are not compulsory; but a defendant may waive his right of setoff, and bring a cross action for the debt due to him from the plaintiff." Babington on Setoff, p. 3, 6 Law Libr. The same author says, that "where the defendant, at the time of pleading, is not prepared to prove his cross demand, it is not prudent for him either to plead or give notice of setoff; for if, at the trial, he should attempt to prove his cross demand and fail in doing so, he cannot afterwards maintain an action for the amount." Id.

When a defendant is prevented by accident, surprise or other cause from proving his setoff, the practice is to withdraw it in order that the judgment may not be a bar to an action for the amount. And a de- 383 fendant who, *under such circumstances, should suffer a judgment to be obtained against him without withdrawing his setoff, would no more be entitled to relief in equity against the judgment on the ground of accident or surprise, than a plaintiff would be entitled to like relief on a like ground, who failed to suffer a nonsuit. Suppose a defendant fails to plead his setoff, or having pleaded, withdraws because he cannot prove it; and after judgment rendered against him discovers evidence sufficient to sustain his claim, which he

could not by reasonable diligence have discovered before, would a court of equity enjoin the judgment until he could establish his claim in order that it might be set off against the judgment? Would he not, on the contrary, have to resort to his action at law for the recovery of his claim? And does not the same principle apply to this case? The appellee has been in no default. He has had no agency, fraudulent or otherwise, in preventing the appellant from pleading the setoffs at law. If he had had, that would probably have been a good ground for a court of equity to interpose and enjoin the judgments, until the cross demands could be established and set off against them. But he resorted to his plain actions of debt, on two plain bonds of the appellant and his sureties, and by due diligence obtained his judgments. Why should he be enjoined from enforcing those judgments by execution, until the appellant can establish cross demands which are entirely unconnected with the judgments, and for which plain remedies at law or in equity exist? True, the appellant had an election of remedies. The statute of setoff gave him a cumulative remedy; and he has been prevented by inevitable accident from availing himself of the statutory remedy. But this has been the result of his misfortune, if misfortune it be, and not the act of the appellee; and his common law remedy, which is a plain and simple one, re-
384 *mains to him. Should he not be left to that remedy, as he would have been if he had elected not to plead his setoffs, or having pleaded, had elected to withdraw them? Should he be permitted, instead of resorting to that plain common law remedy, to come into a court of equity, enjoin judgments on plain bonds, the justice and obligation of which are not denied, until various complicated and disputed cross demands can be litigated and determined, and to have those demands decided by a forum different from that to which the decision of most if not all of them properly belongs? It has been a favorite policy in this state, especially of late, not to afford relief in a court of equity to a party who has a plain remedy at law, except in cases of concurrent jurisdiction. In all other cases, he must avail himself of his legal remedy. If, without his default, he be deprived of all remedy at law, equity may relieve him; but if any legal remedy remain to him, though he may have lost by his misfortune, and without the fault of his adversary, other concurrent legal remedies, he must resort to his remaining legal remedy. This policy is illustrated by the cases cited by the counsel for the appellee, especially Cabell v. Roberts, 6 Rand. 580; Collins v. Jones, 6 Leigh 530; Faulkner's adm'r v. Harwood, 6 Rand. 125; Haden v. Garden, 7 Leigh 157; Allen v. Hamilton, supra 255; to which may be added Slack v. Wood, supra 40. The precise question under consideration seems never before to have been adjudicated by this court. In the case of Morgan v. Carson, 7 Leigh 238, the plaintiff in equity alleged that he was prevented by surprise from pleading setoff at law. This court decided the case against him on the ground that the allegation of surprise was not proved; and of course it was not necessary to decide whether, if proved, it would have entitled him to equitable relief. Judge Carr, however, added (by way of exclusion of a conclusion), that he did not think the
385 *excuse alleged in the bill for the failure to make defence at law, would have been sufficient to sustain the jurisdiction, even if it had been proved, which it was not. The case was assumpsit on a quantum meruit, for work and labor done, and was altogether unfit for a court of equity. If the learned judge had been of opinion that where a defendant in a suit at law is prevented by accident from pleading setoff, he is entitled to relief in equity against the judgment, notwithstanding he has a plain remedy by action at law, he would have sustained the jurisdiction in the case referred to. But he was of opinion that the matter of the setoff must be of such a nature as to give the court of equity jurisdiction otherwise than on the ground of surprise. That case came on for final hearing, and the question was whether a court of equity could give any relief at all. If it had been proper to enjoin the judgment, that would have given the court jurisdiction of the case, without reference to the nature of the claim. In regard to the cases cited by the counsel for the appellant in this branch of the case, viz: Foushee v. Lea, 4 Call 279; Hord v. Dishman, 5 Id. 279; Ross v. Pynes, 3 Id. 490; Ambler v. Wyld, 2 Wash. 36; Knifong v. Hendricks, 2 Gratt. 212, it is sufficient to say that the parties who complained of the judgments at law in those cases, would have been entirely without remedy but for the interposition of a court of equity.

But the counsel for the appellant contends that as no exception to the jurisdiction of the court was taken in the answer, it was the duty of the court to decide the case on its merits; and in support of that position he relies on the provision in the Code, p. 648, § 19, which provides that "when the declaration or bill shows on its face proper matter for the jurisdiction of the court, no exception for want of such jurisdiction shall be allowed, unless it be taken by plea in abatement; and the plea shall
386 *not be received after the defendant has demurred, pleaded in bar, or answered to the declaration or bill," &c. The former law declared that "after answer filed no plea in abatement to the jurisdiction of the court, no exception for want of jurisdiction shall ever afterwards be made; nor shall the court ever thereafter delay or refuse justice, or reverse the proceedings for want of jurisdiction, except," &c. 1 Rev. Code 1819, p. 214, § 86. Notwithstanding the strong language of that law, this court, in Pollard v. Patterson's adm'r, 3 Hen. & Munf. 67, unanimously decided that the statute meant to embrace those cases only in which the bill showed on its face proper

matter for the jurisdiction of equity, and the exception had to be taken by plea; and that the omission to plead gave equity no power to decree in favor of the plaintiff, if the case appeared upon the face of the bill to be a mere legal question. The construction of the statute adopted in that case has ever since been followed. Stuart v. Coalter, 4 Rand. 74; Hickman v. Stout, 2 Leigh 6; Morgan v. Carson, 7 Id. 238. The last case was similar in its nature to this. The defendant made no objection to the jurisdiction of the court of chancery, but in his answer defended himself upon the merits. The case was heard, and a final decree made, upon the merits; and yet the decree was reversed because it appeared on the face of the bill that the court had no jurisdiction. The case of Van Lew v. Bohannan, 4 Rand. 537, has been sometimes considered as an authority to show that if a defendant in his answer defends himself on the merits without objecting to the jurisdiction of the court, he thereby waives such objection, and jurisdiction may be taken of the case. But in that case the defendant in his answer admitted facts which, if they had appeared to the court of law, would have there produced a different result; and the court had nothing to do but, on the admissions in the answer, to 387 perpetuate *the injunction. It was not like a case in which the matters set up in the bill are controverted by the answer, and must be litigated and determined in the court of chancery before relief can be given.

The provision in the new Code seems not to have been intended to make any change in the law as it was in the Code of 1819, and according to the construction put upon it in the case of Pollard v. Patterson's adm'r. That provision expresses what the law of 1819 implied, and uses words which were not in that law, but convey a meaning which that law was construed to import. Those words were, "When the bill shows on its face proper matter for the jurisdiction of the court, no exception for want of jurisdiction shall be allowed," &c. In the case under consideration, the bill did not show upon its face proper matter for the jurisdiction of the court. It asserted claims cognizable only at law, and for the recovery of which a plain legal remedy existed; or, if any of them were cognizable in equity, they were entirely unconnected with the judgments sought to be enjoined; and no ground was stated which could give the court jurisdiction of the case as an injunction suit. It was proper, therefore, to dissolve the injunction on the ground that on the face of the bill the court had no jurisdiction to award it.

It was further contended by the counsel for the appellant that the appellee had no right to make the motion to dissolve at the time at which it was made, as his answer had been filed in the paper, but not at rules or in court, only two days before the motion was made. If there is not sufficient equity on the face of the bill to support the injunction, the defendant may apply at once, and without any answer, for a dissolution. 2 Rob. Pr. 241 and cases cited; also Slack v. Wood, supra 40. Where there is sufficient equity on the face of the bill, an answer must be filed by the defendant; 388 *after which a motion to dissolve may be made at any time; at least there is nothing in the law of the land to prevent it. By rules of court an answer to an injunction bill is generally required to be filed within a certain time after the execution of the subpœna, or the defendant is not allowed to move a dissolution until a certain time has elapsed after the answer is filed. But these rules are subject to the discretion of the court to which they belong, and if disregarded by such court, its decree cannot on that ground be reversed. Of them the appellate court can take no judicial cognizance. It does not, however, appear in this case when the subpœna was executed.

For the foregoing reasons, and without expressing any opinion on the merits of the claims asserted in the bill, we are for affirming the order of the Circuit court, with costs to the appellee.

Decree affirmed.

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389 *Bean & Another v. Simmons.

July Term, 1852, Lewisburg.

1. **Chancery Practice—Answer—Time of Filing** *—It is the right of a defendant in equity to file his answer at any time before a final decree is made in a cause.
2. **Same—Same—Same—Case at Bar.**—Where the court had received the case when submitted for decision, had examined the papers and settled the terms of a decree deciding the principles of the cause, though it was an interlocutory decree, and a decree had been prepared and considered by the court and directed to be entered in the order book, but before it had been entered and on the same day it was directed to be entered, a defendant tendered his answer: HELD: The defendant was then entitled to file his answer.
3. **Same—Same—Same**—QUÆRE: Whether if the

*__Chancery Practice—Answer—Time of Filing.__—In the statute providing that at any time, before final decree, a defendant *may* be allowed to file his answer, the term "may" is imperative and means "must" or "shall." As authority for this proposition, the principal case was cited in Welsh v. Solenberger, 85 Va. 444, 8 S. E. Rep. 91; Radford v. Fowlkes, 85 Va. 828, 8 S. E. Rep. 817 (citing also Bowles v. Woodson, 6 Gratt. 81; Preston v. Heiskell, 32 Gratt. 48); Buford v. North Roanoke, etc., Co., 90 Va. 423, 18 S. E. Rep. 914. See also, monographic *note* on "Answers, in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571.

This construction comes under the general rule, that the word "may" when used in a statute means "must" or "shall" in cases where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the power shall be exercised. The principal case was cited for this proposition in Bank v. County, 28 W. Va. 291; Turner v. Smith, 18 Gratt. 838; Elliott v. Hutchinson, 8 W. Va. 459. See also, in accord, Bolling v. Mayor, 3 Rand. 580.

decree had been entered in the order book and the orders had been signed by the judge, the defendant would have been entitled, at the same term, or at any time previous to the final hearing of the cause, to file his answer.

This was a bill filed in the Circuit court of Hardy county by Valentine Simmons against Adam Bishop, William Seymour and others, to subject a piece of ground in the town of Morefield, sold by Simmons to Bishop, to satisfy a balance of the purchase money. An account was directed to ascertain the amount of purchase money still due; and that account having been taken and returned, the cause was put into the hands of the judge at the April term of the court in 1848, and the decree had been prepared, and was ready to be entered, bringing on the cause to be heard upon the bill taken for confessed as to all the defendants, when Seymour asked leave to file his answer, which was refused by the court. The subsequent proceedings are stated in the opinion of the court. Upon the application of Bean and Seymour, an appeal was allowed.

390 *J. W. F. Allen, for the appellants. There was no counsel for the appellees.

LEE, J., delivered the opinion of the court.

The decree pronounced in this cause on the 24th of April 1848, on the hearing of the case on the bill and amended bills taken as for confessed as against all the defendants, exhibits and depositions filed, required the defendant Bishop to pay to the complainant the amount claimed in the bill, with interest and costs, within sixty days, and on his failure so to do, directed a sale of the land in the bill and proceedings mentioned for satisfaction thereof, by a commissioner named for that purpose. The amount not having been paid within the time specified, the commissioner sold the land as directed, and reported his sale to the court; and the court by its final decree, pronounced on the 23d of September 1848, confirmed the report, and directed the proceeds of the sale to be paid over to the complainant; and gave a further decree against the defendant Bishop, personally, for a balance found to remain unsatisfied by the sale of the land. After the decree of the 24th of April 1848 had been prepared, considered by the court, and directed to be entered in the order book, the defendant Seymour tendered an answer, prepared after the decree had been rendered, (that is directed to be entered,) in which he contests the complainant's right to recover in the case at all, and also claims preference for the deed of trust under which he claimed over the lien set up by the complainant. The court, however, refused to permit him to file his answer, and the decree recited that the cause was heard as on the bills taken for confessed as to him as well as the other defendants. And after the final decree was pronounced, the defendants, Bean and Seymour, obtained an appeal to this court.

The act of the 7th of March 1826, 391 altering proceedings *in the courts of chancery, (Supp. Rev. Code 1819, p. 130,) authorizes a complainant to bring his cause to a hearing after subpœna served on the defendant, and no answer, plea or demurrer filed within four months (afterwards reduced to two months,) thereafter, without a decree nisi served on the defendant; but provides, "that the defendant may, at any time before final decree, be allowed to file his answer, or plead or demur, but the cause shall not be sent to rules, or continued therefor, unless upon good cause shown." And the question arises as to the construction of the terms, "may be allowed to file an answer," &c. in this proviso; whether they are to be regarded as imperative, and as conferring an absolute right, which the court cannot withhold; or whether the court may exercise a discretion upon the subject, giving leave to file an answer after the four months, or refusing it according to the circumstances of the case.

The general rule in the construction of statutes is, that the term "may," when used in a statute, means "must" or "shall," in cases where the public interest and rights are concerned, and where the public or third persons have a claim de jure that the powers shall be exercised. 7 Bacon's Ab. (Gwil. Ed.) 451, title "Statute" I; Drage v. Brand, 2 Wils. R. 377; Roles v. Rosewell, 5 T. R. 535; Newberg Turnpike Company v. Miller, 5 John. Ch. R. 113; Bolling v. Mayor of Petersburg, 3 Rand. 563, 580. And considering the subject to which the power conferred by the provisio in question of allowing an answer to be filed, notwithstanding the expiration of the four months (or two months) of subpœna served, and that it involves what may be considered the natural right of every defendant in a cause to make his defence, the court has no hesitation in saying, that the term "may" in this proviso is imperative, and to be construed as meaning "must" or "shall," and that the 392 court has *no discretion to refuse to permit an answer to be filed when tendered within the time limited by the act, if otherwise proper to be received. And the remaining question is, when does this time expire? When shall it be said there is "a final decree" within the meaning of the proviso, after which the defendant cannot claim to file his answer? In this case, it seems that the court had received the case when submitted for decision, had examined the papers, and settled the terms of the decree, and a decree had been prepared and considered by the court, and directed to be entered in the order book; but before it had been entered, and on the same day it was directed to be entered, the answer was tendered. And without intending to decide whether if the decree had been entered in the order book and signed by the judge, but during the same term the defendant had asked leave to file an answer, or whether if he had tendered his answer at the next term of the court, before the final decree confirming the report of sale was pronounced,

be ought or ought not to have been permitted to file it, yet the court is of opinion, that in the exact circumstances of this case, and the decree not having been entered in the order book, the defendant was entitled to file his answer, the complainant not objecting to it for insufficiency, or indeed for any cause, but the court refusing leave to file it, because it regarded it as tendered too late.

It may be urged that this construction of the act referred to will be productive of much inconvenience, by permitting parties unduly to delay making their defence until after a cause has been heard by the court, and the decree settled and prepared, and nothing remaining, except to enter it in the order book. But it is not often perhaps that a party will be willing to run the risk of such delay in preparing his defence; and whatever may be the inconvenience,
393 the *court can only construe the statute as it is, leaving the remedy, if any be required, to the legislature.

Without therefore deciding any other question in the cause, the court is of opinion that the Circuit court erred in refusing leave to the appellant Seymour to file his answer when tendered, and that for that cause the decree must be reversed with costs to the appellants, and the cause remanded to the said Circuit court, with directions to permit the said Seymour to file his answer, and for further proceedings therein to be had.

Decree reversed.

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394 *Henderson v. Henderson's Ex'x.

July Term, 1852, Lewisburg.

(Absent ALLEN, J.)

Judgment—Satisfaction of—Parties.*—A bill is filed to subject lands to the satisfaction of a judgment after the death of the debtor, and charging fraud in certain conveyances by the debtor to his son. The son having conveyed some of the lands to third persons, all such persons must be made parties to the cause.

This was a bill filed in September 1835, in the Circuit court of Wood county, by Richard H. Henderson, executor of Alexander Henderson of Dumfries, against George W. Henderson and the administrator of Alexander Henderson, late of Wood county. The plaintiff claimed to be a creditor of Alexander Henderson of Wood county by judgment recovered against him in 1824; and he sought to set aside certain conveyances of real and personal estate, made by Alexander Henderson of Wood to his son George W. Henderson in 1825 and 1826. In his bill, after setting out his judgment and the deeds, and the insolvency of Alexander Henderson of Wood at his death, he charged that these deeds were intended to hinder and delay his creditors, and especially the plaintiff; and George W. Henderson was called upon to say whether he had sold the land conveyed to him by his father, and if he had, when and to whom he had conveyed it, and who was the then owner. And the prayer of the bill was, that the conveyances might be set aside, and that the defendant George W. Henderson might be required to account for the value of the property with interest and profits, and for general relief.

George W. Henderson answered the bill, averring that he had purchased the
395 property and given full *value for it. And in answer to the enquiry whether he had sold the land conveyed to him by his father, he stated, that after making considerable improvements on one of the tracts, he in 1830 exchanged it with his uncle Archibald Henderson for other lands; and in 1833 he sold and conveyed another tract to Joseph Tomlinson, and that Tomlinson afterwards conveyed it to his daughter, the wife of the defendant; and he filed with his answer the deeds to and from himself.

In the progress of the cause the plaintiff Richard H. Henderson died, and the suit was revived in the name of his executrix, Orra M. Henderson.

The cause came on to be heard in March 1848, when the court held that one moiety of the lands conveyed by Alexander to George W. Henderson by the deeds of the 5th and 7th of December 1825, were bound by the judgment against the grantor therein. And it was decreed, that unless George W. Henderson, on or before the 1st day of the next June, paid the balance due on the judgment, that a commissioner appointed by the decree should after, &c., sell at public auction one moiety of the said lands upon a credit, &c. And an issue was directed to ascertain whether the deeds of the 5th and 7th of December 1825, and a bill of sale of the 1st of April 1826, for the slave and other property therein mentioned, were voluntary conveyances, and therefore void; or whether or not they were for an inadequate consideration, and fraudulent and void: or if for a valuable consideration, then what was the true value of each of the tracts of land in the said deeds mentioned, and the true consideration paid therefor by George W. Henderson. And also to ascertain the true value of the slave and other personal property mentioned in the bill of sale aforesaid, and the consideration paid therefor. George W. Henderson applied to this court for an appeal from this decree, which was allowed.

396 *Price and McPherson, for the appellant.

Fry, for the appellee.

SAMUELS, J. I am of opinion the Circuit superior court of law and chancery for Wood county should have rendered no decree in the case until it had caused the persons holding the titles to the lands sought to be charged, to be made parties to the suit. As a moiety of their lands if subjected to the lien of complainants' judgment, can only be so subjected after apply-

*See principal case cited in Cronise v. Carper, 80 Va. 681. See also, monographic *note* on "Judgments."

ing the personal estate of Alexander Henderson, if any, to the part payment thereof, these persons have a direct interest in the questions connected with the personal property. It was improper therefore, to decide in regard to the personal property in their absence. And moreover the decree in regard to the land would be wholly inoperative against those who held the titles but who are not parties to the suit.

The decree should be reversed with costs to the appellant, and the cause remanded with directions to make parties such persons as hold titles to the land conveyed by Alexander Henderson to George W. Henderson by the deeds bearing date the 5th and 7th days of December 1825, and for further proceedings to be had therein.

The other judges concurred.

The decree was as follows:

The court is of opinion that the Circuit court of Wood county erred in rendering any decree affecting the real or personal property sought to be charged without having before it as parties the persons holding titles to the lands conveyed by Alexander Henderson to George W. Henderson by the deeds bearing date the 5th and 7th of December 1825. It is therefore adjudged, ordered and de-
397 creed that the said decree be *reversed and annulled, that the appellant recover of the appellee his costs expended in this court, to be levied of the assets in her hands to be administered; and the cause is remanded to the Circuit court of Wood county with directions to cause the persons above mentioned to be made parties, and for further proceedings to be had therein.

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398 *Stephenson v. Taverners.

July Term, 1852, Lewisburg.

1. **Principal and Surety—Principal Dead—Rights of Surety—Bill Quia Timet—Parties.***—A surety, whose principal is dead, may file a bill *quia timet* against the creditor and the executor of the debtor, to compel the latter to pay the debt so as to exonerate the surety from responsibility. He may enforce for his exoneration any lien of the creditor on the estate of his principal, and may bring any suit in equity which the creditor could bring, for a settlement of the administration account on the estate of the deceased, and for the administration of the assets, whether legal or equitable; but the creditor must be a party that he may receive the money when it is recovered.

2. **Creditors' Bill—Marshaling†—Administration of Assets—Parties‡—Amending Bill.§**—A bill to marshal assets and for their administration, should be on behalf of the plaintiff and all other creditors, and the heirs and devisees of the testator should be parties. But if the proper parties are not made, the bill should not be dismissed; but the plaintiff should have leave to amend and make the proper parties, unless a decree for an account had been made in some other creditor's suit having the same object.

3. **Same—Consolidation of Suits.‖**—If several suits are pending by different creditors, the court will order the proceedings in all the suits but one to be stayed, and will require the several parties to

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***Principal and Surety—Rights of Surety.**—No principle in equity jurisprudence is better settled than that a surety is entitled to enforce every security for the debt which the creditor has against the principal debtor; and therefore a mortgage or other security taken by the creditor must be dealt with in good faith and held in trust, not only for the creditor's security, but for the surety's indemnity. And this right of the surety stands not upon contract, but upon principles of natural justice. Penn v. Ingles, 82 Va. 71, citing the principal case, and Meade v. Grigsby, 26 Gratt. 612. But the surety can enforce for his exoneration only such security as the creditor has against the principal. Barton v. Brent, 87 Va. 390, 13 S. E. Rep. 29, citing the principal case.

In Neal v. Buffington, 42 W. Va. 329, 26 S. E. Rep. 178, the principal case was cited to the point that before the surety has paid anything on the debt of his principal he is entitled, the debt being due, to come into equity, by bill *quia timet* against the creditor and debtor and compel the debtor to make payment so as to exonerate himself from responsibility. On the subject of Bills Quia Timet, see monographic *note* on "Bills Quia Timet" appended to Devries & Co. v. Johnston, 27 Gratt. 805. As to the rights of sureties, see the principal case also cited in William & Mary College v. Powell, 12 Gratt. 391.

In Watson v. Wigginton, 28 W. Va. 575, the court, speaking through GREEN, J., said: "In no case, which I have seen, has the right of a surety to come into a court of equity to compel the creditor to make his debt out of the principal debtor been laid down more strongly and in a more unqualified manner than by JUDGE MONCURE in *Stephenson v. Taverners, 9 Gratt. 404 et seq.*, and I must say, that I should, as at present advised, be disposed to qualify his language somewhat; but I do not deem it necessary to do so as its adoption would not vary the conclusion, which must, I think, be reached in this case; and perhaps a thorough investigation of the subject might show, that his language ought not to be qualified." The principal case was distinguished in this same opinion at page 577.

†**Marshaling Assets.**—In McCrum v. Lee, 38 W. Va. 595, 18 S. E. Rep. 761, the principal case was cited, among others, to the point that a court of equity, in a proper case, will compel a creditor having a lien on two parcels of property so to enforce it as not to injure the rights of him who has a lien on but one of them.

‡**Creditors' Bill—Administration of Assets—Parties.**—A creditor has a right to bring a suit for his claim against his deceased debtor's estate but he should bring it for himself and the other creditors. Ewing v. Ferguson, 33 Gratt. 558, citing the principal case. See monographic *note* on "Creditors' Bills" appended to Suckley v. Rotchford, 12 Gratt. 60.

§**Chancery Practice—Amending Bill.**—See principal case cited in Holland v. Trotter, 22 Gratt. 139; *foot-note* to Parrill v. McKinley, 9 Gratt. 1; Yates v. Law, 86 Va. 123, 9 S. E. Rep. 508. For further information, see monographic *note* on "Amended Bills" appended to Belton v. Apperson, 26 Gratt. 207.

‖**Creditors' Bill—Consolidation of Suits.**—See the principal case cited with approval in Sexton v. Patterson, 1 Va. Dec. 556; Harvey v. Steptoe, 17 Gratt. 304; Saunders v. Griggs, 81 Va. 515; Paxton v. Rich, 85 Va. 381, 17 S. E. Rep. 531; Beach v. Woodyard, 5 W.

come in under the decree in said suit, so that only one account of the state may be necessary.

4. **Same—Separate Suit—Costs.**¶—A creditor, who with knowledge that there has been a decree for an account in another creditor's suit, brings a separate suit, for his own claim, will be compelled to pay the costs.

5. **Same—Decree for Account—Effect.****—A decree in one creditor's suit for an account, operates a suspension of all other pending suits of creditors; and they must come in under the decree.

6. **Same—Several Suits Pending—Order of Making Decree.**††—When several creditors' suits are pending, the decree may be made in the cause first ready for a hearing, though that is not the first suit brought.

This was a suit instituted in May 1845, in the Circuit court of Wood county by John Stephenson against Thomas and Franklin Taverner. The bill charges that Charles R. Baldwin, late of the county of Wood, died in 1839. That he was indebted by account to Stephenson, Neale & Co., of which firm the plaintiff was a 399 *partner, for several hundred dollars. That by his will he appointed the plaintiff and Thomas Taverner, the latter of whom was his father in law, his executors, both of whom qualified as such: That Thomas Taverner took almost exclusive charge of the estate, and performed almost every executorial act that was done without consulting the plaintiff, many if not all of which acts were irregular; and for a detail of which he referred to a bill filed in the same court and then depending by J. J. Jackson against said Taverner. That Taverner in managing said estate had made it out insolvent. That Baldwin in his lifetime, had purchased a lot in Parkersburg of M. E. Holliday, for which he executed his note, with the plaintiff and S. C. Shaw as his sureties, in the sum of 155 dollars and 75 cents, payable on the 1st of September 1839; that this note had been assigned to J. F. Snodgrass, and by him was assigned in May 1841 to Franklin Taverner, the son of Thomas Taverner; and he charged that this was in fact a payment of the note by his coexecutor Thomas Taverner. That such was plaintiff's understanding, and thus the matter stood until December 1843, when a writ was served upon him in the name of Holliday suing for the benefit of Burnett, Withers & Co., demanding this debt. That Franklin Taverner was active in transacting the business for his father, and plaintiff has no doubt the note was taken from Snodgrass in good faith at the time as paid; and that this subsequent proceeding was a pretence; the firm of Burnett, Withers & Co., not being known in that country.

The plaintiff further charged that Thomas Taverner had sold the testator's land in Ohio, made settlements with the court, and done divers other acts without the plaintiff's concurrence, and had not given him any commission; had not permitted plaintiff to retain his own debt as he had a right to do, and had preferred creditors without plaintiff's concurrence, and to his injury. 400 *That plaintiff reluctantly consented to the sale of the real property mentioned in Jackson's bill, which Baldwin had purchased of Snodgrass in the town of Parkersburg, but that he understood the terms of the sale wholly different from Taverner. The plaintiff understood the sale to be subject to the vendor's lien: that the estate was to be credited with the proceeds of sale and the purchaser was to state the property subject to the incumbrance: on any other supposition the price was grossly inadequate, and the sale for cash utterly indefensible. That the will of Baldwin which subjected all his estate to the payment of his debts and authorized his executors to sell, constituted that estate equi-

Va. 233; Bell v. List, 6 W. Va. 474. See principal case distinguished in Barger v. Buckland, 28 Gratt. 868; Patterson v. Eakin, 87 Va. 54, 12 S. E. Rep. 144. See monographic *note* on "Creditors' Bills" appended to Suckley v. Rotchford, 12 Gratt. 60.

¶**Creditor's Bill—Separate Suit—Costs.**—If a creditor with knowledge that there has been a decree for an account in another creditors' suit brings a separate suit for his own claim, he will be compelled to pay the costs. Laidley v. Kline, 23 W. Va. 565, citing the principal case, and Kent v. Cloyd, 30 Gratt. 555. See also, monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

****Creditor's Bill—Decree for an Account—Effect.**—The settled rule, in respect to a creditors' suit for the administration of assets of a deceased debtor, is that a decree for an account of outstanding debts operates a suspension of all other pending suits of creditors, who must come in under the decree which is treated as a decree in favor of all the creditors. Paxton v. Rich, 85 Va. 381, 7 S. E. Rep. 531; Kent v. Cloyd, 30 Gratt. 561; Hurn v. Keller, 79 Va. 418; Beverly v. Rhodes, 86 Va. 417, 10 S. E. Rep. 572; Woodyard v. Polsley, 14 W. Va. 219; Laidley v. Kline, 23 W. Va. 571; Craig v. Hoge, 95 Va. 281, 28 S. E. Rep. 317, all citing the principal case. And it is only where a decree for an account of debts against the estate of a decedent is made in a suit for the administration of the assets, that the pendency of the suit operates a suspension of all other pending suits of creditors having the same object in view. Robinson v. Allen, 85 Va. 724, 8 S. E. Rep. 835, citing the principal case. Until a decree for an account, each creditor has control of his own suit, and he may dismiss it, if he thinks proper. Piedmont, etc., Ins. Co. v. Maury, 75 Va. 512; Craig v. Hoge, 95 Va. 281, 28 S. E. Rep. 317, both citing the principal case.

See monographic *note* on "Creditors' Bills" appended to Suckley v. Rotchford, 12 Gratt. 60.

Same—Same—Statute of Limitations.—In Crawford v. Smith, 93 Va. 630, 23 S. E. Rep. 235, the principal case was cited to the point that, in a creditors' suit, when a decree is entered to take an account of the debts against the estate of the decedent, the statute of limitations ceases to run against the creditors of the estate. See principal case also cited in *foot-note* to Ewing v. Ferguson, 33 Gratt. 548; Paxton v. Rich, 85 Va. 381, 7 S. E. Rep. 531. See also, in accord, Harvey v. Steptoe, 17 Gratt. 290, and *foot-note*.

††**Creditors' Bill—Several Suits Pending—Order of Making Decree.**—See principal case cited with approval in Robinson v. Allen, 85 Va. 724, 8 S. E. Rep. 835. See also, monographic *note* on "Creditors' Bills" appended to Suckley v. Rotchford, 12 Gratt. 60.

table assets to be distributed ratably, which Taverner had wholly disregarded. That plaintiff was entitled to be substituted to the rights of Holliday as to his debt, if the court should be of opinion that the debt had not been paid. That Thomas Taverner had sold the lot purchased of Holliday to his son Franklin Taverner, to which sale plaintiff had not assented, and that it had not been sold for the best price. Thomas and Franklin Taverner, Holliday, Shaw, Neale and Logan are made defendants to the bill, and are called upon to say whether the debt to Holliday had not been paid. And the prayer of the bill is, that the executorial accounts may be resettled; that plaintiff may have a decree for his account, and be indemnified for his said suretyship. That all the lands sold by Thomas Taverner may be resold; and the proceeds equally distributed. That the judgment of Holliday for, &c., against him may be enjoined; and for general relief. The injunction was granted.

The defendants Thomas and Franklin Taverner, filed separate answers to the bill. Thomas Taverner demurred for want of equity, and also for want of proper parties. He said that as the plaintiff had referred to the bill of John J. Jackson, he re-
401 ferred to and relied *upon his answer filed in that suit, and the exhibits there referred to; and he filed copies of the answer and exhibits which he relied upon as clearly showing that he had fairly and legally administered the estate of Baldwin which had come to his hands. He admitted that he took the almost exclusive control and charge of the estate, with the consent of the complainant; but that in the sales of the real and personal estate of Baldwin he consulted with and had the concurrence of the plaintiff, as was evident from deeds executed by the plaintiff jointly with the respondent, of which he filed copies with his answer. These deeds, he said, shewed the character of the sales and the purpose for which they were made, especially the deed made to Franklin Taverner for the property purchased of John F. Snodgrass. That all complainant ever did in the premises was to consent to the sales and sign the deeds; and defendant submitted to the court whether that entitled complainant to commissions.

The defendant denied that he ever was the owner of the judgment in the name of Holliday for the use of Burnett, Withers & Co., against complainant and S. C. Shaw, or the single bill on which it was founded; nor did he know that complainant and Shaw were the sureties in said single bill until a few months before the suit was brought. That security having been given for the purchase money the vendor's lien ceased, and therefore complainant could not be substituted to a lien which did not exist, and especially unless he had first paid the money for which he claims substitution.

The defendant insisted that the sales of all the real estate were fair and at adequate prices; at least they were the best prices that he could obtain: and he therefore denied the right of the court to disturb the settlements or set aside the sales. He knew nothing of the justice of the account in favor of Stephenson, Neale & Co., and called for proof. But if it was correct,
402 *complainant could not enforce the collection of it in this mode of proceeding and in his own name. That as to the real estate in Ohio it was sold under the decree of the court of the state of Ohio, which decree was in full force; and he relied upon said decree as conclusive as to the said real estate.

Franklin Taverner referred to the answer of Thomas Taverner so far as it referred to matters in which Franklin was concerned. He denied that he was active in settling up the executorial accounts of Baldwin's estate; though it was true he aided his father in adjusting some of the accounts. He said that the single bill on which the judgment was obtained against complainant and Shaw was purchased by himself out of his own means and exclusively for himself; and that Thomas Taverner had nothing to do with said purchaser, and that he had no interest in the judgment. That respondent being indebted to John F. Snodgrass, assigned the single bill to him, and that he instituted the action thereon for the use of Burnett, Withers & Co.: he having done business for them, took the liberty of using their names, though the money, in fact, when collected, belonged to him. He also relied on his answer and the answer of Thomas Taverner in the suit of John J. Jackson.

At the September term 1846 the plaintiff amended his bill and charged that there was an agreement, either in writing or by parol, by which Franklin Taverner was to take the property and pay the Snodgrass debt, let the property sell for what it might, and yet that Thomas Taverner had charged the estate of Baldwin with this debt. This agreement was expressly denied by both Thomas and Franklin Taverner; and there was no proof of it; nor was there any proof to sustain the charges in the original bill of complicity between these parties in the sale of the property purchased by
403 Franklin Taverner. The only *evidence of the account stated in the bill to be due to Stephenson, Neale & Co. is that stated in the bill.

The cause came on to be heard in October 1849, when the court dissolved the injunction and dismissed the bill with costs, but without prejudice to any right the complainant might show himself entitled to retain as executor of Baldwin, or to show assets belonging to the estate of his testator. From this decree Stephenson obtained an appeal to this court.

B. H. Smith, for the appellant, and Fry, for the appellees, submitted the case.

MONCURE, J., delivered the opinion of the court.

The charge in the appellant's bill that the note of Baldwin to Holliday, in which he was a surety, and which was assigned to the appellee Franklin Taverner, had been paid

by the other appellee Thomas Taverner, coexecutor with the appellant, of said Baldwin; and all the other charges in the bill tending to implicate the said Franklin, or subject him to liability on account of any of the claims therein asserted, being denied in his answer and unsustained by the evidence, it was therefore proper to dissolve the injunction and dismiss the bill as to him.

In regard to the claim of the firm of Stephenson, Neale & Co., of which the appellant was a partner, asserted in the bill, the account is not in the record, though professed to be exhibited; the amount is not stated in the bill except vaguely as amounting to several hundred dollars; the other members of the firm were not made parties to the suit; the appellee Thomas Taverner denied any knowledge of the justice of the claim and called for proof thereof, and relied on the act of limitations, and objected that the other members of the firm were not parties; and there is no evidence in the record to sustain the claim, ex-
404 cept that *in "a list of claims, due and unpaid, against the estate of Charles R. Baldwin deceased," which appears to have been exhibited by Thomas Taverner, is an "account in favor of J. Stephenson & Co., amount not known," which may have been the claim in question. The bill was therefore properly dismissed as to that claim, without prejudice however, as the dismission in effect was, to any proceeding which may be properly instituted in the name of the said firm for the recovery of said claim.

In regard to the claim of the appellant to a part of the commission charged by Thomas Taverner as executor of Baldwin, it is charged in the bill and admitted in the answer that Thomas Taverner took almost the exclusive charge of the estate, and did almost all the business connected with the administration thereof. He appears to have received all the money of the estate that was received. There is no evidence in the record to show whether the appellant is entitled to any, and if any, what part of the commission. His claim for it, if he have any, is a personal claim against his coexecutor, and could not be asserted in this suit for the recovery of claims against the testator, without rendering the bill multifarious and liable on that ground to be dismissed. It was therefore proper to dismiss the bill as to that claim.

In regard to the remaining claim, to wit, the claim of the appellant to have the debt to Holliday, for which he is bound as surety, paid out of the estate of Baldwin, the principal debtor: when the suit was brought, the appellant had not paid the debt, and probably has not yet paid it. But he is entitled nevertheless, the debt being due, to come into equity by a bill quia timet, against the creditor and the debtor, and compel the latter to make payment of the debt so as to exonerate himself from his responsibility. Story's Eq. Jur., § 327, 639 and 849. He may en-
405 force *for his exoneration, any liens of the creditor on the estate of the principal; and if the latter be dead, may bring any suit in equity which the creditor could bring for a settlement of the administration account of the estate of the decedent, and for the administration of the assets, whether legal or equitable. The only difference is that he must bring the creditor into court along with him, in order that he may receive the money when it is recovered. The appellee therefore had a right to bring this suit for the recovery of this claim. He ought to have brought it, not only for himself, but for all other creditors of Baldwin, who might elect to become parties, and contribute to the costs of the suit. His object was not only to have an account and payment in a course of administration, but to have the assets marshaled if necessary, and the equitable assets, if any, apportioned pari passu among all the creditors; and all the creditors were necessary parties, at least in that general way. 1 Story's Eq. Pl. § 99. The creditor who was entitled to receive the debt, for which the appellant was bound as surety, should also have been a party; and so should the heirs or devisees of Baldwin, who were interested in the real estate, sought to be marshaled and applied as equitable assets. The suit was therefore defective for want of parties; but it ought not on that ground to have been dismissed. The appellant should have been permitted to amend his bill and make the necessary parties, unless a decree for an account had been made in some other creditor's suit, having in view the same objects; in which case it would have been proper to have stayed or dismissed the appellant's suit, and required him to become a party to the other suit by petition or motion, or proving his claim before a commissioner. "If several suits are depending in favor of different creditors, the court will order the proceedings in all the suits but one to be stayed, and will
406 require *the several parties to come in under the decree in such suit, so that only one account of the estate may be necessary." Story's Eq. Pl. § 100, note 2; Hallett v. Hallett, 2 Paige's R. 15; Ross v. Crary, 1 Paige's R. 416, note a. If a creditor, with knowledge that a decree had been made in another creditor's suit for an account of outstanding claims against an estate, should bring a separate suit for his own claim, instead of coming in under the decree, he would have to pay the costs of his suit. And where in a suit for the administration of assets, a decree is made for an account of outstanding claims against the estate, it operates a suspension of all other pending suits of creditors who must come in under the decree, which is considered a decree in favor of all the creditors. This is the settled practice of equity, dictated by the interest of all concerned and the obvious necessity of the case. When the appellant brought his suit, the bill of John J. Jackson, another creditor, for an account and administration of the assets, was pending

in the same court; and the appellant had knowledge of the pendency of that bill, for he refers to it and makes it part of his bill. Jackson's bill was not filed in behalf of other creditors, but as it appeared from the answer thereto at least, that there would be a deficiency of assets, it was proper in the decree that might be made in that suit to give an opportunity to all other creditors of the testator coming in and agreeing to bear their proportions of costs, to prove their debts before a commissioner within a reasonable time, and participate so far as they might be entitled, in the distribution of the assets. Story's Eq. Pl. § 100 note; 2 Paige's R. 18; Kinney's ex'ors v. Harvey, 2 Leigh 70. But it does not appear that any decree had been made in that suit when the appellant's bill was filed; and until such decree, it was competent for another creditor to bring his suit; Jackson's bill not being on its face a bill for all the
407 creditors. Where *several such suits are pending at the same time, it seems the decree for an account of outstanding claims "may be made in the cause which is first ripe for a decree, whether that cause was first commenced or not: and that when the decree is made in the younger suit, then the proceedings in the elder suit must be stayed." Ross v. Crary, 1 Paige's R. 417, note (a); Jackson v. Leaf, 1 Jac. & Walk. 229, therein cited.

It follows from what has been said, that the decree of the Circuit court, so far as it dissolves the injunction or concerns Franklin Taverner, should be affirmed with costs; and so far as relates to the partnership account claimed in the bill, and the commission therein claimed, it should also be affirmed; but in all other respects, it should be reversed with costs, and the cause remanded to be proceeded in according to the principles hereinbefore declared. The court declines expressing any opinion on the questions arising on that branch of the case in regard to which it is reversed, considering it premature to do so, as the proper parties are not before the court.

The decree was as follows:

The court is of opinion that there is no error in the said decree so far as it dissolves the injunction, or concerns the appellee Franklin Taverner, nor so far as relates to the partnership account, or the commission claimed in the bill. But the court is further of opinion that instead of dismissing the bill in other respects, the Circuit court should have permitted the appellant to amend it, and make all other creditors of Charles R. Baldwin, who might elect to become parties and contribute to the costs of the suit, plaintiffs with himself; and make the creditor entitled to receive the debt to Holliday in the bill mentioned, for which the appellant is bound as surety, and the heirs or devisees of said Baldwin, defendants; unless a decree had been
408 *rendered in the suit of John J. Jackson in the proceedings mentioned, or some other creditor's suit for account and administration of the assets of said Baldwin, and for an account of outstanding claims against his estate; in which case, the appellant should have been required to become a party to any such suit, and prove his claim on account of said debt to Holliday therein; and his own suit should have been dismissed, or further proceedings therein stayed. Therefore, without expressing any opinion on the questions arising on that branch of the case in regard to which the decree is considered erroneous (deeming it premature to do so, as the proper parties are not before the court), it is decreed and ordered that so much of the said decree as the court is of opinion is not erroneous as aforesaid, be affirmed with costs to the appellee Franklin Taverner; and that the residue thereof be reversed with costs against the appellee Thomas Taverner, to be levied de bonis testatoris; and that the cause be remanded to be further proceeded in according to the principles above indicated.

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409 *Ragsdale v. Hagy & Others.*

July Term, 1852, Lewisburg.

1. **Bonds†—Assignment—Equitable Offsets at Time of.**—QUÆRE: If in an action by an assignee of a bond against the obligor, the obligor can set up an offset which at the time of the assignment was an equitable offset, but which by an arrangement made by him subsequent to the assignment, became a legal offset.
2. **Equity Practice‡—Injunction against Judgment—Offsets—Case at Bar.**—A vendee of land being entitled to come into equity to enjoin a judgment recovered by an assignee on a bond given for the purchase money, on the ground of difficulties in the title, and it being doubtful whether he can get a title; though the title is decreed to him in his suit, he is entitled to set up in equity offsets he held against his vendor prior to the assignment; and he was not bound to plead them at law; and this especially as one of the offsets arose out of the contract of sale, and another was only an equitable offset at the time of the assignment.
3. **Bonds—Assignment—Case at Bar.**—The bonds assigned being for the purchase money of a part of a tract of land, and the vendor selling the other part to a third person, the assignees being defeated in recovering the money from the vendee whose bonds they held, have no lien on the purchase money of the other part of the land.

***For monographic note on Assignments, see end of case.**

†**Bonds.**—See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

‡**Equity Practice—Land Conveyed with Warranty against Incumbrances—Rights of Grantee.**—In Johnson v. Young, 20 W. Va. 663, it is said: "In White & Tudor's Lea. Ca. vol. 2, part 2, p. 1345, it is said: 'Hence, when land, subject to a judgment, is conveyed with a covenant of warranty or against incumbrances, the grantee may not only require that the judgment should be deducted from the purchase money, but may file a bill to have the amount set off in a suit for a distinct cause of action. Terry v. Wooding, 2 Patton & Heath 178. See *Ragsdale v. Hagy, 9 Gratt. 419.*' "

In October 1840 Martin Hagy obtained from the judge of the Circuit court of Washington county an injunction to two judgments recovered against him in that court, one by Lewis Smith as assignee of John Snead, and the other by Greenway & Co. as assignees of the same party.

The bill charges that the plaintiff, on the 3d of August 1839, purchased of John Snead and John Ragsdale a piece of land, part of a tract descended from Benjamin Clark, at the price of eight dollars per acre, for which they executed to him their bond with condition to make him a good title. That on the 26th of the same month, Snead sold to the plaintiff another parcel of the same tract, of one hundred acres, at the same price, for which Snead executed his bond with condition to make the plaintiff a 410 *good title. That at the date of the first contract the plaintiff paid to Snead, in money and bonds, 423 dollars 88 cents; and, as the quantity of land embraced in that purchase was not then known, he took Snead's bond for this sum, payable in land at eight dollars an acre. That he apprehends that one of the bonds transferred to Snead, amounting to 90 dollars, had not been made, and if not, that sum was to be deducted from the amount of Snead's bond. That for the second purchase the plaintiff, on the 26th of August, executed his bond to Snead for 500 dollars, and on the next day he executed to Snead another bond for 276 dollars; the first of these bonds had been assigned to Greenway & Co. and the other to Lewis Smith. That at that time the number of acres embraced in the first purchase was not known, but it had been since ascertained to be forty-three and a third acres.

It was further stated that Snead and Ragsdale had purchased a tract of about two hundred and ninety-two acres from Benjamin Fulcher, of which that purchased by the plaintiff was a part; that Fulcher had purchased from Jacob Clark, and had the legal title; that he made a deed for the land to Snead and Ragsdale, which was placed in the hands of Charles C. Gibson, who was to hold it until the purchase money was paid; that there was yet a balance of purchase money due to Fulcher; that Snead was insolvent, and plaintiff apprehended Ragsdale would not pay it unless coerced. That Snead had conveyed to him the land he had purchased, but Ragsdale had not, and plaintiff apprehended he should not be able to obtain a title to the land except through the interposition of the court. That the one hundred and forty-three and a third acres purchased by himself was not as valuable as the remainder of the land purchased from Fulcher, as all the buildings and the spring were on this last mentioned part of the tract.

411 *The bill further stated that at the time the plaintiff executed the two bonds for the purchase money of the one hundred acres of land, he was the security of Snead to James Orr on a bond for 300 dollars, due the 27th of November 1838; that in January 1840, seeing that he would have this money to pay, he executed to Orr his bond for the amount, upon Orr's giving him some indulgence, and took in the bond of Snead. That Snead was indebted to him by a note for 50 dollars, due the 3d day of February 1839, subject to a credit of 13 dollars 41 cents. That on the 30th of January 1840, John McDaniel assigned to the plaintiff two promissory notes executed by Snead, one of them for 75 dollars, due the 2d of January 1839, and the other for 80 dollars, due the 2d of January 1840. That these notes were, however, assigned by McDaniel upon the understanding that he was to take them back and account for them, if the plaintiff did not succeed in using them as offsets against the bond of 276 dollars, which, the plaintiff had reason to believe from Snead's conduct, had not then been transferred to Smith or any other person; certainly plaintiff had not then any notice of the assignment to Smith, though he had notice of the assignment of the other bond to Greenway & Co.

The bill further stated that John M. Preston, claiming as assignee of Jacob Clark, had instituted a suit in the County court of Washington to subject the land purchased by Fulcher to satisfy a balance of the purchase money which he alleged was still due upon that purchase; but that although the plaintiff was in possession of the one hundred and forty-three and a third acres of the land which he had purchased, at the time that suit was brought, he had not been made a party to that suit.

The bill further stated that Fulcher had sold to Snead and Ragsdale in July 412 1839, and put them in *possession of the land. That when the plaintiff purchased, Snead seemed to have exclusive control of the land purchased on the western end of the tract of two hundred and ninety-two acres. Whether Snead and Ragsdale had then agreed upon a partition of the land, plaintiff did not know; nor does he certainly know that they had ever agreed upon a partition; but that possession had been given to the plaintiff about November 1839, which he had peaceably held, and that he was ready and willing to perform anything that remained unperformed on his part, if the title to the one hundred and forty-three and a third acres should be secured to him. And making Snead, Ragsdale, Benjamin Fulcher, Greenway & Co. and Smith defendants, the bill prayed for an injunction to the judgments, that the title of Snead and Ragsdale to the land purchased from Fulcher might be confirmed; that when this was done, Ragsdale might be compelled to convey to the plaintiff the land purchased by him; or, if the land could not be conveyed to him, that the contracts might be rescinded; that if the plaintiff's title could be confirmed, he might be allowed the set-offs before enumerated against the judgments, and for general relief.

Snead in his answer admits the purchase by himself and Ragsdale of the land from Fulcher: that he sold the forty-three and a third acres to Hagy, and that this sale was afterwards assented to by Ragsdale, and Hagy paid him, as stated in the bill, 423 dollars 88 cents. He says that by a distinct contract he sold to Hagy the one hundred acres, for which Hagy executed to him the two bonds of 500 dollars and 276 dollars. That after the purchase of the land from Fulcher, Ragsdale, by a verbal agreement between him and Snead, surrendered to Snead the entire management of the whole, with the understanding that Snead was to be responsible for the
413 payment of the purchase money *to Fulcher, and might dispose of the land in any way he thought proper: That whilst this understanding existed, he sold to Hagy the one hundred acres of land mentioned in the bill: That Snead having failed to pay the purchase money to Fulcher, Ragsdale had agreed with Snead to take the remainder of the land which had not been sold as his half of the land, with the understanding that if it measured more than the amount sold by Snead to Hagy, that Ragsdale was to pay for the surplus, at the rate of 10 dollars per acre; and in pursuance of this agreement Snead had executed a title bond for it.

He further states, that the purchase money to be paid to Fulcher was 3000 dollars; and he proceeds to state how much of this he had paid, amounting to more than a moiety: that he does not know how much is yet due to Fulcher, though the amount is small, and will be paid whenever Fulcher can make a complete title to the land, or release it from the supposed lien of Preston.

Ragsdale in his answer denies that Snead had paid half of the purchase money to Fulcher. He says that all the purchase money has been paid except 200 dollars, which he would pay but for the claim of Preston; and for excess beyond his moiety of the purchase money, which he may be compelled to pay, he holds the land itself responsible. He admits that soon after the purchase from Fulcher he said to Snead that if he would pay for the land he might take the benefit of the contract wholly to himself; but denies that he gave Snead any control of his moiety of the land, except upon this express condition. He denies that he and Snead jointly sold any land to Hagy. He says he never heard of the sale until Hagy called upon him to sanction the contract and unite in the title bond of Snead, which Hagy then held, and he positively refused; as he also refused
414 to sanction the second sale. *That before their purchase from Fulcher, Snead had become indebted to him in a large amount; and he did not begin to suspect Snead's solvency until some short time after the purchase: That so soon as his fears on that subject were excited, he uniformly told both Snead and Hagy that he would unite in no contract or conveyance in relation to the land purchased of Fulcher, which would in any way impair his rights, until he was made safe as well in reference to the purchase money of said land as to the individual debt which Snead owed him. That matters stood thus until the 11th of November 1839, when he made a contract with Snead, by which Snead was to sell him his interest in the Fulcher lands, as to which Hagy did not then hold the title bond, at 10 dollars per acre; and that the amount to which Snead would be entitled, was to be credited on the debt which Snead then owed to Ragsdale; and Snead then executed his title bond accordingly. That after this, in 1840, Hagy and Snead again called upon Ragsdale in relation to their contracts aforesaid, and Ragsdale then agreed to sign the title bond for the tract of forty-three and a third acres, and indemnify him against his securityship to Orr for Snead, upon his relinquishing his contract for the one hundred acres, which Snead agreed should be taken by Ragsdale. That it was in part fulfillment of this contract that Ragsdale signed the title bond for the forty-three and a third acres: That he offered to procure Hagy's release from his securityship to Orr, but that Hagy then refused to comply with his part of the agreement. He denies that there ever was a partition of the lands between himself and Snead, or that he ever agreed to take as his portion of said land what remained unsold to Hagy by Snead after their two contracts, or that he is under any obligation to convey to Hagy his interest in the one hundred acres embraced in the last contract between Hagy and Snead.

415 *Greenway & Co. and Smith also answered the bill. They both say that the assignments to them were for full value, and without any notice on their part of the offsets and equities now attempted to be set up by the plaintiff. They object that the offsets should have been pleaded at law; and that not having been done, and no excuse being given for the failure to do so, that a court of equity will not allow them to be set up in that court. That as to the notes assigned to the complainant by McDaniel, that was not an assignment for value, but for the benefit of McDaniel.

The title bonds referred to in the bill and the answers are filed. That from Snead to Ragsdale recites the purchase by Ragsdale from Snead of one hundred and fifty acres of land, and binds Snead to procure a good title to be made for it to Ragsdale on the payment of the whole purchase money at 10 dollars per acre.

The cause came on to be heard in October 1842, when the court was of opinion that the plaintiff was entitled to have a conveyance of the two tracts of one hundred acres and forty-three and a third acres purchased by him from Snead; and that he was entitled to a credit on his bonds in the hands of Greenway & Co. and Smith, for any actual deficiency in the land: And as to the other offsets claimed, the court reserved the question until the final hearing. And it was decreed that an account be taken by

a commissioner of the court to ascertain how much of the purchase money was still due to Fulcher, and also how much of said purchase money had been paid by Snead, and how much by Ragsdale; and the commissioner was directed to ascertain the value of that part of the land sold to the plaintiff and the value of that part retained by Ragsdale, and also the value of the deficiency in the land sold to the plaintiff.

The commissioner made his report in April 1845, to which the defendant
416 Ragsdale filed three exceptions, *the first and third of which related to the amount of purchase money due to Fulcher; the second related to the amount of purchase money he had paid.

In May 1846 the cause came on again to be heard, when the court, without deciding upon the exceptions, recommitted the report, and directed the commissioner to ascertain and report, 1st. What sum Ragsdale would have to pay for the lands purchased by himself and Snead from Fulcher, to equalize them as to the value of the lands held by each, taking Snead's portion to be the lands claimed and held by the complainant. 2d. What sum the complainant has paid towards the purchase of the one hundred and forty-three and a third acres of the land held by him, so as to show what credits he will be entitled to set off against the judgments of the defendants Greenway & Co. and Smith; and in ascertaining the amount paid by the complainant, the commissioner was directed to ascertain whether the complainant did not ultimately pay as assignor the note of 90 dollars assigned to Snead, on Clevinger and Clarke. 3d. To calculate the interest up to the next term on the debt due to Fulcher for purchase money.

In September 1846 the commissioner again made his report, in which he submitted two statements of the payments made to Fulcher: In one of these statements he omitted a credit to Snead of 318 dollars, the amount of his bond executed to Fulcher September 1st, 1839, for the balance of one of the bonds of 1000 dollars, executed by himself and Ragsdale for the purchase money of the land. It did not appear what had become of this bond of Snead's, and there was no one setting up any claim to it. The second statement allowed a credit for the amount of this bond. On the first statement there was due to Fulcher 610 dollars 79 cents; on the second there was due to him 219 dollars 61 cents. Disallowing Snead a credit for this bond, and the amount of his
417 payments to Fulcher was *1146 dollars 31 cents; allowing the credit, his payments amounted to 1506 dollars 33 cents, being 256 dollars 33 cents more than his proportion. The payments made by Ragsdale were 1331 dollars 81 cents, being 418 dollars 19 cents less than his proportion.

As to the payments made by Hagy for the lands purchased of Snead, the commissioner reported, that at the time of the first purchase Hagy paid to Snead in money and bonds 423 dollars 88 cents. That of the notes thus transferred one was upon Clevinger and Clarke for 90 dollars. This note was afterwards transferred to various persons, until it was at length sued upon, and at the May term 1840 a judgment was recovered against Clarke, (Clevinger having left the county,) and there was a return of "no effects." Suit was then brought against Hagy as assignor of the note, which suit was afterwards dismissed by the plaintiff. The commissioner also reported the debt of 50 dollars due from Snead to Hagy, subject to a credit, and the debt of 300 dollars for which Hagy was the security of Snead to Orr, and which he had paid. Allowing him these credits and there was due from Hagy for the purchase money of the lands purchased by him of Snead, on the 10th of January 1840, 376 dollars 9 cents.

Ragsdale excepted to the report of the commissioner because it did not set out the amount which appeared to have been advanced by him to Snead to be applied to the payment of the purchase money of the land bought of Fulcher.

Greenway & Co. and Smith also excepted to the allowance to Hagy of the credit for the balance of the note for 50 dollars, and of the amount of the debt due to Orr.

In May 1847 the cause came on again to be heard, when the court overruled the exceptions to the report, and confirmed it; and taking the value of the land as
418 *reported by the commissioner held by Ragsdale to be 1750 dollars, and the value of that held by the complainant to be 1250 dollars; and Snead having paid more than his portion by 256 dollars 33 cents, the court held that under the circumstances of the case this sum should be applied for the benefit of the assignees, Greenway & Co. and Smith. And allowing to the complainant the credits allowed by the commissioner, the court dissolved the injunction as to the sum of 381 dollars 25 cents, with interest from the 10th day of January 1840, but without damages; and perpetuated it as to the residue of said debts. And it was further decreed that Ragsdale should pay the said sum of 256 dollars 33 cents to the commissioner of the court, to be apportioned between Greenway & Co. and Smith; and that Hagy should pay to the same commissioner the sum of 381 dollars 25 cents, to be apportioned in like manner. And it was further decreed that the amount of purchase money due to Fulcher should be paid into court at its next term, until it could be ascertained who was entitled to it; Fulcher himself being a bankrupt. And until said purchase money was paid, the court suspended any further order in relation to a conveyance of the land. There was a decree in favor of the plaintiff against Ragsdale for his costs, and that the other defendants should each pay their own costs. From this decree Ragsdale applied to this court for an appeal, which was allowed.

Floyd, for the appellant.

B. R. Johnston and Samuel Logan, for the appellees.

ALLEN, J. The final decree allowed to the appellee Hagy certain offsets against the two bonds executed by him to Snead, for the purchase money of the 100 acres of land. The bonds were dated according
419 to the allegations *of the bill, on the 26th and 27th of August 1839; and were assigned, one of them to Greenway & Co. and the other to L. Smith on the 29th of the same month. Suits seem to have been brought by the assignees, immediately after the notes became payable. No defence was made to the action at law, and the office judgments being confirmed, the appellee during the same term of the court, obtained this injunction. It is contended on behalf of Snead's assignees, that the offsets were legal, and should have been set up at law; that the appellee has shown no good reason for failing to rely upon them at law, and they should not therefore be allowed in equity. The principal offset was the note to Orr in which the appellee Hagy was a surety for Snead. It was past due when Hagy executed his bonds to Snead, but the debt had not then been arranged with Orr. Finding afterwards that he would be compelled to pay the debt, he settled with Orr, and lifted the note on the 10th of January 1840. When his notes were assigned by Snead, Hagy had no claim to a legal offset against the notes. The setoff was merely equitable, and there might be some doubt whether by his own act in adjusting this debt, he could convert that, which at the date of the assignment was an equitable, into a legal offset, of which he could have availed himself at the trial at law. However that may be, it seems to me the case was proper for a court of equity on other grounds.

Hagy had made a contract with Snead for the purchase of a portion of a tract of land held in common by Ragsdale and Snead, and received from them a title bond dated the 3d of August. On the same day Hagy paid to Snead in cash, and transferred paper to him amounting together to 423 dollars 88 cents, and took from Snead his note in which it was stated that the amount thereof was to be discharged in land at 8 dollars per acre. The parties did not
420 know at the time *the quantity of land which the boundaries described in the title bond would contain; and the substance of the arrangement was, that after deducting the price of the land sold when the quantity was ascertained, the residue of the sum of 423 dollars 88 cents was to be discharged in land at the same price.

Before the quantity described in the title bond was ascertained, Hagy and Snead entered into another contract, whereby the former purchased of Snead the tract of one hundred acres, at 8 dollars per acre, and executed his two bonds for the sum of 776 dollars of the purchase money: how the residue of the purchase money was adjusted, does not appear from the record. Before these bonds became due, difficulties arose as to the title of both tracts sold to Hagy. The land was part of a tract of two hundred and ninety acres, which had theretofore been purchased of Jacob Clark, one of the heirs of Benjamin Clark, by Benjamin Fulcher. In July 1839, Fulcher sold the land to Snead and Ragsdale for 3000 dollars, of which 1000 dollars was paid on the day the contract was completed, and the residue was to be paid in two installments, for which bonds were given; and a deed for the land was executed by Fulcher to Snead and Ragsdale, and placed in the hands of a third person, to be held as an escrow, and delivered upon the payment of the purchase money. Soon after the contract of purchase, there was some understanding or agreement, as appears by the answers of Snead and Ragsdale, by which Snead was to take the land and pay the purchase money; and it was no doubt after this understanding and whilst Snead exercised the control over the whole tract, that he undertook to sell off a portion to Hagy, and to put him in possession of the part so sold to him, although no partition had been made between Snead and Ragsdale. In his answer, Ragsdale avers that before their purchase from Fulcher, Snead had
421 become largely indebted *to him, and that he did not begin to suspect Snead's solvency, until some short time after the purchase. But that so soon as his fears about the circumstances of Snead were excited, he informed both Snead and Hagy that he would unite in no conveyance or sale of the land until he was made safe as well in reference to the purchase money, as in relation to the individual debt of Snead; and that matters so stood until the 11th of November 1839, when they entered into the contract of that date filed with his answer; which recites that Ragsdale had purchased from Snead a tract of 150 acres of land, and Snead undertook to procure a good title to be made to Ragsdale, on the payment of 10 dollars per acre. The amount of Snead's interest in this contract, Ragsdale alleges was to be credited on Snead's private debt.

In consequence of these arrangements, it is insisted for Ragsdale, that he is entitled to the whole of 150 acres, and furthermore that he is also entitled to a moiety of the 100 acres sold by Snead to Hagy, under their joint purchase, as he had not united in the sale.

Besides the claim of Ragsdale to a moiety at least of the 100 acres, the tract in consideration of which the two bonds were executed, it appeared that a portion of the purchase money was still due to Fulcher, the vendor of Snead and Ragsdale; but the amount so in arrear was uncertain, and has only been ascertained upon the settlement of transactions between these parties, of an involved and complicated nature.

In addition to this, it was alleged that there was a considerable portion of the purchase money still unpaid by Fulcher to his vendor Jacob Clark. That the claim had been transferred to John M. Preston, who had instituted and was then prosecuting a

suit in the County court of Washington county, to subject the land to the payment of this debt.

Such was the position of Hagy when 422 sued upon the *bonds he had executed for the price of the 100 acres. The legal title was outstanding and his vendor could make him no title. No partition had been made between Snead and Ragsdale, and the latter under the joint purchase, claimed a moiety of the land as his. There was an admitted balance of the purchase money due to the immediate vendor of Snead and Ragsdale. A claim was asserted and a suit was depending to subject the land to the payment of a debt alleged to be due to a more remote vendor; and Snead, it is averred in the bill, and appears to be admitted throughout the record, was at that time insolvent. Hagy was compelled to resort to a court of equity to clear up the difficulties about the title; and that being his position, was it incumbent on him to set up his offsets in the action at law? The right to enjoin the payment of the purchase money where there is an incumbrance on the land purchased, is well settled. In Virginia, an injunction will be sustained after a conveyance, although there has been no actual eviction, but upon proof of a better title to the land in a third person. Ralston v. Miller, 3 Rand. 44.

There could be no doubt, therefore, if the bonds had remained in Snead's hands, that a court of equity would have enjoined the payment until the difficulties about the title had been removed. It was uncertain, when the suits were instituted and the judgments confirmed, whether Hagy would get anything by his purchase. The alleged incumbrances for the purchase money covered the whole tract; and if the pretensions of Ragsdale were well founded, there would be little left for Hagy under his purchase from Snead. Though Snead might hold his bonds, which at law constituted a debt, it was still necessary to go into equity to ascertain whether in fact any debt existed. His bill, therefore, prayed that the contract of purchase should be rescinded, and 423 his obligations canceled in *the event of his being unable to get a good title to the land.

In this state of uncertainty, it would have been improper to have relied on his offsets at law, for it would have been an admission that there was a valid debt against him to the extent of the offsets, whereas he owed nothing unless he could get the land. That was the principal controversy, and that could be settled in equity alone. When it was so settled, and a debt ascertained to be due, it would be proper to enquire into the offsets. If the offsets had been offered and allowed at law, and it turned out that no title could be made, he would be driven to another action to recover the amount of the offsets for the failure of the consideration; and thus by requiring him to rely on his offsets at law, on the penalty of losing them entirely, he might be compelled to surrender bonds and securities constituting evidences of debt, and be driven to recover the money back in an action of assumpsit for the failure of the consideration. A portion of his offsets arose out of the contract in relation to the land itself. He had paid 423 dollars 88 cents on his first purchase. The land when surveyed, in the progress of this suit, was found to contain 43⅓ acres, amounting, at 8 dollars per acre, to 348 dollars; leaving a balance, which, by the terms of their arrangement, was to be paid in land. This was an offset which could only be ascertained and fixed by a survey. Under every view of the case, it seems to me the court of chancery was the proper forum to decide upon the validity of the debt; to ascertain whether anything was due; and then as an incident to the principal subject of which it clearly had jurisdiction, and to avoid multiplicity of actions, to pass upon the offsets, no matter what was their character. But where, as in this case, a portion arose out of the contract of sale and purchase, and another portion was an equitable offset at the 424 date of *the note and the assignment, it would have been competent for a court of equity to have allowed them, although not relied upon at law. If Snead were the party claiming the benefit of the judgments, I do not think he could be heard to make this objection; and unless Hagy has done something to waive his equity, as regards the assignees of Snead, they can occupy no higher position. It is not alleged or proved that they were induced to take the assignments in consequence of any assurances from the obligor. They stand like all other assignees, and take the obligations assigned to them subject to all the equities which affected them in the hands of Snead. There is nothing whatever to distinguish their case from that of other bona fide assignees who have paid their money for that which turned out to be of little or no value. The obligor has been guilty of no laches in the assertion of his equity. Suit was instituted, and judgments recovered at the earliest possible period after the notes fell due. He interposed no delay, and at the first term after the notes became payable, filed his bill, convening all the parties to settle the difficulties about the title, and to ascertain whether anything would be due from him, and to distribute it amongst those entitled to it, according to their rights. I think the court had jurisdiction to allow the offsets claimed by the appellee Hagy, and that there was no error in the decree directing an account of such offsets, and overruling the 1st, 2d and 3d exceptions of the assignees Greenways and Smith to the second report of M. C. Lynch, allowing some of said offsets. An objection was made in the argument here to allowing a credit for the sum of 423 dollars 88 cents, the full amount of cash and notes advanced and transferred to Snead at the time of the first purchase, because the bill suggests a doubt whether one of the notes so transferred, a note on Clevinger and Clarke for 90 dollars, had been

425 made. The commissioner in *his report sets forth facts, which unexplained justified him in treating it as a payment to Snead; and as there was no exception to the report crediting Hagy with the 423 dollars 88 cents, it is too late to raise the objection here.

Nor do I think there was any error in so much of the decree as held that the appellee Hagy was entitled to a conveyance from Ragsdale, as well for the 100 acres for which he held Snead's title bond as for the 43⅓ acres for which he held the title bond of both. The allegation in Ragsdale's answer that when he became a party to the contract of the 3d of August 1839, by signing the title bond, it was agreed between Hagy, Snead and himself, that the contract of the 26th of August 1839 should be canceled, is an affirmative allegation, unsupported by proof. His pretension to claim the 150 acres in virtue of his contract with Snead of the 11th November 1839, and a moiety of the 100 acres as a joint purchaser with Snead, it appears to me is unfounded. It appears from the facts in the case, that Snead made the contract with Fulcher, and Ragsdale subsequently united with him in the purchase. It is alleged in the bill that when the appellee Hagy purchased, Snead seemed to be exercising exclusive control over the land purchased, and had placed him in possession, which he continued to hold without interruption. The answers of both Snead and Ragsdale admit that there was an understanding between them that Snead was to take the entire tract and pay the purchase money. It was during this arrangement that Snead sold a portion of the land to Hagy. One of the purchases was sanctioned by Ragsdale, by his uniting in the title bond, though the whole consideration had been paid to Snead. It furthermore appears from the report of the commissioner that Snead had advanced more of the purchase money to Fulcher than the value of the land sold by 426 him to *Hagy. Under these circumstances, and if there had been no other arrangement between Snead and Ragsdale, the latter should not be permitted to disturb the sales made by his cotenant, sanctioned in part by himself, and made at a time when by his own agreement, the whole subject had been committed to the control of his cotenant; and when too, more than a moiety of the land remained undisposed of, exceeding in value the amount paid by him on the joint purchase. The agreement of the 11th November 1839, though somewhat obscure in its terms, when construed by the light of surrounding circumstances, so far from disaffirming, impliedly sanctions the sales made by Snead. Finding that Snead was unable to comply with the arrangement to take the whole tract and pay the purchase money, Ragsdale agreed to take what remained unsold upon the terms mentioned in the agreement. In consequence of the arrangement under which Snead had claimed the whole tract, the new agreement recited that Ragsdale had purchased the 150 acres from him, and made no allusion to their joint ownership under the purchase from Fulcher. The 150 acres was the residue after deducting the portion sold to Hagy. The court rightfully construed these transactions as being equivalent to an equitable partition, and properly held that the purchase should be apportioned between them according to the value of the lands held by each, taking Snead's portion to be the land sold by him to Hagy. Nor do I think there was any error in overruling the 2d exception of the appellant Ragsdale to the first report of the commissioner. His first and third exceptions were in effect sustained by the decree of the 25th May 1847. Nor was there any error in overruling his exceptions to the second report of the commissioner, or in so much of the decree as ascertained that there was a balance of 219 dollars 61 cents due to Fulcher on account of the pur-
427 chase money, *with interest from the 15th December 1840 until paid; and that Snead had overpaid the sum of 256 dollars 33 cents beyond his proportion of the purchase money. But it seems to me the Circuit court erred in holding that this surplus overpaid by Snead should enure to the benefit of Snead's assignees, to compensate them in part for that portion of their debts which was lost by allowing Hagy's offsets. The assignees had no lien on this fund; their notes were a lien on the land sold to Hagy, but that lien did not attach to the land retained by Ragsdale. For the sum so overpaid, Snead would stand in the place of the vendor, and could subject Ragsdale's portion; Tompkins v. Mitchell, 2 Rand. 428; but his assignment of Hagy's bonds did not transfer this lien to his assignees. If a portion of the debts assigned be lost, the assignees stand like other general creditors, with no right to subject any specific fund of the assignor to their indemnity. In the present case, it appears from the admissions of Snead and the evidence in the record, that he was debtor on private account to Ragsdale in a much larger sum than the amount of purchase money overpaid by him. He cannot therefore require Ragsdale to pay the excess to him, or charge it on Ragsdale's portion of the land if the latter chooses to give him credit for the amount on their private accounts. This is a matter for adjustment between themselves, and not involved in the present controversy. The appellee Hagy was only so far interested in the accounts between Snead and Ragsdale, as they related to the payment of the purchase money of the land sold to him; and when it was shown that Snead had paid so much of the purchase money as was equal in amount to the value of the land, he had established all that was necessary to his case. I think the court also erred in not charging the balance of the purchase money due to Fulcher on the 150 acres of the land held by Ragsdale, and in
428 *omitting to decree a sale of it unless the money should be paid to the commissioner of the court within some limited

time; as Hagy should not be delayed in procuring his legal title by the omission of Ragsdale to pay the balance of the purchase money.

As to the suit by Preston to subject the land to the lien of a remote vendor, the record does not disclose what disposition was made of it. This matter seems not to have been noticed farther in the progress of the cause by the parties or the court, and it has probably been determined against the validity of the claim, as was stated by the counsel.

The other judges concurred in the opinion of Allen, J.

The decree of the court is as follows:

The court is of opinion that the Circuit court erred in holding that the overpayment of the purchase money by the appellee Snead should enure to the benefit of Smith and of the Greenways, the assignees of the bonds executed to him by the appellee Hagy; and in decreeing that the appellant should pay the sum of 256 dollars 33 cents, with interest, to the commissioner of the court, to be apportioned between the assignees ratably. The assignees had no lien on that fund, and could not object to the same being applied by Snead to the payment of his individual debt to Ragsdale, or to prevent the latter from setting off the private debt due to him by Snead, against the amount aforesaid ascertained by the decree to have been overpaid by Snead. This was a matter to be adjusted between Snead and Ragsdale, their private accounts not being in issue in this controversy.

The court is further of opinion that as the appellee Hagy went into chancery to ascertain the amount of and to clear up the incumbrances, to the end that he might obtain a title to the land purchased 429 by him, the *court should have gone on and rendered a decree against the appellant for 219 dollars 16 cents, the balance of the purchase money due to Fulcher, with interest from the 15th December 1840 till paid; and unless paid within a prescribed period, the 150 acres of land belonging to Ragsdale should have been subjected to sale for the payment thereof, so that upon the payment of said incumbrance, the deed executed by Fulcher to Snead and Ragsdale could have been delivered for recordation, or a decree could have been entered for the execution of a new conveyance by Fulcher or a commissioner in his behalf to Snead and Ragsdale, if the deed delivered as an escrow at the time of the purchase could not be produced; and a decree also pronounced for a conveyance to the appellee Hagy, by Ragsdale and Snead, or by a commissioner in their names, for the 143⅓ acres described in the title bonds made exhibits with the bill.

It is therefore adjudged and ordered that said decrees, so far as the same are herein declared to be erroneous, be reversed and annulled, and that in all other respects the said decrees be and the same are hereby affirmed. And it is further adjudged and ordered that the appellant recover of the appellees, except the appellee Hagy, his costs about his appeal; and it is further adjudged and ordered that the appellee Hagy recover of the appellant his costs by him about his defence here expended, he being the party substantially prevailing, so far as his interests were affected by said appeal. And this cause is remanded for further proceedings according to the principles aforesaid, in order to a final decree.

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as a defence to the payment of that note. Etheridge v. Parker, 76 Va. 252.

Secret Liens.—An assignee cannot be affected by a latent equity in the hands of a third person of which he has no notice, and a secret implied lien cannot be set up against a *bona fide* assignee of the bonds. Gordon v. Rixey, 76 Va. 704; Moore v. Holcombe, 3 Leigh 597.

The right of a *bona fide* assignee, for valuable consideration, of a note negotiable at the bank of Virginia, to recover against the maker and indorsers of such a note, is not to be affected by any equity, of which he had no notice when he received it. McNiel v. Baird, 6 Munf. 316.

2. WHAT PASSES BY ASSIGNMENT.

a. ASSIGNMENT OF THE CHOSE CARRIES THE SECURITY.—It is a well-settled principle of law that the assignment of a chose in action or a debt, by force of law as an incident thereto, carries the deed of trust or mortgage which secures the debt. The same principles apply to the vendor's lien, resulting from the retention of the legal title. Of course the above rule applies only in the absence of any express stipulation to the contrary, or a fair and reasonable implication that the benefit of the lien was not to pass. Tingle v. Fisher, 20 W. Va. 506; Gwathmeys v. Ragland, 1 Rand. 466; Gregg v. Sloan, 76 Va. 499; McClintic v. Wise, 25 Gratt. 448; Stimpson v. Bishop, 82 Va. 200; Machir v. Sehon, 14 W. Va. 777; Camden v. Alkire, 24 W. Va. 680; James v. Burbridge, 33 W. Va. 276, 10 S. E. Rep. 397; Grubbs v. Wysors, 32 Gratt. 127, 131; Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 878; Jenkins v. Hawkins, 34 W. Va. 799, 12 S. E. Rep. 1090.

Assignment of Bond Carries Trust Deed.—The assignment of a bond carries with it the trust deed and vendor's lien on the property securing the bond. Lightfoot v. Green, 91 Va. 518, 22 S. E. Rep. 242; Jenkins v. Hawkins, 34 W. Va. 799, 12 S. E. Rep. 1090; Schofield v. Cox, 8 Gratt. 533.

Assignment of Note Carries the Security.—The assignment of a purchase money note carries with it the lien given in security thereof. Briggs v. Enslow, 44 W. Va. 499, 29 S. E. Rep. 1008.

Assignment of Note Carries Remedies.—The assignment of a promissory note, carries with it all the remedies of the assignor, including the right to attack a fraudulent conveyance, because "when choses in action could not be assigned, because to allow their assignment tended to beget maintenance and champerty, there may have been something in the contention of the appellants that the assignment of the notes to the plaintiff did not carry with it the right to attack the fraudulent conveyance, though equity limited the restriction long ago; but many, many years ago, the Virginia legislature made debts assignable, and the law is well settled that the assignee can sue in his own name, or he can sue in the name of the assignor, without power in the assignor to prevent him." Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. Rep. 820.

The better rule seems to be, however, that the assignment of a promissory note carries with it all the remedies of the assignor, including the right to *successfully* attack a fraudulent conveyance, and if the assignor was not entitled to such remedy he could not transfer such right by assignment. Prim v. McIntosh, 43 W. Va. 790, 28 S. E. Rep. 742.

Assignment of the Debt Carries Lien.—When the debt is assigned to a third person, the assignment carries with it the lien, which is a mere incident to the debt. Gordon v. Rixey, 76 Va. 694.

Assignment "Without Recourse."—Upon the question whether the vendor's implied equitable lien for purchase money would pass by an assignment of the debt, the authorities are conflicting. Although some of the cases decide that an assignment of the debt, even without recourse, carries with it this lien, like any other lien; but the majority of the cases, if not the weight of authority, seems to be decidedly the other way; at least unless it appears that the assignor intended to assign the lien as well as the debt; in which case it seems that both would pass to the assignee, even though the assignment were without recourse to the assignor. When, however, the assignment is not without recourse, the weight of authority is that the lien continues in full force notwithstanding the assignment, and passes thereby to the assignee. Mayo v. Carrington, 19 Gratt. 120. See Jenkins v. Hawkins, 34 W. Va. 799, 12 S. E. Rep. 1090.

If a vendor of land, retaining the title, assigns one of the bonds given for the purchase money, and brings his ejectment against the purchaser, and recovers the possession, he recovers in subordination to the assignee. The assignee by the assignment having acquired the benefit of the lien, whatever it may be, is entitled to all the remedies of the vendor to enforce it. He cannot be deprived of any of these remedies by any act of the vendor. If the bond in the hands of the assignee is not paid, he may go into a court of equity to enforce the lien. McClintic v. Wise, 25 Gratt. 459.

Assignment of a Mortgage.—Since the possession of the mortgagor, continuing by the mortgagee's permission, is to be considered as the possession of the mortgagee, it follows that where the latter could recover in ejectment, his deed *assigning* the mortgage will enable the assignee to recover in like manner. Chapman v. Armistead, 4 Munf. 383.

Assignment of Debt without Mortgage.—As the debt is the principal thing, and an assignment of it carries with it the mortgage, therefore so long as a recovery on the note or bond given for the debt is not barred, the right to enforce the lien of it created by the mortgage or trust deed on the land continues and may be enforced by suit in equity, a mortgage being regarded merely as a security for the debt. Camden v. Alkire, 24 W. Va. 680; Hale v. Pack, 10 W. Va. 145.

Assignee of a Vendor's Lien.—An assignor of a chose in action, secured by a vendor's lien reserved on real estate, cannot sue in equity to enforce the lien for the benefit of his assignee. The assignee of a vendor's lien is an assignee of a mere chose in action, and the assignment carries no interest in the land upon which the debt is secured. Penn v. Hearon, 94 Va. 773, 27 S. E. Rep. 599.

Mutual Assurance Society.—If buildings insured in the Mutual Assurance Society against fire, are mortgaged, the policy of insurance is *ipso facto* assigned to the mortgagee, for it is a covenant real, running with, and entered into, for the purpose of upholding the estate. Farmers' Bank v. Mut., etc., Society, 4 Leigh 69.

Question of Intention.—Where, upon the question of whether the assignment of a bond secured by a deed of trust to the trustee was intended by the payee to pass the ownership of the bond, the evidence is conflicting, the decree of the circuit court will be affirmed. Ayres v. Wells (Va.), 1 Va. Dec. 692, 9 S. E. Rep. 326.

Conflict of Laws—Compulsory and Voluntary Assignments.—The general rule is well established that a

bona fide and voluntary assignment of personal property and choses in action wherever situated or found pass to the assignee at the time of the assignment, and so will have priority over subsequent liens, although neither such liens nor the debtors (in case of chose in action), had notice of the assignment at the time the lien was created, unless it comes in conflict with some positive or customary law of the state or place where such property or choses in action may be located or found. But it is equally well established that coercive and involuntary assignments do not operate beyond the territory and jurisdiction of the state or sovereign under whose laws such compulsory assignment was made. Bank v. Gettinger, 3 W. Va. 316; Harrison v. Bank, 9 W. Va. 431.

2. RIGHTS AND LIABILITIES OF PARTIES.

a. ASSIGNOR LOSES CONTROL BY ASSIGNMENT.—The assignor of a judgment, or the claim on which it is founded, upon which judgment was recovered, has no control over it, nor of an execution issued thereon, taken out by the assignee, after a valid assignment is once made of it, and the assignor has no further interest in the claim; and of course no subsequent assignment of the judgment, recovered on such claim, can give any right to such subsequent assignee. In other words, after an absolute *bona fide* assignment for valuable consideration of all the assignor's interest in a chose in action, the assignor's control over it ceases immediately. Clarke v. Hogeman, 13 W. Va. 718; Mackie v. Davis, 2 Wash. 220.

Assignor Cannot Interfere with Suit.—"And now, in all cases, the courts of law in England protect the rights of an assignee, suing in the name of the assignor, so far as not to permit the assignor to dismiss the suit or release the action." Garland v. Richeson, 4 Rand. 266, opinion of GREEN, J.

Assignee May Sue for Specific Performance.—The assignee for value of a note given for the purchase money of land, may maintain a suit against his assignor, the vendor and the vendee, for a specific performance of the contract, in a case proper for such relief, for his benefit; and obtain satisfaction of the amount due him by subjecting the land to sale for the payment thereof. Hanna v. Wilson, 3 Gratt. 243.

Assignees Severally Liable.—Where a purchaser of land from a guardian executed his bond for deferred payments in such proportions as the guardian required, with a view to enable the guardian to transfer the bonds to others for his own purposes, it was held that if the assignee proved unable to pay, the purchaser of the land was bound to reimburse the sureties on the guardian's bond, or to pay the amount to the ward in case the money could not be made out of the sureties or the assignees, each of the said assignees being severally liable for what he received. Broadus v. Rosson, 3 Leigh 25; 2 Barton's Ch. Pr. (2d Ed.) 743.

Neither bills of review nor petitions for rehearing lie for assignees. Armstead v. Bailey, 83 Va. 242, 245, 3 S. E. Rep. 38.

Set-Off.—A is indebted to B by a bond payable January 1820, which, after it is due, is assigned by B to C; but before notice of assignment, A becomes surety for B in a bond to D payable February 1822; then B becomes insolvent. *Held*, A is entitled, *in equity* to set off the amount of the bond in which he is B's surety to D, though not yet due (unless he is indemnified against his suretyship), against his own bond to B, in the hands of C his assignee. Feazle v. Dillard, 5 Leigh 30.

Declarations of Assignor after Assignment.—It is well settled that the declarations of an assignor after assignment, are inadmissible in evidence against his assignee. Brock v. Brock, 92 Va. 173, 23 S. E. Rep. 224; Barbour v. Duncanson, 77 Va. 76; Smith v. Betty, 11 Gratt. 752; Daily v. Warren, 80 Va. 512; Hodnett v. Pace, 84 Va. 873, 6 S. E. Rep. 217.

Whether Oral or Written.—Declarations, either oral or written, of an assignor, that a chose in action has been paid are inadmissible, unless made before the assignment. Ginter v. Breeden, 90 Va. 565, 19 S. E. Rep. 656; Lewis v. Long, 3 Munf. 136.

Acknowledgments of Payment.—The acknowledgments of an assignor that he has been paid his debt are no evidence against the assignee, unless they were made anterior to the assignment, and it is equally true, whether his acknowledgment is written or oral, and the *onus probandi* is on the debtor. Moreover a receipt is nothing but a written acknowledgment, and the date of it is not even *prima facie* presumed to be true, for if this were true every paper would prove itself, and the assignee would be put at a decided disadvantage, as the parties know the true date, whereas the assignee cannot know. Wilcox v. Pearman, 9 Leigh 147.

Statement after Assignment by Obligee. — The assignee being absent, statements made by the obligee of a title bond, after its assignment, detrimental to the rights of the assignee, are certainly not competent evidence as against him, and cannot affect his rights. Coldiron v. Asheville Shoe Co., 93 Va. 364, 25 S. E. Rep. 238.

Statements after Assignment as to Offsets.—Statements made by an assignor of a common-law instrument to the holder after the assignment, that there is no offset or objection to the said bond, nor anything to affect his liability as assignor, is a mere *nudum pactum*, and not binding, and hence will not be sufficient consideration to support an action of *assumpsit* by the holder against the assignor. Hopkins v. Richardson, 9 Gratt. 485.

b. RIGHT TO GO AGAINST ASSIGNOR.

bb. Warranties of Validity Generally.—By an assignment of a judgment, even though it be without recourse, the assignor warrants that it is what it purports to be, that he has done and will do nothing to prevent the assignee from collecting it, and that it has not been paid; but he is not answerable for the insolvency of the judgment debtor. The term "without recourse" does not relieve the transaction of such implied warranty. Findley v. Smith, 42 W. Va. 299, 26 S. E. Rep. 370.

Assignment of Invalid Claim—Statute of Limitations.—Where there is an assignment of an invalid county order, there is a breach at once of the implied warranty that it is a valid subsisting debt, and the right of action accrues immediately to the assignee to recover back the money paid by an action for money had and received. The statute of limitations in such case is five years, and it begins to run from the date of the breach of such implied warranty of the validity of the instrument assigned, unless something appears to avoid the commencement of the running of the statute at that date, but ignorance or neglect of one's right will not avoid its running, unless such ignorance or neglect was due to the conduct of the assignor. Merchants' Nat. Bank. v. Spates, 41 W. Va. 27, 23 S. E. Rep. 682.

Reversal of Assigned Judgment.—If a judgment of a county court be assigned, and afterwards re-

versed by the superior court of law, the assignee may thereupon sue the assignor, without carrying the case to the court of appeals. Arnold v. Hickman, 6 Munf. 15.

Forged Instruments.—Where an agreement under seal for the conveyance of land was assigned without recourse, accompanied by the delivery of a paper purporting to be a grant, together with certificates as to title, which papers proved to be forgeries, it was held that the assignor was not liable, there being no proof of fraud or knowledge of fraud on his part. Crawford v. M'Donald, 2 H. & M. 189.

Warranty of Debtor's Insolvency.—It is well settled that the obligation of the assignor is that he warrants the solvency of the debtor and the existence and justice of the debt. Upon the assignee using or exercising due diligence to collect the debt, and failing, because of the inability of the debtor to pay, or because the debtor shows that he ought not, in law, to be required to pay the same, and thus defeats a recovery, then the law raises an implied promise, on the part of the assignor, to repay the price which he received for it. A suit, however, is not always necessary to entitle the assignee to recover back the money paid upon the assignment, but he must show that a suit would be unproductive of good, and that the assignor has suffered no loss for want of such suit; such as the notorious insolvency of the debtor or some reason why a judgment could not be had. Slifer v. Howell, 9 W. Va. 397.

Implied Warranties.—Where a nonnegotiable note is assigned, calling for the payment of money, the assignor, by writing his name across the back and delivering it, warrants by implication, unless it is otherwise agreed, that it is a valid and subsisting debt, that the maker of the instrument is solvent, or will be when the claim falls due, and his right to assign. Merchants' Nat. Bank v. Spates, 41 W. Va. 27, 23 S. E. Rep. 681.

cc. Failure to Collect from Obligor.—In the absence of proof of an express agreement to the contrary, the assignment of a bond imports a guarantee that the assignee shall receive the full amount of the bond from the obligor (when the money paid for the assignment was the face value of the bond), and further imports the right of the assignee to resort to the assignor for any part thereof which he shall fail to collect from the obligor with the exercise of due diligence. Peay v. Morrison, 10 Gratt. 149; Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 878; Jenkins v. Hawkins, 34 W. Va. 799, 12 S. E. Rep. 1091.

Implied Promise by Assignor.—The law raises an implied promise by the assignor to the assignee, that if the assignee (using due diligence), fails to recover of the obligor or maker, the assignor will repay him the consideration which he received for the paper. This implied promise, however, is decided to extend only to the immediate assignee, and to give to no other a right of action against the assignor, so that no other assignee could sue a remote assignor. Caton v. Lenox, 5 Rand. 42.

Undertaking of Assignor.—In a note by the editor (appended to Long v. Pence, 93 Va. 584, 25 S. E. Rep. 593), in 2 Va. Law Reg. 612, it is said: "The assignor is not bound by the note or by his assignment of it, in the absence a of special agreement to that effect, to pay it, as in the case of the endorser of a negotiable note. His undertaking is to refund or repay the value of the consideration he has received for the assignment, if the assignee, by the exercise of due diligence, cannot recover the debt assigned. The implied contract between the assignor and assignee of a nonnegotiable note is different and quite distinct from the contract between the maker and payee of such note; hence the waiver of exemption as to the obligation of the note does not embrace the obligation arising out of the assignment. This was decided by the court. The same rule would apply to the assignment of a bond or any other nonnegotiable instrument. The distinction pointed out is of much importance in business transactions."

Covenant against Liability.—A bond may be assigned *in general terms* with a verbal agreement that the assignor shall not be responsible; and, thereupon, he will not be responsible even to a subsequent assignee having notice of such agreement. Stubbs v. Burwell, 2 H. & M. 536.

But in the absence of an express stipulation to the contrary, the assignor's liability is the same whether the assignment be general or special. Goodall v. Stuart, 2 H. & M. 105.

Assignment without Recourse.—An assignment without recourse of a bond exempts the assignor from all liability by reason of the insolvency of the obligor, and if the bond is genuine and the amount of money it calls for was owing and unpaid at the time of the assignment, the assignee is not entitled to recover the bond by reason of any failure or inability on his part to make the money. He takes upon himself all risk of collecting the money, providing it was in fact what it seemed to be, a genuine, valid, subsisting debt. Houston v. McNeer, 40 W. Va. 365, 22 S. E. Rep. 80; McSmithee v. Feamster, 4 W. Va. 673.

Fraud by Assignor.—Where a bond was assigned without recourse, and the assignee sued to recover his money back, on the ground of fraudulent representation, it was held that to avoid such contract the representation must be of a material fact and be false within the knowledge of the assignor, and be made with intent on his part that the assignee should act upon it, and the assignee must have, in ignorance of its falsity, relied upon it and been thereby misled to his injury and damage. Houston v. McNeer, 40 W. Va. 365, 22 S. E. Rep. 80.

One who, knowing an obligation to be void for usury, transfers it, without disclosing the defect, is guilty of a deceit which renders him liable to the transferee. Fant v. Fant, 17 Gratt. 11.

Proof of Fraud.—A subsequent assignee, who asserts that he took his assignment for value, without notice of the prior assignment, and, moreover, charges the previous assignment with being fraudulent, is, of course, bound to prove it, as it is his own case. Daily v. Warren, 80 Va. 512.

Taking a Forthcoming Bond.—The taking of a forthcoming bond, on a judgment and execution against the obligor of an assigned bond, is not such a satisfaction of the judgment, as will preclude the assignees from having recourse against the assignors. Smith v. Triplett, 4 Leigh 590.

ccc. Diligence—General Rule.—The general rule is, that the assignee of a bond or promissory note must use due diligence to recover the amount of it from the obligor or maker, before he can resort to the assignor. A suit is in general necessary, but there are circumstances which will excuse the assignee from bringing suit. Caton v. Lenox, 5 Rand. 31; Mackie v. Davis, 2 Wash. 219; Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 880.

Upon an assignment for value, the presumption is that the assignor is liable to the assignee if, by the

exercise of due diligence, the money is not collected from the obligor. Gordon v. Rixey, 76 Va. 706.

Statute of Anne.—Antecedent to the statute of Anne, the assignee could recover against the assignor if payment of the note was demanded from the maker and he refused. And in this country, as bonds and notes are governed by the same principles, the above-stated rule will apply to bonds also. Mackie v. Davis, 2 Wash. 219, 230.

Suit Must Be Sufficient.—It is not sufficient for the assignee of a promissory note to bring a suit against the maker, which fails on account of the informality in the proceedings; but he must bring a *sufficient* suit before he can charge the assignor. Bronaugh v. Scott, 5 Call 78.

The assignee of a note of hand, must sue the maker, before he can resort to the assignor. Lee v. Love, 1 Call 497. See also, Barksdale v. Fenwick, 4 Call 492.

Duty of Assignee When He Does Not Sue.—If an assignee attempts to excuse himself for not suing, for example, relying on the fact that the instrument assigned is invalid, then he should immediately demand the money from the assignor with an offer to return the instrument, that the assignor might take measures to recover from the maker. Merchants' Nat. Bank v. Spates, 41 W. Va. 27, 23 S. E. Rep. 683; Wilson v. Barclay, 22 Gratt. 584, approved in above case.

Various Excuses for Not Bringing Suit.—There are many cases in which no suit need be brought against the maker, as where the note was a forgery, and the assignor has received the money from the assignee, or where the assignor practiced a fraud upon the assignee, or where exchange notes were given between the maker and assignor, as a consideration for each other, and the note given by the assignor has never been paid, nor sued upon. Caton v. Lenox, 5 Rand. 31.

Insolvency.—The assignee cannot recover merely on default of the debtor, but only after legal recourse against him has been exhausted, unless it appear that before the bond fell due the debtor became insolvent, or unless it appear from some cause that a suit against him would be unavailing. Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 878; Drane v. Scholfield, 6 Leigh 390. See Dunn v. Price, 11 Leigh 210.

When the obligor of a bond becomes insolvent before the bond becomes due, a suit against him is unnecessary to establish the right of the assignee to recover of the assignor, as such a suit against the obligor would be unavailing. Peay v. Morrison, 10 Gratt. 149.

The assignee, as a general rule, cannot recover against the assignor the amount paid for the assignment unless due diligence is used without effect against the debtor. But it is never necessary to pursue the debtor, if such pursuit would be unavailing by reason of the debtor's insolvency at the time of the assignment, or when the instrument falls due, or if it be null and void. Merchants' Nat. Bank v. Spates, 41 W. Va. 27, 23 S. E. Rep. 682.

Insolvency at Time of Assignment.—It was held in Coiner v. Hansbarger, 4 Leigh 452, that where a bond, payable on demand, was assigned for valuable consideration, and the obligor was insolvent at the time of the assignment, then it is not necessary that the assignee should bring suit on the bond against such obligor, in order to entitle him to recourse against the assignor, but the latter is immediately liable to the assignee upon the contract of assignment.

Notorious Insolvency of Maker.—The assignee of a bond or note is not bound to sue the maker, if he be *notoriously insolvent*, before he can resort to the assignor. Saunders v. Marshall, 4 H. & M. 455.

It was held, in Broun v. Hull, 33 Gratt. 23, that "as assignees, plaintiffs are under no obligation to make any demand upon the maker, and give notice to the defendant of nonpayment, but they are bound to exercise due diligence in suing the maker, obtaining judgment and execution, which is a condition precedent to their right upon the defendant, unless, indeed, the makers were notoriously insolvent. The defendants, moreover, had the right to show that the plaintiffs had not used due diligence and that the maker was not notoriously insolvent."

"An assignor is not liable as an endorser, of paper not negotiable according to the laws of this state, although it may have been negotiable under the laws of the place where it was made. Therefore, in order to make an assignor liable for its payment, it must be averred and shown that the maker was insolvent at the time it became due, or at the time of the assignment, if assigned after it became due, or that due diligence has been used to collect it, or that it could not have been made by the use of due diligence. Nor can there be a recovery under such circumstances under the common counts in assumpsit." Nichols v. Porter, 2 W. Va. 13. The statement in Nichols v. Porter, that recovery cannot be had under the common counts in assumpsit, has been overruled in Hughes v. Frum, 41 W. Va. 445, 23 S. E. Rep. 605.

Express Agreement by Assignor.—An express agreement by the assignor of a bond, to be responsible for the payment thereof, should the obligor prove insolvent, does not vary the nature of the undertaking, nor affect the assignor's liability, as, without an express stipulation to the contrary, he would have been so liable by mere operation of law. Goodall v. Stuart, 2 H. & M. 105.

Bankruptcy.—It is *generally* necessary for the assignee of a promissory note to sue the drawer, in order to charge the endorser, but to this rule there are exceptions, where the plaintiff can show a discharge of the drawer under the former bankrupt laws of the United States, or the insolvent law of the state or that the drawer was *actually insolvent*, so that a suit would have been wholly unavailing. Brown v. Ross, 6 Munf. 391.

As a general rule the assignee cannot recover from the assignor the amount paid for the assignment, unless due diligence is used without effect, against the debtor; but it is in no case necessary to pursue the debtor, if it be clear that such pursuit would be unavailing, as if the obligor being insolvent at the time of the assignment, or when the note falls due, or where the note is a forgery, or where the maker is a married woman. Morrison v. Lovell, 4 W. Va. 346.

Pursuit of Maker Out of State.—The weight of authority and reason seems to sustain the contention that an assignee is not bound to pursue the maker out of the state, in order to constitute due diligence on his part, but if he elects to leave the state and sue the maker, he is bound to use due diligence, and if he holds up a claim for a long time and allows the maker to become insolvent, then the assignor will be absolved. Drane v. Scholfield, 6 Leigh 386.

Writ Must Be Produced.—In an action by an assignee against an assignor of a bond, the point in dispute

being whether the assignee has used due diligence in suing the debtor, if the plaintiff produce a transcript of the proceedings in a suit which he brought against the obligor, showing the time when the declaration was filed, *but not the date of the writ*, and the defendant demur to the evidence, the court not interfering nor requiring a copy of the writ to be produced; such demurrer should be set aside and a *venire de novo* awarded. Taliaferro v. Gatewood, 6 Munf. 320.

Assignee Must Pursue Security with Diligence.—It is a perfectly well-settled rule of law that the assignee must use due diligence to make the money out of the maker or obligor before he can come against the assignor, and where the debt assigned is secured by a specific lien, it is the duty of the assignee diligently to enforce such lien before he can have any recourse against the assignor. If he fails to pursue this course, it is incumbent upon him to show clearly that the security was worthless, and that no loss or damage has resulted from his lack of diligence. The assignee cannot delay upwards of two years, without any excuse, to pursue the security. Carper v. Marshall, 98 Va. 438, 36 S. E. Rep. 526; Wilson v. Barclay, 22 Gratt. 541, approved.

Judgment upon an Award.—A suit by an assignee of a bond against the obligor being referred to arbitration, the arbitrators find the debt to have been discharged by payments to and set-offs against the assignor, and make an award in favor of the obligor, upon which judgment is entered, whereupon an action is brought by the assignee against the assignor. *Held*, that though the assignor is at liberty to controvert the facts, found by the award, and show that the judgment is erroneous, yet, until the contrary is shown, the judgment will be presumed to be right, and is sufficient therefore to establish the liability of the assignor, and to support an *assumpsit* founded on such liability. Scates v. Wilson, 9 Leigh 473.

Return of "No Effects."—A return of "no effects," by a sheriff on an execution in favor of an assignee of a bond against the obligor is generally held sufficient to charge the assignor; so in an action against the assignor, evidence of the obligor's insolvency is inadmissible. Goodall v. Stuart, 2 H. & M. 105; Minnis v. Pollard, 1 Call 227. See also, Hooe v. Wilson, 5 Call 61.

But in a suit by the assignee against the assignor of a bond, if it appear that after the judgment against the obligor, a *fieri facias* was returned *nulla bona*, and that afterwards the assignee sued out a *capias ad satisfaciendum*, upon which the return was "executed on the body of the defendant, who stands committed to the prison bonds, as per bond," etc., the plaintiff cannot recover but must be considered as having brought his action against the assignor prematurely; because, for aught that appears in the records, the obligor is still in custody under the *ca. sa.*, or may have paid the debt. Johnston v. Hackley, 6 Munf. 448.

The assignee of a bond cannot recover against the assignor upon a declaration stating that the plaintiff brought suit and obtained a judgment which was enjoined upon a bill claiming equitable discounts, on account of certain dealings and transactions between the obligor and the assignor before the assignment; and that the plaintiff was *thereby entirely debarred from* collecting the debt; without stating *that the injunction was made perpetual*, or what proceedings took place thereon. McClung v. Arbuckle, 6 Munf. 315.

Return of Nulla Bona Conclusive Evidence of Insolvency.—In an action between the assignees and assignors the sheriff's return of *nulla bona* on the execution against the obligors in the forthcoming bond, though amended after the assignees' action and five years after the return, so as to show the insolvency of both the surety and principal, is conclusive evidence of such insolvency. The insolvency of the debtors might be proved by other evidence, but the assignees have a right to the conclusive evidence of the sheriff's return. Smith v. Triplett, 4 Leigh 590.

When assignees have recovered judgment on an assigned bond, and sued execution against the obligor, and that execution is returned *nulla bona*, they are entitled to recourse against the assignors, and it is no defence for the assignee to show neglect or malfeasance in the sheriff; the assignors, as parties injured may sue the sheriff for such misconduct; the assignees are not bound to sue him, before they can have recourse against the assignors, upon the contract of assignment. Smith v. Triplett, 4 Leigh 590.

Allegation of Return "Nulla Bona" Sufficient.—When a declaration against an assignor sets forth the return of *nulla bona* against the obligor, which is *prima facie* evidence of his inability to pay, then it is unnecessary to state in the declaration that the obligor was insolvent. Barksdale v. Fenwick, 4 Call 492.

Pursuit of Maker's Bail.—When the assignee has ascertained the insolvency of the maker, that is all he is required to do, so as to have recourse to his assignor, and he need not pursue his bail to insolvency before going against the assignor, for if this latter were necessary it would likewise be necessary in all cases to ascertain by suit, whether the maker could give bail. Caton v. Lenox, 5 Rand. 48.

The assignee of a bond may recover of the assignor, after suing the obligor and obtaining a judgment and execution with a return of *nulla bona*; notwithstanding his attorney directed that appearance bail be not required of the obligor. Harrison v. Raines, 5 Munf. 456.

What is Due Diligence.—To charge either the guarantor or assignor due diligence must be used. The assignee being entitled to recover of the assignor on the grounds of failure of consideration, it will devolve on him to show (unless it be otherwise arranged by agreement) that he used due diligence to collect the debt of the debtor, and used it in vain. What is due diligence is not susceptible of a precise definition. An immediate suit duly followed up by an execution, etc., is *always due diligence*, even though it may not be the surest way to make the money. Immediate suit, however, is not indispensable if the assignee can show that by reason of the debtor's insolvency or for other reasons a suit would be unavailing. Payne v. Huffman, 98 Va. 372, 36 S. E. Rep. 476; 3 Min. Inst. (4th Ed.) 437.

Depends on Circumstances.—But what is due diligence on the part of an assignee depends, very often, on circumstances. Barksdale v. Fenwick, 4 Call 492.

Laches.—Where an assignment of money has been made by an order upon another, which order is accepted, it is the duty of the assignee to use due diligence to collect the money from the acceptor, and upon a failure, to give notice to the drawer and assignor so that they may take proper steps for their security, and they cannot resort to the assignor and drawer, after they have been doing

nothing for years to enforce their right against the acceptor. Wood v. Duval, 9 Leigh 6.

Delay of Two Years.—Where an assignee delays for two years to sue the maker of a note it is not such diligence as the law says an assignee must use. In such a case he cannot recover against the assignor, where there is no proof of the maker's insolvency at the time the note matured or shortly thereafter. Thompson v. Govan, 9 Gratt. 695.

Waiver of Diligence.—The necessity for using diligence to enforce the payment of an assigned bond, may be waived by the terms and conditions expressed with sufficient clearness in the assignment. Lightfoot v. Green, 91 Va. 513, 23 S. E. Rep. 242.

In general the guarantor contracts to pay if, by the exercise of due diligence, the debt cannot be made out of the principal debtor. Still if it appears to have been the intention of the guarantor to make himself liable on the default of the principal debtor, without the use of the ordinary means to compel payment by him, or proof of his insolvency, he will be held liable accordingly. His contract, in such case, is a guaranty of payment, or of punctual payment, by the principal debtor, and not merely a guaranty of solvency, or of ultimate payment, after the usual means of enforcing it are employed. Arents v. Com., 18 Gratt. 750, 770.

Waiver May Be Proven by Parol.—After assignment certain bonds are placed in the hands of an attorney for collection, by the assignee, but with instructions to sue on them or not just as the assignee directed, and these instructions the attorney followed. Upon the attorney's being offered as a witness, an objection was raised that he was incompetent to prove any matter as excuse for due diligence, because it would vary the contract which the law implies that the assignee will use due diligence. *Held*, the rule as to the use of due diligence, is intended for the benefit of the other assignor, and may be waived by him, as was done in this case, and the waiver may be proveh by parol testimony. The assignor will still be liable to the assignee, although the debt may have been lost by the failure to use diligence. Hall v. Rixey, 84 Va. 790, 6 S. E. Rep. 215 See also, McLaughlin v. Duffield, 5 Gratt. 133.

Burden of Proof.—"In questions concerning due diligence, the burden of proving it is always upon that party whose interest it is to establish it." Drane v. Schofield, 6 Leigh 398.

Diligence Question for Jury.—What is due diligence in the assignee of a bond or promissory note, is a question to be decided by the jury. Bronaugh v. Scott, 5 Call 78; Mackie v. Davis, 2 Wash. 219; Barksdale v. Fenwick, 4 Call 492.

Grounds for Recovery When Consideration Fails.—In an action by an assignee against his assignor he is entitled to recover, not on the ground of the assignment, for the transferror of the bond is equally liable by sale of the bond, even without assignment, but on the principles of natural justice that if a man buys of another that which afterwards turns out to be worthless, he is bound to refund the price. The consideration having failed, he must pay back the money. Hence, the assignor is never liable for more than the price paid by the assignee for the bond, with interest and the cost sustained in prosecuting the obligor. Moreover, the assignee who sues the remote assignor can recover from him only so much as he has received from his immediate assignee. Goff v. Miller, 41 W. Va. 683, 24 S. E. Rep. 644; Whitworth v. Adams, 5 Rand. 377.

Consideration for Assignment—Measure of Recovery.—The assignee's right of recourse upon the assignor rests upon the ground that there was a valuable consideration for the assignment. In all cases, however, the actual consideration may be shown, and this constitutes the measure of recovery by the assignee against the assignor. Welsh v. Ebersole, 75 Va. 651; Mackie v. Davis, 2 Wash. 219; Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 878.

Where there is no proof of the consideration for an assignment, the measure of damages recoverable on recourse against the assignor is the value of the thing assigned. Barley v. Layman, 79 Va. 518.

Extent of Assignor's Liability.—"As to the extent of the assignor's liability, I think it can only reach the sum actually received, in case the obligor is able to prove it. If he cannot do this, it is sufficient to be presumed that he received an equal sum with that due on the bond. If incautiously, the consideration actually received be not stated in the assignment, and it cannot otherwise be proved, a court of equity is open to the assignor, and he may there seek a discovery of that fact." Per CARRINGTON, J., in Mackie v. Davis, 2 Wash. 231.

An assignment of a chose as collateral security for a debt will enable the assignee to recover from the debtor the whole liability under it, though, as between the assignor and assignee, part of it may belong, after recovery, to the assignor. Bentley v. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584.

Consideration Must Be Alleged.—Where the plaintiff is only entitled to recover from a defendant the consideration received by him from his immediate assignee, then it is necessary for him to allege in his complaint the consideration for the assignment, otherwise the complaint is to be rejected as insufficient. Goff v. Miller, 41 W. Va. 683, 24 S. E. Rep. 643; Hall v. Smith, 3 Munf. 550.

Presumption of Law—Note as Evidence.—In a proceeding by the assignee against an assignor to recover on the contract implied by the assignment, the note is a necessary piece of evidence in support of the proceeding in order to prove the assignment, and to enable the court to fix the measure of the plaintiff's recovery, for, in the absence of proof to the contrary, the law presumes that the assignor received for the note a sum equal to that specified in it. The statement of the fact of such inspection in the entry of the judgment, however, is wholly unnecessary, but the expression of it does not render the judgment reversible, nor show that the judgment was rendered on the note and not on the contract implied from the assignment. Long v. Pence, 93 Va. 584, 25 S. E. Rep. 593.

c. PRIORITY OF ASSIGNMENTS.

Priority of Parties Depends on Order of Assignment.—It is well settled that the assignees of *choses* in action partake of the lien attached thereto in the *order of their assignment*, and not according to the *dates of maturity* of such *choses*. Turk v. Skiles, 45 W. Va. 82, 30 S. E. Rep. 234; Gordon v. Fitzhugh, 27 Gratt. 835, and *note*; Taylor v. Spindle, 2 Gratt. 44; Gregg v. Sloan, 76 Va. 497; Gwathmeys v. Ragland, 1 Rand. 466.

Where all the creditors and purchasers of the assignor stand on the same footing in point of merit, and can claim no preference over each other on that ground, it naturally follows in such case that he who is first in time shall be first in priority. Bank v. Gettinger, 3 W. Va. 317; Tingle v. Fisher, 20 W. Va. 510; Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 881; Schofield v. Cox, 8 Gratt. 533.

Bonds secured by the vendor's lien, and assigned at different times to different persons, are to be satisfied out of the proceeds of the land, upon which they are secured, in the order of their assignment. Paxton v. Rich, 85 Va. 385, 7 S. E. Rep. 531.

An assignment of a legacy takes effect from its date, and the assignee is entitled to priority of satisfaction, as against creditors who have attached the legacy in the hands of the executors subsequent to the date of the assignment, although it is not shown that the assignment had been delivered to the assignee prior to the service of the process of foreign attachment. Thompson v. Graves, 1 Pat. & H. 101; Anderson v. De Soer, 6 Gratt. 370.

Set-Off—In accordance with the view that the date of assignment of bonds determines the question of priority it has been held, that the purchaser who pays off a prior lien on land bought by him, in order to protect his own title, may set off the same against his own purchase money bonds in the hands of several assignees in the inverse order of their assignments (preferring such assignments as are for value to such as are not), and if some of the bonds are assigned, and some are not, the unassigned bonds would be liable to the right of set-off before the assigned bonds, though the former were payable before the latter. Armentrout v. Gibbons, 30 Gratt. 645; 2 Barton's Ch. Pr. (2d Ed.) 1141.

4. RIGHT TO SUE.

a. AT LAW.

Assignee May Sue in Name of Assignor.—It is well settled, that when a chose in action, such as a bond, note or accepted order, on a third person is transferred and delivered to a creditor, as collateral security for a debt, it is the right of the debtor to sue upon such chose in action at law, and if necessary to use the name of the legal owner of such chose in action. He must use reasonable care and diligence to make it available, and if his negligence, laches, omission or wrongful act causes loss on such chose in action, the creditor must bear the loss. Whitteker v. Gas Co., 16 W. Va. 721; Stebbins v. Bruce, 80 Va. 389; Tyler v. Ricamore, 87 Va. 466, 12 S. E. Rep. 799.

A stranger that has acquired an equitable right to the benefit of an execution by an assignment, or to the property upon which it is levied, may, in most cases, by virtue of such equitable right, sue out and conduct the process, or object to its validity or regularity; but he cannot do so by proceedings in the case, in his own name, but must do it in the name of a legal party to the process. Wallop v. Scarburgh, 5 Gratt. 1.

Assignee Must Sue in His Own Name.—The legal title to a nonnegotiable instrument does not pass by assignment, but the equitable owner by assignment may sue in his own name under the statute. Code of W. Va., ch. 99, sec. 14; Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 880; Garland v. Richeson, 4 Rand. 266; Bentley v. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584; Tyler v. Ricamore, 87 Va. 466, 12 S. E. Rep. 799.

Assignee of a Draft.—The assignee of a note or draft does not acquire the legal title to the debt, but an equitable right, which he may assert at law in his own name by virtue of the statute, or in that of the original payee for his benefit; and it is not necessary, that the record should show, that the suit is for the benefit of the assignee. Clarke v. Hogeman, 13 W. Va. 728; Brown v. Dickenson, 27 Gratt. 690, opinion of STAPLES, J.

Right of Remote Assignee to Sue at Law.—Under the provisions of sec. 2861 of the Va. Code, a remote assignee has the benefit of the promise implied by law from an assignor to his immediate assignee, *i. e.*, that if he fails, by due diligence, to recover from the maker or obligor, that the assignor will repay the consideration he has received for the chose in action assigned, and gives to the remote assignee, as well as to the immediate assignee, the right to recover upon such implied promise. In other words, the right which he previously had in equity the statute gives to him at law. See Code of W. Va., ch. 99, sec. 13; Long v. Pence, 93 Va. 564, 25 S. E. Rep. 593. See Drane v. Scholfield, 6 Leigh 386.

A statute authorizing the last assignee to maintain an action at law against a remote assignor does not preclude such assignee from maintaining the action in the name of his assignor for his own benefit. Dunn v. Price, 11 Leigh 208.

The last assignee of a promissory note cannot maintain an action against a remote endorser: there being neither priority nor consideration between them. Dunlop v. Harris, 5 Call 16; Hooe v. Wilson, 5 Call 61.

Assignee Can Sue Only When Assignor Could.—It is important to observe that under the statute giving the assignee the right to maintain in his own name any action which the assignor might have maintained, the assignee cannot maintain the action except where it might have been maintained by his assignor. Thus, where there are two firms with a common member, and one of the firms is indebted to the other, if the creditor firm assign its claim to a third person, such third person cannot maintain an action against the debtor firm, at law, because his assignor could not have maintained it—it being a well-settled rule that one firm cannot sue another at law, where there is a common member, since such common member would be both plaintiff and defendant—an anomaly which the courts of law will not sanction. Va. Code, sec. 2860; Aylett v. Walker, 92 Va. 540, 24 S. E. Rep. 226.

Need Not Allege for Whose Benefit Suit Brought.—Though in the declaration and summons it is advisable to declare that the assignor sues for the use of the assignee, omission to do so is immaterial, as the declaration of such use is no part of the pleadings. The cause is complete without it. But where it is so stated in the declaration and summons, it is notice to the debtors to prevent payment to the assignee, and judgment for costs may be given against the beneficiary. Bentley v. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 585; Clarke v. Hogeman, 13 W. Va. 728; Clarksons v. Doddridge, 14 Gratt. 42.

b. IN EQUITY.—The assignee of a chose in action has not a right, *in all cases*, to come into a court of equity, upon the mere ground that he cannot sue in his own name; but it must appear that he is prevented from suing at law in the name of the assignor, or that the assignor himself would have had a right, if he had not assigned, to go into a court of equity. Moseley v. Boush, 4 Rand. 392.

In the case of Penn v. Hearon, 94 Va. 773, 27 S. E. Rep. 509, CARDWELL, J., said: "In a note to the case of Kane v. Mann, 93 Va. 239, 24 S. E. Rep. 988, decided by this court, and reported in 2 Va. Law Reg. 433, the learned and lamented editor (JUDGE BURKS) says that it has been decided by many cases, and seems a well-settled rule, that the complainant must be the party owning the beneficial equitable interest, and that he cannot sue for his benefit in the name of another who has a mere barren legal title." See also, 3 Va. Law Reg. 745.

Suit on Promise.—If a promissory note or other

chose in action calling for money be assigned, and the party liable therefor promise its payment to the assignee, such assignee may sue on it at law in his own name, without statutory authority, as he has legal title thereto: whereas, without such promise, he would take only an equitable title, the legal title remaining in the assignor. Bentley v. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584; Cleaton v. Chambliss, 6 Rand. 86.

"Courts of law also permit and protect assignments of choses in action to a certain extent. If the debtor assent to the assignment, and promises to pay the assignee, an action may be brought in the name of the assignee in his own name; but otherwise he must bring it in the name of the assignor." Scraggs v. Hill, 37 W. Va. 706, 17 S. E. Rep. 187.

Who Could Sue upon Implied Promise.—"Prior to the statute authorizing a recovery from an assignor, an assignee had the right, upon the principles of the common law, to recover from his immediate assignor under the contract implied from the assignment, that the assignor would repay the consideration he had received for the chose in action assigned, if payment thereof, by the use of due diligence, could not be obtained from the obligor or maker. This implied promise was not considered, however, to extend at law to any other than the immediate assignee, and consequently no assignee could recover at law from a remote assignor." Long v. Pence, 93 Va. 587, 25 S. E. Rep. 593. RIELY, J. See Mackie v. Davis, 2 Wash. 219.

c. EFFECT, IN GENERAL, OF STATUTES.—It has been settled by many decisions that the effect of the statute—allowing the assignee of any bond, note or writing, not negotiable, to maintain thereon *in his own name* any action which the original obligee or payee might have maintained, but that he shall allow all just discounts, not only against himself but against his assignor, before the defendant had notice of the transfer or assignment—is not to give the assignee of nonnegotiable paper a *legal title*, so that equities are cut off against him, but only to permit him to enforce *in his own name* an *equitable title* at law, subject to all prior equities, just as when he sued in the assignor's name. Code Va., § 2860; Code of W. Va., ch. 99, § 14; Clarksons v. Doddridge, 14 Gratt. 44; Iaege v. Bossieux, 15 Gratt. 98; Whitteker v. Gas Co., 16 W. Va. 717; Tingle v. Fisher, 20 W. Va. 509; St. Lawrence Boom & Mfg. Co. v. Price (W. Va.), 38 S. E. Rep. 527; Tyler v. Ricamore, 37 Va. 466, 12 S. E. Rep. 799; Bentley v. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584; Davis v. Miller, 14 Gratt. 13.

It is well settled that the only effect of the early statutes, passed in 1705 and 1730, was to so far change the common law, as to enable the assignee to sue in his own name, taking the paper subject to all the equities of the maker or obligor. Norton v. Rose, 2 Wash. 233; Mackie v. Davis, 2 Wash. 219; Caton v. Lenox, 5 Rand. 42; Garland v. Richeson, 4 Rand. 266; Feazle v. Dillard, 5 Leigh 80; Gordon v. Rixey, 76 Va. 704; Stebbins v. Bruce, 80 Va. 400.

Common Law Not Abrogated by Statute.—It is a familiar principle that, though an assignee of a *chose in action* may himself sue, in his own name, still suit may still be in the name of the assignor as at common law. Bentley v. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 585. See also, Garland v. Richeson, 4 Rand. 266; Clarke v. Hogeman, 13 W. Va. 718.

May Sue in Assignor's Name or in His Own Name.—It was held, in Dunn v. Price, 11 Leigh 209, that because the act of 1807, provides that "hereafter the assignee shall be *entitled* to recover from any previous assignor or assignors," it does not follow that he can no longer sue in the name of his assignor for his own benefit; he may sue either in his assignor's name, and for his own benefit, or in his own name under the statute. If he pursues the former course, the court of law will take notice of his equitable right, will permit the action to proceed in the name of the assignor, for his benefit, and will protect it against the interference of the assignor. The court furthermore said, that Garland v. Richeson, 4 Rand. 266, is pregnant with proof that a party may proceed under the statute or as at common law; and that the argument in that case is *a fortiori* in this.

It is evident that under the W. Va. statute, ch. 99, § 14, a right is merely conferred upon the debtor which he did not possess before under the common law when it provides that the assignee of any bond, note, account, or writing, not negotiable, may maintain thereupon any action in his own name, without the addition of "assignee, which the original obligee or payee might have brought," etc.; but the right so conferred must be regarded as merely cumulative, and does not in any manner detract from the remedy prescribed under the common law. See Scraggs v. Hill, 37 W. Va. 706, 17 S. E. Rep. 187.

May Recover against Immediate or Remote Assignor.—Under ch. 99, sec. 15 of Code of W. Va., an assignee, by way of recourse, may recover against his immediate or any remote assignor of nonnegotiable paper. Hughes v. Frum, 41 W. Va. 445, 23 S. E. Rep. 604; Long v. Pence, 93 Va. 584, 25 S. E. Rep. 593.

Statute Applies to Nonnegotiable Paper.—The statute which declares "the assignee of any bond, note or writing *not negotiable*, may maintain any action thereupon in his own name, which the original obligee or payee might have brought, but shall allow all just discounts," etc., applies only to writings not negotiable; and its only effect is to authorize the assignee of such writings to sue at law in his own name. The legal title still remains in the assignor, in whose name the suit at law may be brought. But by no just construction can this statute be made to include negotiable notes whether before or after maturity, for the language of the statute expressly excludes them. Davis v. Miller, 14 Gratt. 13.

cc. **Upon Equity Jurisdiction.**—In 2 Va. Law Reg. 384, the editor says: "The remedy provided by sec. 2860 of the Va. Code of 1887 (see Code of W. Va., ch. 99, sec. 14, for a similar provision), for actions by assignees of nonnegotiable choses in action, in their own names, is not exclusive of the jurisdiction of equity to grant relief, save in so far as the jurisdiction is excluded by sec. 2862 (Code of W. Va., ch. 99, sec. 16, makes identically the same provision). The latter excludes equitable jurisdiction only in the case of 'suits upon a bond, note, or writing by an assignee.' So that equity still has jurisdiction of suits by assignees of choses in action, other than bonds, notes or writings, though under sec. 2860, the assignee of any chose in action (whether in writing or not) may maintain an action thereon in his own name."

Code of Va. 1873, ch. 141, sec. 19, providing that equity shall not have jurisdiction of suits on bonds, notes, etc., by the assignee or holder thereof, was not intended to affect the principle that, when the court has once rightly obtained cognizance of the controversy and of the acts of the parties, its power

is effectual for complete relief. Walters v. Bank, 76 Va. 12, 18.

Equity Jurisdiction Still Remains.—The pre-existing right of an assignee of a bond, to demand payment of the same in a court of equity has not been emerged or impaired by the statutory right, since given him, to sue at law in his own name, upon the assignment. The latter remedy is cumulative and additional to the former. Winn v. Bowles, 6 Munf. 25.

Where a case was within the jurisdiction of a court of equity before the statute, and there is nothing in the act expressly excluding the cognizance of that court, it is to be construed as merely cumulative, and to give a concurrent remedy to the court of law. Galt v. Calland, 7 Leigh 600, per TUCKER, J.

Remedy at Law Adequate.—But it is provided by Code of Va., sec. 2862, Code of W. Va., ch. 99, sec. 16, as follows: "A court of equity shall not have jurisdiction of a suit upon a bond, note, or writing, by an assignee or holder thereof, unless it appear that the plaintiff had not an adequate remedy at law."

5. ESTOPPEL.—An assignor, who, by his silence, assurances, or representations, causes another party to take an assignment of a bond, will be equitably estopped from saying that the representations, etc., were false, where the assignee had a right to rely, and did rely on them to his injury. Nicholas v. Austin, 82 Va. 817, 1 S. E. Rep. 182, 5 Va. Law Reg. 115.

Estoppel by Assurances of Payment.—"In cases of assignment it is settled law, that if, before the assignee takes it, he applies to the obligor, informs him of his design to buy, and receives assurances that there is no objection to the bond, and that it will be duly paid, the obligor cannot afterwards set up, against the assignee, the defence of payment or illegal consideration." Per TUCKER, P., in Davis v. Thomas, 5 Leigh 4.

The assignee of a bond, given for a gaming consideration, stands in no better situation than the obligee would have done; but it is otherwise both at law and in equity, if he be induced by assurances of payment from the obligor to become the purchaser of the bond. Buckner v. Smith, 1 Wash. 296; Hoomes v. Smock, 1 Wash. 389.

An endorsee, who purchases a negotiable note, without notice of any equity between the maker and endorser, is not affected by such equity; especially where, before the assignment, the maker gives assurances to the endorsee, that the note will be duly paid. Lomax v. Picot, 2 Rand. 247.

Estoppel by Promises Express or Implied.—Where a debtor expressly or impliedly promises to pay a debt, after notice of the assignment, he is estopped from setting up any defence he had against the assignor. Stebbins v. Bruce, 80 Va. 389; Feazle v. Dillard, 5 Leigh 30.

Estoppel by Silence.—But mere silence will not operate to estop a party from setting up defences. Stebbins v. Bruce, 80 Va. 389.

Gaming Consideration.—"Though, upon a bill in equity by the obligor against the obligee and his assignee, it be fully proved, by evidence unobjectionable on the part of the defendant, that the bond of the plaintiff was given for a gaming consideration, still it is clear that the obligor cannot be discharged from his liability to the assignee, where the evidence satisfactorily shows that neither the assignee nor his agent, previous to the assignment of the bond, had any knowledge of its having been executed for money won at play, and that the agent was induced to purchase it by the plaintiff's assurances that there was no objection to its payment, and that it would be duly paid. Under such circumstances the plaintiff cannot be exonerated from his indebtedness to the innocent assignee, and the only question he can be permitted to make is what is the amount of that indebtedness. Is it the whole sum for which he is bound, or is it the sum paid by the assignee to the assignor for the assignment?" Per BALDWIN, J., and ALLEN, J. Pettit v. Jennings, 2 Rob. 676.

But the assignee of a bond for money won at gaming cannot recover, though the assignment was for valuable consideration, and though he had no notice of the origin of the bond, unless the obligor, before the assignment, induce him to take the bond by promising to pay him the money. Woodson v. Barrett, 2 H. & M. 80.

VI. PLEADING AND PRACTICE.

1. ALLEGATIONS OF PAYMENT—BEFORE NOTICE.—In an action upon an assigned bond the declaration must aver nonpayment by the defendant to the *assignor before notice of the assignment*, and a mere averment of nonpayment, without more, is insufficient, and the defect is not cured by the verdict. Green v. Dulany, 2 Munf. 518.

The assignor and assignee of a bond being made defendants to a bill exhibited by the obligor, for an injunction and for general relief, he alleging that he paid the money to the assignor without notice of the assignment; of that allegation he afterwards disproved, whereupon the injunction is dissolved, and the bill dismissed as to the assignee: the cause ought yet to be retained, and further proceeded in, to give the complainant relief against the assignor. Ruffners v. Barrett, 6 Munf. 207.

In debt on bond, by the administrator of the assignee of the obligee against the administrator of the obligor, the declaration should aver nonpayment by the defendant or his intestate to the assignor, before notice of the assignment, or to the plaintiff's intestate in his lifetime, or to the plaintiff after his death. Mitchell v. Thompson, 2 P. & H. 424.

Plea of Payment.—In debt on an assigned bond, the assignee being plaintiff, if the defendant pleads that he has paid the debt to the plaintiff (without pleading payment to the assignor before notice of the assignment) it is not allowable to give in evidence any set-off against, or payment to the assignor. Hatcher v. Cabell, 6 Rand. 252.

Payment to Whom.—In debt on a bond, in behalf of the survivor of two joint assignees, a declaration, charging that the defendant had not paid the debt to the obligee, or to the plaintiff, without averring, also, that he did not pay it to the other assignee in his lifetime, is bad on general demurrer. Nicholson v. Dixon, 5 Munf. 198.

In an action of debt upon an assigned bond, the declaration ought to charge a failure to pay the money to the obligee, and to each of the assignees, as well as to the plaintiff; and if it only charges a failure to pay the plaintiff, it is too defective to maintain the action, which defect will not be cured by the verdict. Braxton v. Lipscomb, 2 Munf. 283. See also, Norvell v. Hudgins, 4 Munf. 496.

How Question of Payment Ascertained.—Where the debtor is sued by the assignee, it is of course important to him to be satisfied that the plaintiff is in fact the assignee, so that the defendant may be protected against the assignor, on payment of the judgment to the assignee. If the defendant desires to question the validity of the assignment, he may

have a rule issued against the assignor to appear in the suit and avow or disavow the assignment. Clarksons v. Doddridge, 14 Gratt. 42; Triplett v. Goff, 33 Va. 784, 3 S. E. Rep. 525.

2. PROOF OF ASSIGNMENT.—A bill is filed by the assignees, and the answer calls for proof of the assignment which is alleged in the bill. *Held*, it is error to decree for the plaintiffs, without such proof. Tennent v. Pattons, 6 Leigh 196; Corbin v. Emmerson, 10 Leigh 663; Lynchburg Iron Co. v. Tayloe, 79 Va. 675.

But in a bill by an assignee against the obligor and assignor, where the assignment is not questioned by the assignor, no necessity exists for proving it as against the obligor. Mayor v. Carrington, 19 Gratt. 74.

Military Certificate.—The assignment of a military certificate to the plaintiff, ought to be proved, for the property in these papers will not pass by delivery, without assignment. The bare possession is not enough. Johnson v. Pendleton, 5 Call 128; Wilson v. Rucker, 1 Call 500, and Wythe 296, approved and followed.

Proof of Assignment under Statute.—By statute, where the declaration, bill, or other pleading alleges the assignment, proof thereof is dispensed with, unless with the plea, putting it in issue, there be filed an affidavit denying the assignment. Va. Code 1887, ch. 159, sec. 3279; Code of W. Va., ch. 125, sec. 40.

An allegation that the note was "sold and transferred," is not sufficient to dispense with proof of the fact, not being within the statute, which has no application to a transfer of a note by mere delivery, but only to endorsements or assignments in writing. Clason v. Parrish, 93 Va. 24, 24 S. E. Rep. 471, 2 Va. Law Reg. 188, 191, and *note*; Phaup v. Stratton, 9 Gratt. 615. See also, Robinson v. Dix, 18 W. Va. 538; Maxwell v. Burbridge, 44 W. Va. 248, 28 S. E. Rep. 702.

Bond Offered in Discount.—A receipt or assignment of a bond, offered in discount, must be proved at the trial. Without this the avowant could have no pretence to introduce it. Turberville v. Self, 4 Call 180.

Variance.—Declaration on a bond was given to A. and by him assigned to the plaintiff. The bond produced in evidence had had an assignment indorsed to B which was stricken out, except the signature of the obligee, above which was indorsed the assignment to the plaintiff. The court held that there was no variance between the declaration and the bond. Drummond v. Crutcher, 2 Wash. 218.

3. STATUTE OF LIMITATIONS.—One of two assignees, claiming the same judgment, cannot plead the statute of limitations as against the other. Clarke v. Hogeman, 13 W. Va. 718.

Time of Accrual of Action.—Upon a plea by the assignor that the action against him did not accrue within five years, it is found that though the debt originally due from the obligor has been discharged by payments to and set-offs against the assignor, yet the assignee did not know, until after judgment in his suit against the obligor, that nothing was due; and it is also found that five years have not elapsed since the judgment. *Held*, that as part of the debt was discharged by the set-off, it was only the judgment which established the set-off as a payment, and until the judgment was rendered, the action did not accrue against the assignor. Scates v. Wilson, 9 Leigh 473.

4. ACTION OF ASSUMPSIT.—"In an action by the assignee against the assignor, the right of recovery is founded in every case upon the implied contract created by the assignment, and the remedy for the enforcement of the right is the action of assumpsit." Long v. Pence, 93 Va. 568, 25 S. E. Rep. 593; Caton v. Lenox, 5 Rand. 31; Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 880.

Reasons Why Assumpsit Lies.—An assignee may recover against an assignor of nonnegotiable paper, on the common count for money had and received in *indebitatus assumpsit*. "Recovery can be had based on the assignment of a chose in action turning out insolvent, and this is true whether there has been an express or implied undertaking to stand good for it in case of a failure to collect, for the law says that it shall be refunded on the ground that there has been a failure of consideration, and in legal contemplation the money is received for the use of the party who paid it." Hughes v. Frum, 41 W. Va. 445, 23 S. E. Rep. 605. Nichols v. Porter, 2 W. Va. 13, so far as it relates to this feature is overruled by the principal case. Drane v. Scholfield, 6 Leigh 395, opinion of TUCKER, J.; McWilliams v. Smith, 1 Call 125, opinion of ROANE, J. The latter case is pointedly decisive of the question logically, the court saying: "This note with its assignments, was certainly proper evidence on the general count for money had and received." See also, Mackie v. Davis, 2 Wash. 219.

When the Action Will Lie.—The assignee of a promissory note must first sue the maker, before he can resort to the assignor, and until he sues the maker, he cannot recover against the assignor upon the counts in *indebitatus assumpsit* for money had and received, or for money paid, laid out, and advanced, which will lie against the assignor of a bond, and is the proper action, when the proper steps have been taken. Lee v. Love, 1 Call 497; Mackie v. Davis, 2 Wash. 229, 230, opinion of ROANE, J.

Where an assignor endorses his name in blank on a bond for the purpose of enabling the assignee to obtain credit thereon, and buys goods on the faith of his endorsement, he will be liable to the holder thereof, in an action of assumpsit, either as assignor or guarantor of the bonds, where the maker is insolvent. Hopkins v. Richardson, 9 Gratt. 485. See Welsh v. Ebersole, 75 Va. 659, 660, in which STAPLES, J., comments upon the above case.

5. PARTIES—GENERAL RULE.—The general rule is, that where it is necessary to adjudicate the rights of the assignee, the assignor, or if he be dead, his personal representative, must be made a party to the cause. Vance v. Evans, 11 W. Va. 342, 382; Corbin v. Emmerson, 10 Leigh 663; Lynchburg Iron Co. v. Tayloe, 79 Va. 675.

Personal Representative Necessary Party.—The case of Owens v. Riely's Executors, 1 Va. Dec. 136 decided at Staunton, Va., at the September term, 1878, but not reported, is stated as follows, in 1 Barton's Ch. Pr. (2d Ed.) p. 172: "There was a contention between two creditors who had presented their claims for audit before a master commissioner, who was acting under a decree rendered in a general creditors' suit, and in which neither of them was named as a party. The fund was not sufficient to pay all the debts, and the creditor whose debt was not disputed excepted to the commissioner's report auditing the other debt, because that creditor claimed as assignee of another, and yet produced no evidence of the assignment except the mere possession of an unendorsed bond, which was not payable to bearer. The counsel for

both parties agreed in argument that, owing to the difficulty of making the personal representatives of the alleged assignor parties to the suit, the case could properly be tried without their presence. This, however, the court of appeals refused to do, but reversed the cause, and sent it back to the circuit court, with directions that the representatives of the alleged assignor should be made parties to the suit, or else be summoned before the master commissioner."

Assignor of Mortgage.—The assignee of a mortgage may maintain a suit to foreclose, without making his assignor a party, if the legal title has been conveyed to him. Newman v. Chapman, 2 Rand. 93.

Unknown Assignees.—In a bill to set aside a deed as to one and his assigns, and it does not appear that there are any assigns, it is unnecessary to make them parties. Smith v. Cornelius, 41 W. Va. 59, 23 S. E. Rep. 603.

An assignee of an interest in a portion of the purchase money, is the proper party to a bill of specific performance. Davis v. Henry, 4 W. Va. 571.

Parties to a Petition.—Where one files a petition in a pending cause to assert a claim as assignee to a debt reported therein, the assignor must be made a party to the petition and summoned to answer. Daily v. Warren, 80 Va. 517.

Assignment of Whole Interest of Assignor.—If an assignment purports to transfer the whole interest of the assignor, and there is nothing in the pleadings or proof to induce the belief, that it did not really do so, the assignor is not a necessary party to the suit on the claim assigned. Scott v. Ludington, 14 W. Va. 393; Omohundro v. Henson, 26 Gratt. 511; Vance v. Evans, 11 W. Va. 342; Tatum v. Ballard, 94 Va. 375, 26 S. E. Rep. 871; Corbin v. Emmerson, 10 Leigh 663, distinguished in James River & K. Co. v. Littlejohn, 18 Gratt. 53, on the ground that the question of the assignment was not before the court. Daily v. Warren, 80 Va. 517; James v. Burbridge, 33 W. Va. 272, 10 S. E. Rep. 397; Lynchburg Iron Co. v. Tayloe, 79 Va. 674, opinion of LACY, J.

The assignor of a chose in action is not a necessary party to a bill by the assignee to enforce the chose in action against a third party, if the assignment, pleadings, and proof tend to induce the belief that the assignor's whole interest was transferred, and the validity of the assignment was not denied. James River & K. Co. v. Littlejohn, 18 Gratt. 53, 83.

Assignment Absolute and Unconditional.—An assignment being in writing, unconditional and absolute, and the extent and validity of it being neither doubted nor denied, the assignor is not a necessary party. Findley v. Smith, 42 W. Va. 299, 26 S. E. Rep. 371; Chapman v. Railroad Co., 18 W. Va. 184; James v. Burbridge, 33 W. Va. 272, 10 S. E. Rep. 396.

Note Endorsed for Collection.—It was held, in Lynchburg Iron Co. v. Tayloe, 79 Va. 676, that as the note sued on by the alleged assignee in this cause not having been assigned to him by the alleged assignor, but endorsed only for collection, it is necessary to make the said alleged assignor a party to any proceedings having for their object the disposition of the said note.

The assignor and assignee of a judgment may unite as coplaintiffs in a suit in equity to recover a debt. Neely v. Jones, 16 W. Va. 627, 645.

It was held, in List v. Pumphrey, 3 W. Va. 672, that where after a cause is revived, the said administrator *de bonis non* assigns the judgment which is the subject-matter of the suit, to an assignee, and the suit proceeds in the name of the new administrator without the assignee being made a party, still the cause might so proceed until final judgment.

Equity Deals Only with the Real Parties.—It is a well-settled rule that an assignor of a chose in action, though secured by a vendor's lien reserved on real estate, cannot sue in equity for the benefit of his assignee to collect the debt. The reason for the rule is that equity deals only with the real parties in interest, and if they are not before the court no proper decree can be made in the cause. But where the beneficial owner has been made a party to the suit by the cross bill of the respondents, and has filed its answer thereto, a demurrer to the original bill should not be sustained. Hurt v. Miller, 95 Va. 32, 27 S. E. Rep. 831. See also, Penn v. Hearon, 94 Va. 773, 27 S. E. Rep. 599.

VII. EVIDENCE.

1. SCOPE OF SECTION.—Only such matters of evidence will be treated under this section, as do not properly fall under the other general heads.

2. EFFECT OF DEATH OF ONE PARTY.—The evidence of an assignor of choses in action, which contains declarations and conversations with a deceased party, as to the justness of such claims, is incompetent. Code of W. Va. 1868, p. 619, sec. 22; Middleton v. White, 5 W. Va. 572. See also, Ginter v. Breeden, 90 Va. 565, 19 S. E. Rep. 656; Mason v. Wood, 27 Gratt. 783.

One Not a Party to the Bond.—But one not a party to a bond, but who has agreed with the obligor to pay it, and has received from him money for that purpose, is a competent witness to prove payment, though the obligee is dead. Wager v. Barbour, 84 Va. 419, 4 S. E. Rep. 842.

Release Will Not Make Assignor Competent.—When an assignor and assignee of a chose in action are both parties to a suit brought to recover money due upon such chose in action, and the debtor is not living, the assignor is incompetent to testify as a witness in such suit in favor of his assignee. Even though a release is made by the assignee to the assignor, from all and every liability to recourse or otherwise, as assignor of the chose in action, this does not make the assignor a competent witness to testify in favor of his assignee. White v. Heavner, 7 W. Va. 324.

3. POSSESSION AS EVIDENCE OF AN ASSIGNMENT.

Mere Possession Not Evidence of Title.—But where there is no written assignment, the mere possession of the instrument would not be sufficient evidence of title to authorize the debtor to pay to the holder, the principle being that the mere possession of a common-law instrument, in the absence of other circumstances, is not sufficient evidence of title. Brown v. Taylor, 32 Gratt. 135, 5 Va. Law J. 1; Tate v. Tate, 85 Va. 205, 7 S. E. Rep. 352.

It is said, in 1 Barton's Ch. Pr. (2d Ed.) p. 560, that while it is true that the mere possession of a note or bond is not *prima facie* proof that it was assigned, yet the delivery of the instrument by which the debt is secured will amount to an equitable assignment of it if there be proof that it was so intended, at least if there be a valuable consideration therefor. Mr. Barton seriously questions the proposition laid down in Bell v. Moon, 79 Va. 341, that possession of bonds and notes makes a *prima facie* case of ownership. See also, 10 Va. Law J. 450; Morrison v. Grubb, 23 Gratt. 342.

Possession by Personal Representative.—Where the assignment of a bond is made to one who afterwards

becomes personal representative, possession of the bond and production is no evidence of delivery. Lewis v. Mason, 84 Va. 731, 10 S. E. Rep. 529.

Effect of Lapse of Time.—Where time has barred an action for deceit against the obligees of a bond, the assignee is not therefore an incompetent witness for the holder of the bond against the obligors. Fant v. Fant, 17 Gratt. 11.

Remote Assignor Competent Witness.—Where a note, not negotiable, is endorsed by several persons in succession, the last assignee could only sue the maker and his immediate assignor, and not a remote assignor, before the Act of Assembly of 1807, hence, before that act, a remote assignor, might have been a competent witness, to prove that the immediate assignor was discharged, in a suit between him and the last assignee. Caton v. Lenox, 5 Rand. 31.

Guarantee Uncalled for—Assignee Competent.—The assignee of a bond transfers it for value, without assignment, but undertakes verbally to guarantee it, if the transferee calls on him to do so, to enable him to dispose of it. The transferee disposes of the bonds without calling for the guaranty. The assignee is no longer liable on the promise to guarantee, and is therefore not an incompetent witness for the holder against the obligors. Fant v. Fant, 17 Gratt. 11.

Proof of Handwriting of Prior Assignors.—In a suit against the assignor of a bond, the handwriting of the assignors prior to his own, need not be proved upon the trial of the cause, because this action is founded principally on the priority that exists between the assignor and assignee, hence, it will be seen very readily that mesne or intermediate endorsements need not be proved. McWilliams v. Smith, 1 Call 123; Mackie v. Davis, 2 Wash. 219.

Answer of One Assignor as Evidence against Other.—We find it laid down in the books, in the strongest terms, that the answer of one defendant is not evidence against his codefendant, and there is no authority which makes the answer of a vendor or assignor an exception from the general rule, even though the bond assigned be alleged to have been given on a gaming consideration, and this fact cannot be established by the answer of the codefendant (assignor) against the other defendant who is the assignee. Petit v. Jennings, 2 Rob. 676. See, in accord, Hoomes v. Smock, 1 Wash. 389; Dade v. Madison, 5 Leigh 401.

Privileged Communications.—Communications by assignor to attorney of assignee are not privileged when the attorney was acting for his client. Hall v. Rixey, 84 Va. 790, 6 S. E. Rep. 215.

VIII. RECORDATION OF ASSIGNMENTS.

Assignments of Choses Need Not Be Recorded.—Assignments of choses in action, whether general or special, are not required to be recorded, and, hence, such recordation, if made, would not constitute constructive notice to third persons. Gordon v. Rixey, 76 Va. 701; Daily v. Warren, 80 Va. 512; Gregg v. Sloan, 76 Va. 500; Bickle v. Chrisman, 76 Va. 678; Ginter v. Breeden, 90 Va. 570, 19 S. E. Rep. 656; Kirkland v. Brune, 31 Gratt. 126, and *note*; Fleshman v. Hoylman, 27 W. Va. 728; Tingle v. Fisher, 20 W. Va. 497, 511; Renick v. Ludington, 20 W. Va. 511; Bank v. Gettinger, 3 W. Va. 317; Turk v. Skiles, 45 W. Va. 82, 30 S. E. Rep. 236.

The record of a deed of trust, by which bonds are assigned, does not constitute notice to the obligor of the assignment. Terry v. Wooding, 2 P. & H. 178.

Where a lien creditor, who as to a prior unrecorded deed, is a subsequent purchaser for value and without notice, assigns his claim to an assignee, who has notice of the deed, the assignee is as fully protected as the assignor had been. Cox v. Wayt, 26 W. Va. 807.

Meaning of "Goods and Chattels" in Recording Acts.—It seems to be perfectly well settled that the words "goods and chattels," contained in the Virginia and West Virginia recording acts, do not apply to *choses in action*, but only to visible, tangible, movable property. Code of W. Va., ch. 74, sec. 5; Va. Code 1887, sec. 2414; First Nat. Bank of Richmond v. Holland, June 20, 1901, 7 Va. Law Reg. 204; Kirkland v. Brune, 31 Gratt. 126; Turk v. Skiles, 45 W. Va. 82, 30 S. E. Rep. 236; Tingle v. Fisher, 20 W. Va. 498; Fleshman v. Hoylman, 27 W. Va. 728.

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430 ***McCue v. Ralston.**

July Term, 1852, Lewisburg.

Contracts—Specific Execution—Laches—Case at Bar.—A bill for specific execution of a contract between parceners for keeping open a lane through their lands, filed near twenty years after the contract, against a purchaser claiming under one of the parties, without actual notice, and even doubtful constructive notice, the lane having been closed for a number of years, and the plaintiff having stood by without setting up any claim to the lane when the land was twice sold, and having little or no interest in it, dismissed.

William Ralston the elder died about 1810 or 1811, leaving a widow and eight children. By his will he gave to his wife, for her life, his land on Mossy creek in the county of Augusta; and he gave the same land at her death to William, David and Elizabeth Ralston, subject to certain legacies to his other children, with remainder over upon their dying without issue, to his other children. The widow died in 1823.

In 1819 the three devisees entered into a written agreement under seal for a division of the land, by which William Ralston took the land lying on the north side of Mossy creek, and 18¾ acres on the south side, lying along the creek. Elizabeth Ralston took the middle part of the tract adjoining the land of William on the south side of the creek, and bounded in part by the creek. David took the southern part of the tract, which was entirely cut off from the creek. It appears that there was a lane extending from a public road north of William Ralston's house, across Mossy creek, dividing, on the south of the creek, the land of William and Elizabeth Ralston; and, in the agreement of partition, it is provided that "this lane shall be continued as it is."

431 It was further provided that *Elizabeth should give to David a wagon road from a fixed point on the lane to another fixed point on the line between them. And each of them was to give one acre of their land to William Ralston where it might best suit them. This agreement was not recorded; nor did the parties execute deeds of partition.

David and Elizabeth Ralston being un-

married, lived on the land allotted to them, with their mother, and cultivated their shares jointly. William was put into possession of his part at once, and held it separately. In 1828 William Ralston sold and conveyed to David Ralston his land on the south of the creek; and soon after that sale, two or three gates and a pair of drawbars were put up across the lane, and a part of one of the fences along it was taken away. William also put a gate across it on his side of the creek.

David and Elizabeth Ralston desiring to sell their land, and being unmarried and without issue, prevailed upon all but one of their brothers and sisters, including William Ralston, to release to said David and Elizabeth the contingent interest of the brothers and sisters in the land, under the limitation over in the will of their father; and in March 1829 they executed a deed releasing this interest to David and Elizabeth Ralston.

In April 1832, David and Elizabeth Ralston united in a sale and conveyance to Valentine Pence of all the land held by either of them on the south side of Mossy creek; and it was recited that they "do convey the same right mentioned in an article of agreement between William Ralston, David Ralston and Elizabeth Ralston, to the said Pence, of an open way through William Ralston's lands (where the lane formerly went), to the public road leading from Miller's iron works to the North river gap." In May 1836, the executors of Pence, under a power in his will, sold and conveyed the land to James A. McCue; and in their deed they convey "the right of an
432 open way through *the lands of William Ralston, where a lane formerly went, to the public road leading from Miller's iron works to the North river gap, which said right of an open way as aforesaid was reserved in the division between the heirs of William Ralston deceased, hereinbefore referred to."

In April 1839 William Ralston filed his bill in the Circuit court of Augusta county against James A. McCue, David and Elizabeth Ralston and Pence's executors, in which he set out the agreement of 1819. He charged that possession had been taken and held according to the agreement; that both Valentine Pence and McCue had had full knowledge of its existence; and that after McCue purchased the land, the lane had been closed. The prayer of the bill was, that the agreement might be specifically executed; that the two acres of land might be conveyed to him, and the lane reopened as it was in 1819.

McCue, in his answer, contended that the lane was not a public highway, but was merely intended for the convenience of the parties to get their stock to water at Mossy creek, and an outlet for the parties to get to the public road which passed immediately by the house of the plaintiff. That it was a lane in which David Ralston was principally interested, as his land was cut off from the creek. Elizabeth had less interest in it, as her lands were bounded on the north by the creek. That the plaintiff has some interest in it whilst he owned the 18¾ acres of land on the south of the creek, to pass from his land on one side of the creek to his land on the other side; but that after his sale of this land he had no interest in the lane. That David having purchased the land in 1828, and David and Elizabeth cultivating their lands jointly, they ceased to have any interest in the lane south of the creek, except for a passway to the road on the north, which passed near the plaintiff's house and through
433 *his land; and consequently immediately after that purchase by David, the lane on the south side of the creek was closed, and a gate substituted to pass to the north side and to the public road; and the plaintiff closed the lane on the north side of the creek, leaving a pair of bars to enable those on the south side and his own family to get into the public road. He insisted further, that the plaintiff had sold his land to David Ralston without any reservation of his right to the lane, and had united in the deed releasing to David and Elizabeth his contingent interest in the land held by them; and had stood by and permitted the land to be sold to Pence, and by Pence's executors to the defendant McCue, without giving them any notice of his claim to the lane or the two acres of land; and he averred that he had no notice of the claim, and he believed that Pence had none. And he alleged that before he purchased he applied to the plaintiff for the agreement of 1819, but plaintiff failed to produce it, alleging that it was lost or mislaid. And he relied upon the lapse of time and the acquiescence of the plaintiff as barring his claim.

Without detailing all the proceedings in the cause, it is sufficient to state that in the opinion of this court the evidence showed that the plaintiff, after the sale of his land on the south side of Mossy creek, had little or no interest in having the lane kept open. A number of witnesses living near to the plaintiff had never heard of the agreement for the lane; and although it had been obstructed by several gates and one pair of drawbars, and a part of the lane fence had been taken away soon after the purchase of the 18¾ acres by David Ralston, no objection or complaint had been made by the plaintiff until after McCue purchased the land. Of the plaintiff's claim to the two acres of land, no person in the neighborhood seems to have had any knowledge of it until about the same
434 period. It was *admitted, however, by McCue, that he had not paid the whole of the purchase money; and such also was the fact as to Pence.

The cause came on to be finally heard in July 1849, when the court decreed a specific performance of the contract as to the lane and the two acres of land, directing that McCue should remove the obstructions he had placed in the lane, and that the same should be opened to the full extent that it

was at the time of the agreement of 1819, and was subsequently enjoyed under that agreement. And that the plaintiff should open that part of the lane running through his land on the north side of the creek. And a commissioner was directed to go upon the land and to lay down the lane according to directions given in the decree; and also to lay off the two acres of land as might best suit McCue; and to report his proceedings to the court in order to a final decree. And thereupon McCue applied to this court for an appeal, which was allowed.

Michie, for the appellant.
Fultz, for the appellee.

SAMUELS, J. The contract between William Ralston, Elizabeth Ralston and David Ralston, of the date June 3d, 1819, is vague and indefinite in regard to the subjects involved in this suit. It seems from the plat of the land as divided by that contract, that the way provided thereby was intended for the benefit of Elizabeth Ralston in a small degree, and that it was highly important, if not indispensably necessary, to the enjoyment of David Ralston's portion of the land. William Ralston however, could fully enjoy the land assigned him in the partition without this way, and his interest therein, if any, must have been very small. In regard to the acre of land which Elizabeth and David respectively were to convey to William, the selec-
435 tion *was left to Elizabeth and David; and as they might locate those acres detached from each other and in remote and inconvenient places, as McCue afterwards did, it is difficult to perceive what substantial interest of William Ralston could be promoted by a specific performance of the agreement in regard thereto. Thus the case stood between the parties to the original agreement. But the relations of those parties and the condition of the property itself have been since changed, and other parties have acquired an interest in the subject. William Ralston united in the deed of March 8th, 1829, conveying thereby all his interest in the two-thirds of the land held by them, of which the two acres in question formed a part. He made no reservation of those two acres nor of the way, but united in the deed for the purpose of enabling David and Elizabeth to sell and convey. He also sold and conveyed to David Ralston the 18 acres 3 roods and 28 poles of land lying south of the creek, to which part only of all his land the way could be of any advantage. He stood quietly looking on when the sale was made to Pence, giving no notice of the equitable claims now asserted. After all this, at the end of nearly twenty years from the date of the original contract, and at the end of nearly sixteen years after his reversionary estate had vested in possession, he filed his bill for specific execution of the contract in regard to the two acres of land and in regard to the way; and this too against McCue, a purchaser, having no actual notice, who had purchased of Pence's executor, whose testator had also purchased without actual notice. Against each of these purchasers complainant makes out a doubtful case of constructive notice.

On consideration of the whole case, I am of opinion that complainant's claim is too old and stale to be enforced by a court of equity; that in the beginning he had too little interest in the subjects now in
436 controversy *to call for the interposition of such court; that the change in the relations of the parties owning the land, and in the condition and title of the land itself, make it improper to grant the relief prayed; that the deed of March 8th, 1829, passed any claim complainant may have had to the two acres of land; that the alleged right of way was at first of little or no value to complainant, and having parted with the land to which the way is said to have given value, and having allowed the way to be obstructed or closed for years, it must be held that this right of way, if not entirely lost, has become a mere personal right. The general principles governing courts of equity in regard to specific performance of contracts may be found in the cases. Anthony v. Leftwitch, 3 Rand. 238; Pigg v. Corder, 12 Leigh 69; Bryan v. Loftus' adm'r, 1 Rob. R. 12.

I am of opinion to reverse the decree and dismiss the bill, giving the appellant a decree for the costs in both courts, but without prejudice to the right of the appellee to the way in the proceedings mentioned, if he have any such right which may be asserted in a court of common law jurisdiction.

The other judges concurred in the opinion of Samuels, J.

Decree reversed and bill dismissed.

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437 *Peale v. Hickle & Others.

July Term, 1852, Lewisburg.

(Absent MONCURE, J.)

Executors and Administrators—Settlement—Balance in Hands of Administrator—Interest*—Case at Bar.—P died in 1818, leaving a widow and eight children, all of them minors except the eldest, a son who qualified as administrator. He settled his administration account in 1826, when there was in his hands of the personal estate $4179, principal and interest. The real estate was a small one, and all the family lived together, the administrator man-

*Executors and Administrators—Settlement of Accounts.—In Leach v. Buckner, 19 W. Va. 45, it is said: "The principle is well settled, that the *ex parte* settlement of a fiduciary is only *prima facie* correct, and parties interested may file a bill to surcharge and falsify the account so settled. Anderson v. Fox, 2 H. & M. 261; Preston v. Gressom, 4 Munf. 110; Newton v. Poole, 12 Leigh 112; *Peale v. Hickle, 9 Gratt. 437*; Corbin v. Mills, 19 Gratt. 438; Shugart v. Thompson, 10 Leigh 434; McGuire v. Wright, 18 W. Va. 507." See, in accord, citing the principal case, Seabright v. Seabright, 28 W. Va. 435, 438.

See generally, monographic *note* on "Executors and Administrators."

aging the estate, selling the crops and paying the expenses of the family, including the education of the children, out of the profits of the estate or his own means, with the aid of their labor. This was continued until 1846. HELD: Under all the circumstances of the case, the administrator should not be charged interest upon the balance in his hands ascertained by the settlement in 1826, until the breaking up of the family in 1846; and he should be charged interest upon the whole amount, principal and interest, from that time.

This was a suit instituted in the Circuit court of Rockingham county, by George Hickle and Harriet his wife, who was Harriet Peale, and four others, children of Bernard Peale deceased, against Catharine Peale the widow, and Jonathan Peale administrator, and two other children of Bernard Peale. The bill charged, that Bernard Peale departed this life intestate in December 1818, leaving a widow and eight children; that he was seized at the time of his death of a valuable tract of land in the county of Rockingham, containing about one hundred acres, adjoining upon which there was a valuable tan-yard, and near it about fifty acres of wood land; and he was possessed of a considerable personal estate, the precise amount of which the plaintiffs had never been able to ascertain: That the widow Catharine and Jonathan Peale had qualified as administratrix 438 and administrator of the *estate; and that the latter was the acting administrator, and took possession of the whole assets for the estate: That he caused an inventory and appraisement to be returned, the property in which was valued at about 4500 dollars: That there was a large amount of debts due said estate, no part of which appears in the inventory: That at the January court for 1825, an order was made on the motion of the administrator for the settlement of his accounts; and in the month of April 1827 the settlement was made and admitted to record, exhibiting a balance due the estate of 4179 dollars 4¼ cents: That this settlement was wholly ex parte, and is the only settlement made by the administrator: That Jonathan Peale was the only child of age at the death of their father; and having learned the business of tanning, took possession of the tan-yard, and had received the profits arising from it ever since: That he also took upon himself the management of the farm; that the widow and all the children, including Jonathan, continued to reside in the mansion-house, and by great industry and economy she was enabled, with the profits of the farm, to raise and educate her children, leaving said Jonathan in the exclusive enjoyment of the profits of the tan-yard: That they continued to live in this way for ten or eleven years, when Jonathan having become a man of family, the widow Catharine employed her distributive share of the personal estate in building a house on the farm to which she and her children removed, leaving Jonathan and his family in the exclusive possession of the mansion-house and tan-yard, while he continued to manage the farm on behalf of the said Catharine and the other children: That as the children arrived at age or married, application was made by them to said Jonathan for their share of the personal estate; and although the settlement made by himself showed they were each entitled to about 350 dollars, he refused 439 *to pay more than 250 dollars, and settled with two or three of them at that sum: That he had subsequently purchased the interest of the heirs in the tan-yard property at the reduced price of 100 dollars a share.

The bill further charges that the tan-yard was worth an annual rent of 100 dollars from the death of Bernard Peale to the time of its purchase by Jonathan Peale: That the chief products of the farm had been received by Jonathan, he supplying the said Catharine with the substantials of life, which, all things considered, would not perhaps exceed in amount the value of her dower interest in the real estate, no dower having been regularly assigned to her.

The bill further states, that no vouchers were returned with the account returned to the County court, and in their absence the plaintiffs cannot say whether or not said settlement is correct; they ask that the administrator may be required to produce them, and if any errors shall appear, that they may have leave to surcharge and falsify them: That they are advised that a commission of five per cent. had been improperly allowed the administrator; that he had not settled his account as the law directs, and is not entitled to any compensation: That it will be seen from said settlement that a large sum has been applied to pay debts due from the intestate as a security for D. Ragan, a deputy sheriff: That the plaintiffs have been informed, perhaps incorrectly, that the bond upon which said liability arose, is not legally binding upon Bernard Peale's estate; and they therefore call upon the administrator to furnish information on the subject, to produce said bond if in his possession, or if not in his possession, to cause it to be produced, that its validity may be tested. And making Jonathan Peale in his own right and as administrator of Bernard Peale, Catharine Peale, widow of said 440 Bernard, and the other *children, who are not plaintiffs, parties defendants to the bill, they pray for a settlement of Jonathan Peale's account of administration upon the estate of Bernard Peale; and also that he be required to render an account of the rents and profits of the tan-yard for the time he has occupied it; and that commissioners be appointed to assign the widow her dower in the real estate, and to divide the remainder among the children; and for general relief.

Jonathan Peale answered the bill. He admits the property of which Bernard Peale died possessed, as stated in the bill, except as to its value; that there were debts due the estate not stated in the inventory, but

says they were all embraced in the settlement made; says that after the stock in the tan-yard was sold, he took possession of the tan-yard, and conducted it for his own benefit, except as is afterwards stated; and that so conducting it, he kept no account of the profits. He admits that they all lived together, until his mother built the house on the farm: That the house was built in part by means of her interest in the personal estate, that interest having been reduced however, by the amount that she had retained at the appraised price, which was 455 dollars 90 cents; that the house and outhouses cost about 1600 dollars, and the balance, after applying her said interest, he paid himself.

He says that the personal estate, as shown by the account settled, amounted in 1826, to 4179 dollars 4¾ cents. That the farm, at his father's death, was not worth more than 1666 dollars 66 cents, the sum he gave for it in payments, when land bore a higher price than it then did. That the tan-yard lots were not worth more in his opinion than 800 dollars, and he had never heard them estimated at more than 1000 dollars; the wood land was worth 150 dollars, and there were two slaves who were appraised at 350 dollars. These were
441 *all the means for the support of his mother and eight children, all younger than the defendant, who was twenty-one years old in January 1818. That in his opinion the farm would not have rented for more than 60 or 70 dollars a year, the tan-yard lots and improvements thereon for about 50 dollars, the slaves for 30 dollars per year, and the wood land for little or nothing; but that it was his father's express desire on his death bed, that the family should be kept together; a wish which the defendant felt every desire to carry into effect. He knew full well that the interest of his mother and the children was not of itself sufficient to support and educate them, but he believed that they could aid towards that end, and he determined that whatever deficiency arose should be supplied by himself, and for that purpose he carried on the tan-yard exclusively for himself, taking therefrom from time to time, whatever was required for the wants of the family; and at his mother's request, he managed the farm and applied the proceeds to the support of the family. That he either from the proceeds of the farm or out of his own means, aided by their industry and economy, provided for the support of the family, paid all their bills at the stores, educated them, and furnished and maintained them as respectably as other young ladies in the neighborhood; and in this way paid them at least 10 per cent. and perhaps more, on their interest in the estate. He insisted that he was properly allowed commissions, as the account was settled under an order of the court and returned to court within six months after the expiration of the two years required by the law; and moreover, that it was then too late to raise the question, as fully ten years had elapsed since the youngest of the children attained the age of twenty-one; and he relied upon the statute of limitations to protect him against all attempts to set aside that settlement. He stated that
442 the dower of *his mother had been laid off and assigned to her by commissioners appointed by the County court, and their report had been approved by the court; and he insisted it ought not now to be disturbed. That as to the money paid for Ragan, he had been sued and employed counsel and made efforts to defend the case, but it was in vain, and judgments were rendered against him: And he stated two or three small debts due to the estate which had not been introduced into the settlement of the account in 1827, and also some payments which he had subsequently made. And he insisted that in 1840, an agreement had been made between the plaintiffs and himself, whereby they were each to receive, when they ceased to be supported as herein before stated, the sum of 250 dollars for their interest in the personal estate; that being about the amount of the principal due to them according to the settled account; the rents and interest going to their support. And that he was always ready and willing to pay this amount to each of them who had not received it.

A large mass of testimony was taken in the cause, having relation chiefly to the manner in which the family were sustained. It is reviewed by the judge who delivered his opinion in the cause, and need not be further stated.

Under an order of the court made in 1849, a report of the administration of Jonathan Peale upon the estate of Bernard Peale, was made by a commissioner, from which it appeared that there was due from the administrator on the 1st day of July 1826, the sum of 3012 dollars 1¼ cents of principal, and 1194 dollars 52 cents of interest, equal to 4206 dollars 53¼ cents. To this report there were no exceptions, but the commissioner submitted to the court the question whether the administrator should pay the interest. He also made three special statements at the instance of the administrator.

443 *The cause came on to be heard in October 1850, when the court held that Jonathan Peale, the administrator, should account for the sum of 4206 dollars 53¼ cents, with interest on the principal from the 1st day of July 1826; and holding that the widow's thirds and the share of three of the children had been paid, he gave a decree in favor of four of the plaintiffs, each for the sum of 350 dollars 54 cents, with interest on 251 dollars, a part thereof, from the 1st day of July 1826, until paid. And commissioners were appointed to divide the land, except the tan-yard property, which had been purchased by Jonathan Peale, amongst the eight children. From this decree Jonathan Peale applied to this court for an appeal, which was allowed.

Price, for the appellant.
Fultz, for the appellee.

LEE, J. The first and sixth errors which are assigned in this case, are that the suit was brought against Catharine Peale in her character of widow and relict of Bernard Peale, and not as administratrix, and that the decree of the court is several against the appellant, whereas it should have been against him and the said Catharine, jointly. The bill it is true, in naming the parties prayed to be made defendants in the cause, does not specially designate her as administratrix, and in that capacity as well as in that of widow, ask that she be made a party; but it does allege that she and the appellant qualified as administratrix and administrator. The whole assets of the estate came to the hands of the appellant, and he exercised exclusive control over them and disposed of them without interference on the part of the administratrix. It is not pretended that the latter received any part, or that she is liable as for any received and disbursed by her. It is true that having united in the administration bond
444 *with the appellant, she would under the decisions of this court in the cases of Morrow's adm'r v. Peyton's adm'r, 8 Leigh 54, and Boyd's ex'ors v. Boyd's heirs, 3 Gratt. 113, be liable as security for the said appellant for any assets received and disposed of by him; yet if the distributees were content to take a decree against him alone for the amounts respectively due them and for which he was liable primarily as principal, surely it is not for him to complain that the decree was surrendered. If Mrs. Peale had been dead, it would not have been necessary to make her representative a party; Wills' adm'r v. Dunn's adm'r, 5 Gratt. 384; nor does it seem to be error to omit her as such, though living, under the circumstances of this case.

Another objection taken by the appellant is, that the decree was rendered without regard to the payments proved to have been made by him to the appellees at different times, and which are thus disallowed by the court. The evidence in relation to such supposed payments is extremely vague and uncertain. Small amounts appear to have been occasionally advanced by the appellant to his sisters or some of them, but they would appear to have been in the nature of gratuities, or it may be were intended as an acknowledgment of and compensation for sewing and other services, which appear to have been cheerfully rendered by them to their brother and his family. It can scarcely be considered that they were intended by the appellant at the times they were made, as payments on account of the distributive shares due them of their father's estate. He produced no account of any such payments before the commissioner, and it is to be presumed that he kept none, evidently not regarding them himself as matters to be remembered or set up when he came to pay over to his sisters their shares of the estate. The amounts proved
445 are inconsiderable and *very imperfectly ascertained, and the appellant took no exception to the commissioner's report in which the amount for which he was liable according to his mode of stating the account was determined, without allowing him credit for any such payments. Upon the whole, I think that the court was right in disregarding them, and that they were properly disallowed.

An ex parte settlement made by an administrator of his account as such with the court by which he was appointed, though not final or conclusive, is yet prima facie evidence of its correctness till the contrary is shown. It forms no barrier to a bill in equity specifying errors, whether of law or of fact, and impugning the settlement upon that ground. The parties interested may surcharge such a settled account by specifying items for which credit should be given, but which are omitted, or may falsify by pointing out charges improperly made. It is impossible for the administrator, under general charges not specifying errors, to defend himself properly, if the plaintiff may come at the hearing with proof of those errors of which the defendant has before heard nothing. And not only the duty of specifying errors, but also the onus probandi, devolves on the party complaining. The court will take it as a stated account and establish it, unless errors be alleged and proven. 1 Madd. Ch. 103; Stoughton v. Lynch, 2 John. Ch. R. 209; Nimmo's ex'ors v. Commonwealth, 4 Hen. & Munf. 57; Atwell's adm'r v. Milton, Id. 253; Newton v. Poole, 12 Leigh 112. And if no evidence be exhibited to surcharge or falsify the account, and nothing improper in it is disclosed by the answer, the court will not refer the case, but the bill will be dismissed. Wyllie v. Venable's ex'or, 4 Munf. 369. And it would seem that where specific charges are made, the enquiry will not be opened beyond the special matter charged, though the bill may contain a general charge
446 and a prayer for a *full account. Consequa v. Fanning, 3 John. Ch. R. 587; S. C., 17 John. R. 511. In this case the bill called for the production of the sale bills and vouchers on which the settlement was made, and asked leave to surcharge and falsify, if errors should appear upon their production; but the only items complained of in the account as it appeared, and which were specified, are the allowance of a commission of five per centum to the appellant, upon the ground, as alleged, that not having made the settlement within the time prescribed by law, he was not entitled to any compensation; and the payments made on account of the liability of the decedent as security for one Ragan, a deputy sheriff; the bill alleging that the complainants had been informed, perhaps incorrectly, that the bond on which said liability was founded was not binding upon the estate, and calling upon the appellant to furnish information upon the subject. With regard to the complaint that the commission had been improperly allowed, there seems to have been no foundation for it whatever. The act of the 16th of February 1825 (Supp. Rev. Code

1819, p. 215), provided (§ 8, p. 217), that it should be the duty of every executor or administrator theretofore appointed to apply to the court to appoint commissioners for the purpose of stating and settling his accounts within two years from the commencement of the act, and also to cause his accounts to be so settled within six months after such order should be procured, on pain of forfeiting all right to commission or compensation for administering so much of the estate as should not have been settled agreeably to the provisions of that act. By the 12th section, the act of the 19th of February 1823 was repealed, and the law declared thenceforth to be as if that act had never passed. It appears that Bernard Peale died and the administrators qualified in 1818, and the settlement was returned to the court and ordered
447 *to be recorded at the April term 1827; so that it was made within the time prescribed by the act.

With regard to the other supposed error in the account, the allowance of the payments made on account of the liability of the estate for Ragan, the deputy sheriff, it was not directly charged as such, and the bill alleged that the information on which it was suggested might be incorrect, and called on the appellant to give the proper information in regard to it. He did so in his answer, stated that he made the proper defence, but the court had decided against the estate, and what he had paid he was compelled to pay under the adjudication of the court; and there was no evidence upon which to question the correctness of his answer upon this subject. I think, therefore, that the order of reference made on the 15th of May 1849 was perhaps too broad in giving the complainants the right to surcharge and falsify generally the settlement of July 1826 before the commissioner, and that the settlement and account which he was directed to make should have been restricted to the correction of any errors apparent on the face of the former settlement, and the bringing into the account the matters which were admitted in the appellant's answer not to be embraced in it. But this is not material, because the commissioner, to whom the case was referred by the court, has not exceeded the limits within which, as I think, the power of correcting the settlement of 1826 might be properly exercised; and has, by his mode of stating the account, ascertained an amount to be due the estate from the appellant, not varying much from that of the commissioner of the County court, in the settlement of July 1826; and to this report no exception whatever has been taken. I think, therefore, the balance ascertained to be due on the 1st July 1826 by commissioner Tams, was properly adopted by the court as the basis of the decree which it pronounced.

448 *It is contended by the appellant, however, that the matter in controversy between himself and the complainants was adjusted by an agreement made in 1840, that each would receive the sum of 250 dollars in full of her distributive share when she left the family; and he relies upon the deposition of Samuel Newman as fully establishing this agreement. It appears, however, that Newman was the security in the administration bond; for although that bond is not exhibited, nor the fact of his suretyship directly proven, yet when an exception is taken to his testimony, and that reason assigned, a formal response is filed to the exception by the appellant's counsel, in which the fact of such suretyship is not denied or questioned; but a reason suggested why he was not thereby disqualified as a witness. So that it must be taken as admitted that he was in fact such surety, and his testimony is excepted to as that of a witness interested and incompetent. It is answered, however, that the settlement was made in 1826, and that Evelyn, the youngest child, became of age in 1837, and thus that more than ten years had elapsed since the cause of action had accrued, and since the youngest child became of age, and therefore that Newman would be protected by the statute of limitations against any liability on the administration bond, and is therefore no longer interested, and his competency as a witness is restored. I do not deem it necessary, however, to stop to consider this point, because I do not regard the testimony of this witness as satisfactorily establishing such an agreement as that contended for. It is vague and indefinite, proving rather a conversation and discussion in relation to the matter, than any formal or positive agreement, and one of the appellees, Mrs. Hickle, the witness himself states, was not present, though he understood she was either in the house or expected there; and, indeed, there is no sufficient consideration shown
449 *for such an agreement, had it been more clearly shown, to make it binding upon the appellees. I dismiss it, therefore, without further consideration.

The last question to be considered is that of the allowance of interest on the distributive shares, and from what time. It appears very manifest that the family remained, and were kept together after the death of Bernard Peale, by the mutual understanding and consent of all the children as soon as they successively became old enough to take thought on the subject, and for the common benefit and advantage of all, in conformity to the wish to that effect expressed by the father in his last illness. The appellant being the oldest son, and perhaps the only child that was of age at the death of the father, naturally became the head of the family, subject to the advisory influences of the mother, and he seems to have stood in loco parentis towards his sisters as long as they remained united and in harmony. Under his care and good management an estate of inconsiderable value was made to yield ample means for the comfortable support of quite a large family. The sisters were most carefully tended, raised and educated through his

kind and generous provision for them, doubtless aided by the affectionate care of their excellent mother. They appear to have been denied nothing that was necessary for their health, comfort and happiness, and nothing that was required by their associations or the customs of the highly respectable circle in which they moved. Ample provision was made for their wardrobe, and that it should be such as was proper and becoming. Unlimited credit was given them upon the appellant's account at the stores in which he dealt, and the accounts were paid without any objection being made to their amount; and presents were made them from time to time by their brother, in articles useful or agreeable to them. Ample provision was made to enable them to
450 *visit their friends and acquaintances at pleasure, and to receive and entertain their company in a hospitable and becoming manner. All this was done, or very nearly so, out of the products of the industry, skill and judicious management of the appellant; for their mother had very little means to spare to be applied to their support. Indeed, it would seem that her share of the personal estate of her husband must have been mainly expended in the construction of the house which she built, or at least a large portion thereof was so applied. It is undoubtedly true, as showing evidence in the cause, the appellant's sisters were very meritorious girls, economical, thrifty and industrious, and that while he was discharging the duties of a good brother towards them, and supplying the place of their deceased father to the full measure of his ability, they, on their part were by no means remiss in the performance of all the kind offices, and rendering all the services due from them as affectionate sisters and members of one family. They no doubt did good service, and gave their brother and his family much necessary and valuable aid in the economical arrangements of the household. But it can hardly be thought that six girls could be at the same time usefully or profitably employed in a family not larger than that of the appellant, and most or much of their time was no doubt spent in work for their own use, or to gratify their own fancy and taste. It is very clear they never stood on the footing of hired girls, but were in all respects treated as cherished members of the family, with all the rights and privileges as such, and with all the comforts which they probably would have enjoyed if their father had lived.

After a careful perusal of the testimony in the case, voluminous as it is and embracing somewhat conflicting opinions and varying estimates of different witnesses, I cannot resist the conclusion that,
451 considering *the manner in which the sisters were raised, educated and maintained by their brother, it cannot be an unreasonable pretension on his part to claim that he should be allowed the modicum of interest on their shares of the personal estate, and their portion of the rent of the farm and tan-yard, and the hire of the two slaves over and above the services rendered by them in the family, whilst they remained with and were supported by him; and that during that period, he ought not to be charged with interest upon their distributive shares of the personal estate.

I am of opinion therefore that the court erred in giving interest on the distributive shares of the appellees from the date of the settlement in July 1826, but that each share (without discriminating between principal and interest) should bear interest from the time at which the appellee ceased to remain with and to be supported by the appellant, which, as well as I can determine from the record, was about the 1st of July 1846; and that therefore the decree of the Circuit court should be reversed with costs to the appellant, and a decree now entered in favor of each of the four appellees, Hickle and wife, Amanda M., Caroline and Evelyn B. Peale, for the sum of 350 dollars 54 cents, with interest thereon from the 1st day of July 1846, till paid; and that the cause should be remanded to the Circuit court to dispose of the question of costs reserved by that court, and also the report of the commissioners appointed to assign the widow's dower and divide the real property among the heirs.

The other judges concurred in the opinion of Lee, J.

The decree was as follows:

The court is of opinion that the Circuit curt erred in giving interest upon the distributive shares due the appellees, George Hickle and wife, Caroline Peale,
452 *Amanda M. Peale and Evelyn B. Peale, from the appellant, as administrator of the estate of Bernard Peale, from the 1st of July 1826, the time of the settlement by the appellant of his account as such administrator as aforesaid, with the commissioner appointed by the County court of Rockingham for that purpose; and that in lieu thereof, it should have allowed interest on the gross amount of each distributive share, (without discriminating between principal and interest,) from the time at which the said appellees ceased to reside with and to be supported by the appellant, which time may be assumed to be the 1st of July 1846.

Therefore it is adjudged, ordered and decreed, that the said decree be reversed and annulled so far as it relates to the amounts required to be paid by the appellant to the appellees, Hickle and wife, Caroline, Amanda M. and Evelyn B. Peale, with interest thereon as aforesaid, and that the said appellees do pay unto the appellant his costs by him in the prosecution of his appeal in this court expended. And this court, proceeding to pronounce such decree touching the matter aforesaid as the said Circuit court ought to have rendered, it is adjudged and ordered that the appellant do pay to the appellees, Hickle

and wife, the sum of 350 dollars 54 cents, with legal interest thereon, from the 1st day of July 1846 till paid; that said appellant do pay to the appellee, Caroline Peale, the sum of 350 dollars 54 cents, with legal interest thereon, from the 1st day of July 1846 till paid; that the appellant do pay to the appellee, Amanda M. Peale, the sum of 350 dollars 54 cents, with legal interest thereon, from the 1st day of July 1846 till paid, and that the appellant do pay to the appellee, Evelyn B. Peale, the sum of 350 dollars 54 cents, with legal interest thereon, from the 1st day of July 1846 till paid.

And it is further adjudged and or-
453 dered that in all other things *the said decree be affirmed. And this cause is remanded to the said Circuit court, that it may dispose of the question of costs reserved by it until the final decision of the cause in the said Circuit court, and for such action as may be necessary and proper in the premises growing out of so much of said decree as relates to the assignment of dower to the widow, and the partition of the real estate of the said Bernard Peale among his heirs at law, and for further proceedings therein to be had. Which is ordered to be certified to the said Circuit court.

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454 *Niday v. Harvey & Co. & als.

July Term, 1852, Lewisburg.

(Absent ALLEN* and SAMUELS, Js.)

1. **Res Judicata†—Claim Made in Answer Having No Connection with Relief Sought—Does Not Conclude the Question When Set Up in Cross Bill.**—A claim is made in the defendant's answer, but has no connection with the relief sought in the bill, and is not necessary to be decided in deciding upon the case so made in the bill. Though the court in its decree expresses an opinion in favor of the defendant, this decree does not conclude the question when it is afterwards set up by the defendant by a cross bill in the cause.

2. **Partnerships—Bond Given for Simple Debt by One Partner after Dissolution‡—Release of Other Partner.**—Whether a bond and deed of trust to secure it, given by a partner after the dissolution of the partnership, for a simple contract debt of the partnership, releases the other partner in equity, depends upon the intention of the parties in giving and taking them; and this intention may be ascertained from the attendant circumstances.

3. **Depositions—Failure of Justice of Peace to Forward to Clerk—Effect.**—A justice of the peace having failed to forward a deposition taken by him to the clerk of the court in which the cause is pending, and the cause having been heard and decided without it, is no ground for a bill of review.

David Niday, in November 1835, exhibited his bill in the Circuit Superior court of law and chancery for the county of Botetourt, against John M. Harvey & Co., George W. Wilson, trustee, and others, praying an injunction to the sale of real and personal property which had been conveyed by John Wood, one of the defendants, to Wilson in trust to secure a debt due from him to Harvey & Co., and which property was then advertised by the trustee for sale. An injunction was granted; but Harvey & Co. and their trustee disregarding it, made sale of the property. Niday then filed a supplemental bill to have said sale set aside. The pleadings and proofs make the following case:

455 *In the fall of 1833 John Wood purchased a tract of land from James Wiley, paid part of the purchase money and took his bond for the title. Upon this tract of land he afterwards erected a furnace. Subsequently Niday entered into partnership with him upon the following terms: To advance 700 dollars and pay one-half the expense of conducting the business, in consideration whereof he was to have half the property and to receive one-half the profits.

The partnership was dissolved in August 1834, upon the following terms: Wood was to take all the partnership property and pay all the debts, and refund to Niday the advances which had been made by him, amounting to 1091 dollars 46 cents. To secure the performance of these conditions on his part, he assigned to Niday the title bond of James Wiley, and executed a deed conveying to Andrew Taylor in trust certain personal property for the purposes aforesaid.

On the 4th day of October 1834, subsequent to the transactions just mentioned, Wood conveyed his lands and a quantity of personal property to Wilson, in trust to secure a debt of 2485 dollars 5 cents due from him to Harvey & Co., also an account which Wood was to have with them for goods, wares and merchandise which they agreed to furnish him for twelve months then to come. And upon his failure to pay the said bond with interest from the date of the deed within twelve months, and all that may be due them upon the running accounts at the expiration of that period, the trustee is authorized to sell. This deed embraces the personal property which had been conveyed as aforesaid to Andrew Taylor, and the tract of land, the title bond for which had been previously assigned to Niday; and it was to enjoin the sale which had been advertised under this deed that

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*JUDGE ALLEN had made a decree in the cause in the court below

†**Res Judicata.**—Upon this question the principal case is cited and followed in Tarter v. Wilson, 95 Va. 24, 27 S. E. Rep. 818. See also, Fishburne v. Ferguson, 85 Va. 321, 7 S. E. Rep. 361; Blackwell v. Bragg, 78 Va. 529.

‡**Partnerships—Bond Given for Simple Debt by One Partner after Dissolution—Effect as to the Partner.**—In the principal case it is held that, whether a bond given by one partner after dissolution, for a simple contract debt of the partnership, releases the other partner in equity, depends upon the intention of the parties. See, citing the principal case, Karn v. Blackford, 1 Va. Dec. 845; McArthur v. Chase, 13 Gratt. 704; Meade v. Grigsby, 26 Gratt. 616, and *note*; *foot-note* to Steptoe v. Pollard, 30 Gratt. 689.

he applied for and obtained an injunction, as before mentioned.

456 *The bill sets forth several grounds upon which he prayed the injunction. It will only be necessary to mention the following:

First. That there was a large balance of the purchase money for the land which had been advertised to be sold, due the vendor James Wiley, the amount of which had not been precisely ascertained, and that it was important that the amount should be ascertained before the land was exposed to sale.

Secondly. That a claim had been set up by one Caleb Hank to a part of the land, adversely to Wood, which had thrown a cloud over the title, which it was necessary should be removed before the sale was made: And the said Wiley and Hank were made parties defendants. The bill was filed also for another purpose, to wit:

To assert Niday's right to a preference over Harvey & Co. to satisfaction out of the property. He alleges that he had paid debts of the firm which Wood, by the terms of the dissolution, was bound to pay; and that there were other debts of the firm which were unsatisfied for which he was responsible, though Wood had taken upon himself the obligation of paying them, in addition to the debt of 1091 dollars 46 cents, which was due from Wood to him; and he insists upon his right to a preference over Harvey & Co. to the satisfaction of his individual debt, as well as the debts of the firm, out of the said property. James Wiley and Caleb Hank both answered, and Harvey & Co. filed their answers, both to the original and supplemental bills. James Wiley also by leave of the court filed a cross bill, alleging that there was a balance of the purchase money due him for the land, asserting the vendor's lien, and praying that it might be enforced.

J. M. Harvey & Co. in their answer state that at the sale of the land Harvey agreed with Wiley to pay his debt, and therefore that claim did not injure the sale;

457 *and as to any claim of Hank it had not been heard of. They contest the right claimed by Niday to a preference over them to satisfaction out of the property; and they allege that the debt for which Wood gave his individual bond was the partnership debt of Wood & Niday; and they insist that the taking the individual bond of one of the partners for a partnership debt does not in equity release the other.

At the April term 1839 the court pronounced an interlocutory decree in these causes. That decree sets aside the sale made by the trustee Wilson as irregular after notice of the awarding of the injunction to Harvey & Co. and himself, and whilst a cloud hung over the title. It sustains the bill as to the propriety and necessity for an injunction, and sustaining the claim of James Wiley, directs that the land shall be sold by a commissioner of the court to satisfy the balance due Wiley of the purchase money, the amount of which is ascertained by the decree. But the decree sustains the defendants Harvey & Co. in the allegation that the debt for which they had taken the individual bond of Wood, was the partnership debt of Wood & Niday.

The commissioner appointed for the purpose by said decree, made sale of the land, and from his report it appears that the land sold for an inconsiderable amount over and above paying the sum decreed to Wiley, after deducting expenses of sale.

At the April term 1842 of said court Harvey & Co. by leave of the court, filed a cross bill against Niday in this cause, by which they demand of him the amount of the said bond of John Wood, subject to a deduction for the amount made by the sale of the personal property by the trustee Wilson. They insist upon the liability of Niday for this debt, because, as they allege, he and John Wood were partners, and

458 that *their claim above mentioned is a debt which was contracted with them by Wood & Niday as partners.

The answer of Niday denies that any partnership existed between him and Wood prior to the spring of 1834, or subsequent to 26th of August of the same year, when the partnership was dissolved; or that he and Wood, as partners, had any dealings with the plaintiffs prior to the former period or subsequent to the latter. The answer admits that a portion of the plaintiff's claim described therein was a debt which had been contracted with them by Wood & Niday as partners, and denies that the remainder of it was contracted by them as partners, but alleges that it was the individual debt of Wood.

Th answer further alleges that in order to obtain the said deed from Wood, Harvey & Co. had released Niday from all liability for said debt, and that Wood positively refused to give the deed until Harvey & Co. agreed to release Niday and surrender up the notes which he held on Wood & Niday to be canceled. He further insists upon the statute of limitations as furnishing a complete bar to the plaintiff's demand against him.

Upon these issues on the cross bill, and upon the proceedings had upon the original and supplemental bills as before mentioned, the causes came on for final hearing on the 6th of October 1843, before the Circuit Superior court of law and chancery for the county of Bedford, to which it had been transferred. The court was of opinion that the debt for which Wood executed his said bond to Harvey & Co. was contracted by the firm of Wood & Niday, and that the settlement of the account and execution by Wood of his separate bond and deed of trust, though it extinguished his partner's liability at law, had not the effect to discharge his liability in equity; and that the rem-

459 edy of Harvey & Co. *against Niday for the said debt, was not barred by the statute of limitations; and decreed that Wood & Niday should pay to the said John M. Harvey & Co. the sum of 2485 dollars 5

cents, with interest thereon from the 4th day of October 1834 till paid, and the costs, subject to a credit for 147 dollars 62 cents, the value of the personal property sold by Wilson, trustee, as of the 30th November 1835; also 95 dollars as of the same date, the amount recovered by said Wilson as trustee; also for 70 dollars 86 cents, as of the date of the decree, being the balance of the proceeds of the sale of the land, after deducting cost and expenses. And the court further decreed that the original and amended bills be dismissed, as to John M. Harvey & Co. and G. W. Wilson, and that the plaintiff pay to them their costs expended in the defence of said suit.

The facts bearing upon the questions in these causes are sufficiently stated by Judge Daniel in his opinion, and need not be repeated.

After the foregoing decree was made, viz: in January 1844, Niday applied to the judge of the Circuit court of Bedford county in vacation for a review of the decree and proceedings in the foregoing suits, and for an injunction to the execution of the decree of October 1843. The bill charged that previous to that decree he had, in March 1843, taken the deposition of William W. Campbell, to be read as evidence in said causes; that the justice who took it was directed to send it to the clerk of the Circuit court of Bedford, and the plaintiff supposed it was sent accordingly, but that in fact the justice had not sent it, and that the cause had been heard and decided in the absence of said deposition. That the deposition (which was exhibited with the bill) showed that 466 dollars 89 cents of the debt for which Harvey & Co. had obtained a decree against the complainant, was the individual debt of John Wood.

460 *The bill also charged errors in law on the face of the decree, first, because the statute of limitations, which had been relied on by the complainant in his answer to the cross bill, was a bar to the claim of Harvey & Co.; second, because Harvey & Co. had not been charged with the full value of the personal property sold by the trustee Wilson; the proofs showing, as complainant contended, that it was sold at half its value; and third, because the court had given a decree in the first suit against the complainant for costs, and in not giving him a decree in that case for costs against Harvey & Co.

The judge gave leave to file the bill, and awarded the injunction as prayed for.

John M. Harvey answered the bill, contesting the complainant's right to have the decree reviewed on the grounds stated in the bill. And thereupon, the cause came on to be heard on the 3d of October 1844, when the court was of opinion that under the circumstances the plaintiff had reason to believe that the deposition of Campbell had been filed before the decree of October 1843 was made, and that said deposition proved conclusively that 473 dollars 74 cents, a part of the sum for which the said decree was rendered, was the individual debt of Wood; and without deciding any other question in the causes, the decree of the 6th of October 1843 was set aside, and the causes redocketed; and a commissioner was directed to enquire and report how much of the bond of the 4th of October 1834, executed by Wood to Harvey & Co., was the individual debt of Wood, and how much of it was the debt of Wood & Niday. There were other enquiries directed, not necessary to be stated.

The commissioner reported that individual debts of Wood to the amount of 1227 dollars 6 cents were included in said bond. And then the cause came on again to be heard on the 16th of September 1847,

461 *when the court held that the decree of the 6th of October 1843 might be reviewed for the purpose of considering the deposition of Campbell, and extending to the plaintiff such relief as that deposition might show him entitled to; but that the decree should not be reviewed for any other purpose. And the plaintiff was credited on that decree for the sum of 473 dollars 74 cents, as of the 1st of July 1834; and the decree of October the 3d, 1844, and all proceedings under that decree, were set aside. From the decrees of October 6th, 1843, in the original and cross cause, and the decree of September 16th, 1847, upon the bill of review, Niday applied to this court for an appeal, which was allowed.

John T. and F. T. Anderson, for the appellant.

Boyd, for the appellees.

DANIEL, J. I think that the judge of the Circuit court of Botetourt did not err in his opinion and decree of April 1839, in holding, "that as by the terms of dissolution Wood was to pay the debts of the firm, and for that purpose took all the property, real and personal, it was not competent for the retiring partner (Niday) to acquire an incumbrance on any part thereof, to the prejudice of the rights of a creditor of the firm." The truth of the proposition of law involved in so much of the opinion is obvious, and was not seriously controverted in the arguments of the appellant's counsel here. It is, I think, also evident, that regarding the testimony in the view most favorable to the cause of the appellant, and estimating the personal property at the highest valuation which any of his witnesses place upon it, there is a sufficient amount and more than a sufficient amount of partnership debt shown to be embraced in the bond and deed of trust of the 4th of October 1834, to absorb any surplus

462 that could *arise out of the avails of the trust fund, after satisfying the prior and well established lien of Wiley.

If I am correct in this view, it is manifest that there is no longer any question (except that of costs) arising out of the interlocutory decree of 1839, and the final decree of 1843 in the original suit, which Niday could now ask us to consider; the real object of that suit being not to determine any controversy as to the personal liability

of Niday for the debt claimed by Harvey & Co., but to enjoin a sale of the property under the deed of trust, till the amount and priority of the several liens could be ascertained and adjusted; and then to have a disposition of the fraud according to the respective rights of the several claimants. There is, I think, however, a manifest error in the final decree in regard to the costs of the suit, which Niday has a right to have corrected. In any aspect of the case he came properly into court. There were clouds over the title of the property which he had a right to have removed; conflicting claims to the fund, which he has a right to have settled before a sale should take place. Having thus come properly into court, he ought not to have been subjected to payment of costs, but ought, on the contrary, to have had a decree for costs.

The main matter of controversy, which it is of moment now to Niday to have considered, is that which arises out of the cross bill filed by Harvey & Co. in 1842. After applying so much of the proceeds of the trust fund as was applicable thereto to the payment of the bond for 2485 dollars 5 cents, there remains a large balance due upon it; and Wood, who is shown to be wholly insolvent, has left the state. In this state of things Harvey & Co. seek by their cross bill to make Niday personally responsible for his balance. They allege that Niday and Wood were partners, and that the claim of 2485 dollars 5 cents, for which Wood gave his individual bond, was a debt con- 463 tracted with them by *said Wood and Niday, as partners. They refer to the proceedings in the original suit of Niday, and to the opinion of the judge expressed in the interlocutory decree of 1839, holding that the bond was taken for a debt contracted by the firm of Wood & Niday, and that the execution of his individual bond by Wood did not operate, in equity, a discharge of his copartner Niday.

Niday in his answer admits that the bond was given in part for debts due by the firm, but alleges that much the larger portion of the consideration on which it was founded was the individual indebtedness of Wood. He states that a dissolution of the firm of Wood & Niday took place in August 1834; and that by the terms of the dissolution Niday was to give up his certain interest in the partnership property, and Wood, in consideration thereof, agreed to become solely responsible for the debts: That in October 1834, after the dissolution of the firm, Harvey, with a view of securing the debt from Wood, proposed taking a deed of trust upon the said Wood's property, including the iron works property: That Wood refused to give the deed, unless Harvey would consent to release Niday from the several notes and claims which had been executed in the name of Wood & Niday to Harvey & Co., and would surrender up the said notes, to be canceled: That Harvey thereupon agreed to surrender the said notes, and release Niday from the payment thereof, provided certain individual debts due from Wood to Harvey & Co. were also embraced in a bond to be given by the said Wood, and secured by such deed: That this condition was assented to by Wood, and the bond and deed of trust accordingly executed. He calls upon the plaintiffs to produce their account against the firm of Wood & Niday, and all the evidences of debt which they may have against them, and also to furnish proof of the indebtedness of Wood & 464 Niday to the *amount of the bond; and he also contends, that as the claim of the plaintiff is founded on simple contract, and more than five years have been permitted to run before the filing of the cross bill, he is now protected by the statute of limitations, which he asks to be permitted to rely on as fully as if it was especially pleaded.

The judge of the Circuit court in his decree has carried out the views of Harvey & Co., and made Niday personally responsible for the debt. In this I think he had erred. I think that the execution of the bond and deed of trust, taken in connection with the attendant circumstances and the subsequent conduct and declarations of Harvey, ought to have been regarded by the court as operating an extinguishment of all personal liability on the part of Niday, as well in equity as at law. It was argued by the counsel of the appellees that this question was adjudicated by the interlocutory decree of 1839 rendered in the original suit; and that as the said decree had never been set aside, the court was bound, when it came to render the decree in the cross suit, to act in conformity with it, and to hold Niday personally responsible for the debt. I do not think so. It is true that the judge in rendering the decree of 1839 did express the opinion, that as it appeared by the testimony in the cause that the debt due to Harvey & Co. was contracted by the firm of Wood & Niday, the settlement of the account, and the execution by Wood of his separate bond and deed of trust, would not operate in equity as a discharge of his copartner. It is also true that Harvey and Mitchell, in their joint answer to Niday's bill, aver, that by taking the individual bond of Wood, they did not relinquish their recourse against Niday, as one of the partners of the firm of Wood & Niday; and that Harvey in his separate answer says that the firm of Harvey & Co. never intended, by taking Wood's bond for the balance due from Wood & Niday, to thereby release 465 Niday, or *lessen their security in any way; and that he is advised that the firm of Harvey & Co. will have a just and legal claim upon the complainant (Niday) himself for any balance of their debt not paid by the proceeds of the sale under the deed.

Still, when we look to the object of Niday's suit, the character of the allegations made in his bill, and the relief sought, it is obvious that no issue was properly made as to the effect of the execution of the bond and deed of trust upon his personal liability for the debt; and that in order to deter-

mine which should be first satisfied out of the proceeds of the trust fund, Niday or Harvey & Co., it was not necessary to decide whether the execution of the bond and deed of trust by Wood extinguished the liability of Niday, or still left him personally responsible for the debt. The expression of any opinion as to the effect of the execution of the bond and deed of trust upon the personal liability of Niday being thus out of the real issue between the parties when the decree of 1839 was rendered, I do not think that the said decree can be relied on as concluding Niday in a proceeding subsequently instituted by Harvey & Co., with a view to obtain a personal decree against him for the debt. The question as to Niday's continuing liability for the debt, was first fairly presented for decision in the cross suit; and when the original and cross suits came on to be finally heard together in 1843 it was I think competent for the court, notwithstanding the interlocutory decree of 1839, and without any formal motion for rehearing it, to look fully into the whole case, to refer to all the evidence bearing on Niday's liability that had been taken in the original suit previous to the rendition of the said interlocutory decree, and also to the deposition of Looney that seems to have been taken a short time thereafter, and to decide the question of Niday's liability, untrammeled by 466 what was *said by the judge in reference thereto, in rendering the before mentioned interlocutory decree of 1839.

Looking at the case thus presented, it seems to me that Niday should have been regarded as no longer bound, either at law or in equity, for the payment of the debt.

It has been held in some cases that a bond given by one partner for a simple contract debt due from a firm, to the creditor, and accepted by the latter, operates of itself, an extinguishment of the simple contract both at law and in equity; that the giving and acceptance of the bond amounts to a release at law of the other partner, and an extinction of the simple contract debt; and that though equity will interpose its aid when a remedy is wanting at law, the demand continuing, yet it cannot revive a debt which in law is extinguished. The case of Williams v. Hodgson, 2 Har. & John. 474, is one in which this doctrine is fuly maintained.

It may however, I think, be stated as the well settled doctrine of this court, that whilst the mere acceptance of such higher security by a creditor from one member of a firm for a partnership debt due by simple contract, destroys the right of the creditor to proceed at law against the member who was not a party in giving such higher security; yet that a court of equity will look at the original character of the debt, and will not withhold relief against the member not uniting in the higher security, merely because of the merger and destruction of the legal remedy against him; but will treat that simple contract as a debt still subsisting in foro conscientiæ, unless it is shown that the creditor intended by accepting such higher security to abandon all recourse upon his original demand. In other words, that in a court of law the higher security operates per se a destruction of the simple contract; about that in a court of equity, whether such is to be the effect of the transaction, is a question 467 to be decided *by proof of the intention of the parties. If by taking such higher security it was not the design of the parties that the social debt should be wholly extinguished, equity will still hold all the partners bound. If on the other hand, the higher security is given and accepted as a substitute for the original simple contract of the firm, and with the intention to absolve the firm, all remedy upon the latter is gone in equity as well as at law.

Testing the case by these principles, it seems to me that Niday's defence to the cross bill is fully sustained. The proofs tending to show that in giving and taking the bond and deed of trust, the parties intended that Niday should be no longer looked to for payment of the debt, are numerous, and when taken all together, are to my mind conclusive:

1st. Niday, though residing in the neighborhood, is not consulted as to the arrangement. The individual bond of Wood is taken, payable twelve months after date, and the deed of trust, which is not to be closed till the end of a year after its date, embraces horses, oxen, wagons, and all the stock of goods then on hand and which might be on hand at the expiration of the time for closing the deed; property which, from its nature, was liable to be wasted and consumed, or greatly deteriorated in value by the use.

2d. It is proved that Harvey placed a high value on the real estate embraced in the deed, and that he desired to purchase it, and also to purchase paper on Wood, declaring that it would be as good to him as cash.

3d. It is proved by Taylor, the trustee in the deed of trust of the 21st August, executed by Wood in part for the security of Niday, that in a conversation held between himself and Harvey just before he obtained the bond and deed of trust of the 4th October 1834, Harvey stated that Wood 468 owed a large debt which he *had then come to see if Wood would make arrangements to secure; and further stated that if Wood would give him a deed of trust on his property he would give him time. That he then informed Harvey of the existence of this deed of trust of the 21st of August, and at his request showed it to him, and that Harvey read it and made remarks upon its contents. That deed, among other things, recited that by the terms of the dissolution Wood was to remain in possession of all the partnership effects, real, personal and mixed, as his own property, and was to be responsible to all the creditors of the said Wood & Niday, and also to the said Niday for all the debts due by the firm of Wood & Niday, and also for the private debt due by Wood to Niday.

The agreement between Niday and Wood that Wood alone should be responsible for the debts of the firm, could not of course, by itself, affect the right of any creditor of the firm to prosecute his demand against Niday, either at law or in equity. But proof of its existence, accompanied by full knowledge of its provisions on the part of Harvey, is strong, if not conclusive, to show that Harvey as well as Wood, by the arrangement of the 4th October, designed to release Niday from all further responsibility for the debt.

4th. Niday, in his answer, avers that it was part of the understanding between Wood and Harvey that the latter should deliver up to be canceled all the notes held by Harvey & Co. upon the firm of Wood & Niday; and he calls for the production of the account and all the evidences of debt held by the plaintiff, against the firm of Wood & Niday. The account is produced, and it appears therefrom and the evidence in relation thereto, that Harvey & Co. did hold several notes on Wood & Niday. These notes are not produced. Does not the failure to produce them and to account for their nonproduction, go far to sustain the statement of Niday, and to show that by the understanding and arrangement 469 *between Wood and Harvey, he was not to be regarded as any longer bound for the debt?

5th. By the deposition of Looney it is proved that in a conversation with Harvey in December 1835, the latter stated that if he had known that Niday was good he would not have released him from the payment of a debt against him and Wood. The particulars of the conversation, it is true, are not detailed, nor is there anything said referring the statement of Harvey to the particular debt in question. If, therefore, this deposition stood unaided by the other circumstances in the case, it would perhaps be unsafe to attach much importance to it in determining the rights of the parties. No other debt, however, is shown to have been due from Wood & Niday; and it is not shown that Harvey had released Niday from any other liability. Taking the deposition, therefore, in connection with the other proofs in the cause, it cannot be treated otherwise than as evidence of Harvey's understanding of the effect of the transaction between him and Wood as a release of Niday from the debt secured by the bond and deed of Wood.

Without further comment on the proofs and circumstances in the cause, it seems to me that they disclose such a dealing with Wood on the part of Harvey; such a trusting to and giving of time to him, without consulting Niday; such a relying on the individual liability of Wood, as shows that his obligation and the means provided for its payment were alone looked to for the satisfaction of the debt: And in declaring that the execution and acceptance of the bond and deed of trust of the 4th October 1834 operated to release Niday, as well in equity as at law, we shall be giving effect to the real intention and understanding of the parties concerned.

It is argued that such a course on the part of this court would conflict with its 470 former decisions; and we *are referred to Williams v. Donaghe's ex'or, 1 Rand. 300; Sale v. Dishman's ex'or, 3 Leigh 548; Galt's ex'or v. Calland's ex'or, 7 Leigh 594; and Weaver v. Tapscott, 9 Leigh 424. It is true that in each of these cases it was held that the giving by one of the partners of his individual promise or obligation for a debt of his firm, and its acceptance by the creditor, did not, under the circumstances, release the other partner in equity. But in neither of these cases were the circumstances attending the transaction similar to those found in the case under consideration. In the case of Williams v. Donaghe's ex'or, no higher security was in fact taken. An account due by a firm was closed by the individual note of one of the partners, so that there was no release of the simple contract, either at law or in equity. There was no circumstance to show that the creditor intended, by taking the note, to look alone to the individual responsibility of the partner giving it. It was alleged in the bill that the partner who gave the note (which was payable twelve months after date) was about to leave the state, and that the other partner was a nonresident, but a man of wealth and owning large possessions in the state. The court said that the debt did not cease to be the debt of the firm because of the execution of the note; and that the nonresidence of one of the partners gave jurisdiction to the court; and gave relief.

In Sale v. Dishman's ex'or, a quantity of corn had been delivered by Sale to the firm of Berryman & Dishman, in pursuance of a covenant which had been signed and sealed by Sale, and by Berryman alone, in the name of the firm of Berryman & Dishman; but it appeared that Dishman had advised Berryman to purchase the corn. Dishman died before the debt was paid, and shortly after his death, in a settlement between Sale and Berryman the surviving partner, a balance was found due on account of the corn; for this balance Berryman 471 *gave his bond to Sale, who, however, declared at the time he took it, that he would not give up his recourse against Dishman's estate. Some four years after the execution of the bond Sale filed his bill, alleging the insolvency of Berryman, and seeking a decree against the executors of Dishman. This court reversed a decree of the chancellor dismissing the bill, and sustained the demand. They held that it was clearly the intention of the parties that the firm should be liable on the original contract; and neither the death of Dishman, nor the taking of the bond of Berryman, absolved the estate of Dishman in a court of equity. As to the effect of the execution of the bond, Judge Tucker said that "the implication that the taking of Berryman's bond was intended to absolve the partnership, was not only weakened by the fact

that he was the only surviving partner, but was expressly repelled by Sale's declaration at the time that he would not give up his resort to Dishman's estate."

In Galt's ex'ors v. Calland's ex'ors, the bond was executed by Bullock, in the name of the firm of Galt, Bullock & Co. It was given for money loaned to him for the firm, and upon its credit. It was shown that the creditor was regularly credited by the amount on the books of the firm, and that Galt had often inspected the books, seen the credit, and made remarks on the heavy balance. There was not only the absence of any proof to show that Bullock alone was looked to, but the presence of the most convincing circumstances to show that the creditor and the partners of the concern all regarded and recognized the debt as a debt of the firm.

In Weaver v. Tapscott, the bond was given by Trimble, with Tapscott as security, for the hire of slaves to be employed as boatmen, for the benefit of the firm of Weaver & Trimble. There was no circumstance in the case from which it could be in-
472 ferred *that the firm of Weaver & Trimble was discharged, and that the individual responsibility of Trimble was looked to. Judge Tucker said that the bond was the only ground of such inference, and that lost all its force when it was considered that it was most probably adopted in conformity with general usage in the hire of slaves, and in compliance with the notions and requisitions of the owner.

There is, I think, nothing in either of these cases which militates at all with the conclusions to which I have arrived in this; and I think that the Circuit court, instead of rendering a decree in favor of Harvey & Co. in their cross suit against Niday, ought to have dismissed their bill with costs.

It does not seem to me, however, that there is any error apparent on the face of the decree entitling Niday to a bill of review, nor do the facts which he states, with respect to the deposition of Campbell, bring his case within the scope of that relief which is given by a court of equity, on the score of newly discovered matters. I think, therefore, that the decrees of the 3d October 1844, and the 16th September 1847, should be both reversed, and the bill of review dismissed at Niday's cost.

The other judges concurred.

The following is the decree of the court:

In the original suit, the court is of opinion, that Niday came properly into court to enjoin the sale under the deed of trust of the 4th October 1834, till the cloud over the title of the real estate therein embraced could be cleared up, and the priorities of the competing liens on the trust property adjusted and settled; and therefore that it was error in the Circuit court, after having properly entertained his bill for this purpose, and given him relief on that
473 score, to dismiss *the bill at his costs. The decree of the 6th October 1834 is, therefore, for that cause reversed. And this court proceeding, &c. the bill is dismissed at the costs of the appellees, Harvey & Co.

In the cross suit, the court is of opinion that the execution of the bond and deed of trust of the 4th October 1834 by Wood, and the acceptance thereof by Harvey, under the circumstances disclosed in the record, operated to absolve Niday, as well in equity as at law, from all further personal liability on account of the debt of the firm of Wood & Niday, for which the said bond was given. That the Circuit court therefore, instead of rendering a decree against Niday for the balance due on said bond, ought to have dismissed the bill of the appellees with costs. The decree in the cross suit therefore of the 6th October 1843, is reversed. And this court proceeding to render, &c., the bill is dismissed at the costs of the appellees.

The court, however, is also further of opinion that there is no error of law apparent on the face of either of said decrees of the 6th October 1843, which entitled Niday to a bill of review, and that the facts alleged by him in his bill of review and proved, in reference to the deposition of Campbell, do not fall within the scope of that relief which is afforded by the court in cases of the discovery of new matter. And that the Circuit court therefore erred in giving relief to any extent on the bill of review. The decrees of the 3d October 1844 and of the 16th September 1847, are therefore both reversed. And this court proceeding, &c., the bill of review is dismissed at Niday's cost.

The court is further of opinion that Niday is entitled to his costs in this court, and decrees accordingly.

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474 *Strange v. Floyd.

October Term, 1852, Richmond.

1. **Joint Bonds*—Failure of All Obligees to Join in Suit—Demurrer—Effect.**—All the obligees in a joint bond must join in an action thereon, or some sufficient excuse for not joining them must be stated in the declaration, or the objection is fatal on general demurrer.

2. **Same—Failure to Aver Nonpayment†—Demurrer—Effect.**—In an action on a bond to more than one obligee nonpayment of the debt to all of the obli-

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***Joint Bonds—How Suit Brought.**—See the principal case cited and approved in Peerce v. Athey, 4 W. Va. 27.

†Action of Debt—Nonpayment Must Be Averred.—In Reynolds v. Hurst, 18 W. Va. 651, it is said: "In either mode the form of action is debt; and the defendant must demand the penalty of the bond and allege its nonpayment as in all other cases of actions of debt. The cases are numerous on this subject in Virginia and are uniform, that in an action of debt nonpayment of the debt demanded must be averred. Braxton's Adm'x v. Lipscomb, 2 Munf. 282; Green v. Dulany, 2 Munf. 518; Norvell v. Hudgins, 4 Munf. 496; Hill v. Harvey, 2 Munf. 525; Buckner *et ux.* v. Michell's Ex'or, 2 Munf. 336; Nicholson v. Dixon's Heir, 5 Munf. 198; Cobbs v. Fountaine, 3 Rand. 484; *Strange v. Floyd*,

gees must be averred in substance in the declaration; or the objection will be fatal on general demurrer.

3. **Appellate Practice—Demurrer—Judgment Reversed.**‡—A demurrer to a declaration is overruled in the court below; and the appellate court reverses the judgment. The cause will be sent back with directions that the plaintiff shall have leave to amend the declaration.

This was an action of debt in the Circuit court of Brunswick, instituted by Jane Floyd against Robert Morris the principal, and Benjamin Strange his surety, on a ne exeat bond. The suit abated as to Morris by the return on the writ that he was no inhabitant. The plaintiff, in her declaration, set out a bond executed to herself and two others, and stated no excuse for not joining them as plaintiffs in the action; and she assigned the breach in the condition of the bond in not paying the amount claimed to her, and did not state that it was not paid to her co-obligees. Strange, without craving oyer of the bond, demurred to the declaration; but the court overruled the demurrer. He then pleaded "conditions performed," and there was a verdict and judgment for the plaintiff. Whereupon Strange applied to this court for a supersedeas, which was awarded.

Gholson, for the appellant, submitted the case.

There was no counsel for the appellee.

475 *MONCURE, J., delivered the opinion of the court.

This was an action of debt brought by the appellee Jane Floyd against Robert Morris and the appellant Benjamin Strange, on a ne exeat bond. It abated as to Morris by a return of "no inhabitant" on the writ. Strange demurred generally to the declaration, and pleaded condition performed; and issues were thereon joined. The demurrer was overruled, and verdict and judgment were rendered for the plaintiff for the penalty of the bond and costs, to be discharged by the payment of the damages assessed by the jury and the costs. To that judgment a supersedeas was awarded by this court, on a petition in which the error assigned in the judgment is, the overruling of the demurrer; which it is insisted ought to have been sustained, first, because the declaration showed that the suit was brought by only one of three obligees, no excuse being shown for not joining the other two as coplaintiffs; and secondly, because the declaration does not aver the nonpayment of the penalty of the bond to the other obligees beside the plaintiff. The bond is copied in the record, but was not made part thereof by oyer; and the court cannot therefore look to it for the purpose of ascertaining its nature; but must look alone to the declaration. The bond, as stated in the declaration, is a joint bond to the plaintiff and two others. And there is no better settled rule of law, (except so far as it may be affected by the second section of the 116th chapter of the Code, which does not apply to this case,) than that all the obligees in a joint bond ought to be joined in the action thereon; or the death of such as are not so joined, or some other sufficient excuse for not joining them, ought to be averred in the declaration; and that if it appear upon the face of the declaration that there are other obligees who ought to be, but are not, joined in the action, the objection is fatal on general demurrer. 1 Chitty's Pl. 7 and 8;

476 *1 Wms. Saund. R. 153-6, and 290-292, and notes; Scott v. Godwin, 1 Bos. & Pul. 67; Baker v. Jewell, 6 Mass. R. 460. It is also well settled that in an action on a bond to more than one obligee, nonpayment of the debt to all of the obligees ought, in substance, to be averred in the declaration. This court is therefore of opinion that the Circuit court erred in overruling the demurrer. But inasmuch as the defendant may have had a sufficient excuse for not making her co-obligees coplaintiffs with her in the suit, and might have obtained leave to amend her declaration for the purpose of averring such excuse, if the Circuit court had been of opinion that the demurrer should be sustained, it is proper that an opportunity of doing so should still be afforded her, according to the case of Hale v. Crow and wife, supra 263, and according to the principle of the case of Creel v. Brown, 1 Rob. R. 265, and other decisions of this court. Therefore the judgment is reversed with costs, the verdict set aside, a new trial awarded; and the case is remanded to the Circuit court that it may render judgment for the defendant on the demurrer, unless the plaintiff should, on leave obtained in that court, amend her declaration and show a sufficient excuse for not making her co-obligees coplaintiffs with her in the suit, and aver nonpayment of the debt to any of the said obligees; and if the declaration be so amended, for such further proceedings to be had therein as may be proper on the present pleadings and such other pleadings as may be offered by either party and admitted by the court.

Judgment reversed.

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477 ***Parker & Wife v. Wasley's Ex'or & als.**

October Term, 1852, Richmond.

1. **Wills*—Construction—Case at Bar.**—Testator by one clause of his will says, "Item. I loan to my daugh-

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9 Gratt. 474: Douglass v. Central Land Co., 12 W. Va., opinion of GREEN, Judge, 510, 511." In the last-named case the principal case is cited and approved.

‡**Appellate Practice—Demurrer to Declaration—Judgment Reversed.**—A demurrer to a declaration is overruled in the court below; and the appellate court reverses the judgment. The cause will be sent back with directions that the plaintiff shall have leave to amend his declaration. For this proposition the principal case is cited and approved in the following cases: Fitzhugh v. Fitzhugh, 11 Gratt. 308, and *note*; Hamtramck v. Selden, 12 Gratt. 28, and *note*; Cromer v. Cromer, 29 Gratt. 286; Reid v. Field, 83 Va. 34, 1 S. E. Rep. 395; *foot-note* to Duval v. Chelf, 1 Va. Law Reg. 900.

*Wills—Term "Loan" Used in.—In Robertson v.

ter, Mary A. Parker, a negro girl named Celah and $200 in cash, which is her full proportion of all my estate." By a codicil to his will he says, "I loan to my daughter, Mary Ann Parker, $300 more in lieu of a negro girl named Celah, which I loaned her in my will." HELD: Mrs. Parker took the absolute interest in the legacy.

2. **Same—Same—Must Look to Whole Will.†**—Every part of a will considered in ascertaining the construction of one of the bequests contained in it.

This was a suit instituted in the Superior court of chancery for the Richmond circuit by William R. Wasley and others, children of Robert C. Wasley deceased, against Francis Y. Parker and Mary Ann his wife, who was Mary Ann Wasley, and others. The only question in the cause was, what was the interest in a legacy taken by Mrs. Parker under the will of her father Robert C. Wasley deceased? The fourth clause of his will is as follows: "I loan to my daughter Mary A. Parker a negro girl named Celah, and 200 dollars in cash, which is her full proportion of all my estate." By a codicil to his will he says: "I loan to my daughter Mary Ann Parker 300 dollars more, in lieu of a negro girl named Celah, which I loaned her in my will." By a subsequent clause of his will he gave the residue of his estate to eight of his children by name, of whom Mrs. Parker was not one, to be equally divided between them. The plaintiffs, who were residuary legatees, contended that Mrs. Parker took but a life estate under the bequest to her; and prayed that her husband might be required to give security for the return of the prin-
478 cipal money, before it *was paid over to him by the executor. The court below sustained this construction, and held that the husband was entitled to the interest on the money bequeathed to Mrs. Parker, and had no other legal claim upon said money; and it was decreed that the executor do lend out the money, taking bond and security payable to himself as executor, with condition to pay the interest annually to Parker and wife during her lifetime, and to pay the principal at her death with interest from that time. Parker and wife applied to this court for an appeal from the decree, which was allowed.

Gregory and Steger, for the appellants.
There was no counsel for the appellees.

MONCURE, J. In the will of Robert C. Wasley there is a clause in these words: "Item. I loan to my daughter Mary A. Parker a negro girl named Celah, and 200 dollars in cash, which is her full proportion of all my estate." And to the will a codicil is annexed in these words: "I loan to my daughter Mary Ann Parker 300 dollars more in lieu of a negro girl named Celah, which I loaned her in my will." The question arising in this case is as to the meaning of the word loan in these bequests. The Circuit court was of opinion that it imported a loan to the legatee for life, and not a gift in absolute property.

The testator evidently intended, by the use of the word loan, to qualify or limit the bequest in some manner, or to some extent; but in what manner, or to what extent, is the difficulty. He certainly did not use the word in its ordinary acceptation, as implying a mere loan of property at will or at sufferance, to be returned whenever required by his representative. He intended to give some interest in the property to the legatee. The loan, as it is called, is made by will; is part of the division which
479 the testator wishes to be *made of his estate after his wife's death; is to his child; and is expressed to be her full proportion of all his estate. These features of the case are either inconsistent with the idea of a mere loan at sufferance, or tend strongly to show that a gift of the property to some extent was intended. But to what extent is the question which again recurs.

Having ascertained that a gift, to some extent at least, and not a mere loan at sufferance was intended, I think the gift is absolute, unless it be limited by the context of the will. At common law, for feudal reasons, words of inheritance were necessary to the creation by deed of an estate in fee simple in realty. In a will a fee simple would pass without such words, if the intention to pass a fee were indicated by the will. The statute law of Virginia has long since abolished the rule of the common law; and now declares that "where any real estate is conveyed, devised, or granted to any person without any words of limitation, such devise, conveyance or grant, shall be construed to pass the fee simple, or other, the whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless a contradictory intention shall appear by the will, conveyance or grant." Code p. 501, § 8; 1 Rev. Code 369, § 27. The rule of the common law was never applied to personalty; but always a gift of personalty without more, implied an absolute gift. Indeed, we are told that "anciently there could be no limitation over of a chattel, but a gift for life carried the absolute interest." 2 Kent's Com. 352. And though this ancient doctrine has been long obsolete, it yet seems to show that absolute estates in personalty were always favored by the common law; and that a gift of personalty was never held to be less than ab-

Hardy, 2 Va. Dec. 277, it is said: "No restriction of the gift of the personal property can be inferred from the use of the word "loan" in the first clause. The significance and effect of the use of this word in a will was much considered by JUDGE MONCURE, in the case of *Parker v. Wasley's Ex'or, 9 Gratt. 477;* and, in the construction of a will of considerable difficulty, it was held to vest in the legatee the absolute interest in the legacy."

†**Wills—Construction—Must Look to Whole Will.**—Upon this subject, see principal case cited and approved in McCamant v. Nuckols, 85 Va. 337, 12 S. E. Rep. 160. See also, *foot-note* to Wootton v. Redd, 12 Gratt. 196, where the question is discussed and a large collection of cases; also, *foot-note* to Cheshire v. Purcell, 11 Gratt. 771.

solute, except when, per formam doni, it was plainly limited.

Then what is there in the context 480 of the will to *limit the gift imported by the word loan in this bequest? It may be said that the word "loan" is used in three other clauses of the will; that wherever it is so used, it is plainly intended to give a limited estate; and that, therefore, the same word should be regarded as having the same meaning in this bequest. But the answer is, that in all the other clauses in which the word is used, the estate is expressly limited to the loanee or donee, with remainder over. In the first clause he loans all his estate to his wife as long as she should remain his widow; and at her marriage or decease, directs it to be divided in the manner mentioned in the subsequent clauses. In the second clause he loans a certain plantation to five of his children as long as his dumb children (being three of the five) should live; and at their decease gives it to two of the five, (being the two that were not dumb). In the eighth clause he loans to his dumb children their equal proportions as long as they should live, and at their decease gives it to four of his other children. I think if the testator had intended to give a limited and not an absolute interest in 500 dollars to his daughter Mary A. Parker, he would have expressly limited it to her with remainder over; as in the other instances in which the word "loan" is used. The subject of the bequest was money; and yet he loans her the subject itself, and not the interest, as in the case of his wife; and loans it to her without interposing or providing for the appointment of a trustee, as in the case of his dumb children. By the first clause of his will he loans all his estate to his wife during her widowhood, and at her marriage or decease, directed it to be divided in the manner mentioned in the subsequent clauses. It is plain that he did not intend to die intestate as to any part of his estate; and that his wife's marriage or decease was to be the period of division of his estate among all his other legatees, specific, pecuniary or residuary.

481 *After giving certain specific and pecuniary devises and bequests, he gives the residue of his estate to eight of his children, to be equally divided between them. I do not think the testator could have intended to embrace in this residue an estate in remainder in 500 dollars, dependent on the death of his daughter Mrs. Parker; and therefore he must have died intestate as to that subject after her death, if he intended to give her only a life estate therein. He has carefully provided for various contingent or ulterior limitations, to take effect after the period of general division, at his wife's marriage or decease; and would no doubt have made a similar limitation over of the 500 dollars at Mrs. Parker's decease, if he had intended to give her only a life estate therein.

Again it may be said that the testator uses the word "give" in several of the clauses of his will; and that wherever he uses it, he plainly intends to make an absolute bequest. That he uses the word "loan" in no case, unless it be that of Mrs. Parker, where he does not plainly intend to give a limited interest; and that therefore the word "loan" in her case, ought to be construed as importing a limited, and not an absolute estate. This is an imposing view of the case and presents a difficulty, which, however, I think is not insuperable. The most that can be made of it is, that the testator had some meaning in the use of the word "loan" in the bequest to Mrs. Parker, different from that which he had in the use of the word "give," in other clauses of his will. But what the meaning was it is impossible from the record to ascertain. We may conjecture that it was to give to Mrs. Parker, who was his only married daughter, a separate estate in her legacy, or to exempt it from liability for the debts of her husband; and that he supposed his object could be effected by making the gift in the form of a loan.

But whatever his motion on this sub- 482 ject may have been, it *is enough to say that in my opinion there is nothing in the will to limit the duration of the estate given to Mrs. Parker. It is true there are no words of perpetuity annexed to the bequest to her; nor are there any annexed to those bequests, in which the word "give" instead of "loan" is used. In this respect they are alike. There is a very close resemblance in the terms of the bequests, standing side by side, to his daughter Mrs. Parker, and his son Thomas M. Wasley. To the former he loans a negro girl "and 200 dollars in cash, which is her full proportion of all his estate." To the latter he gives a negro man, "and 200 dollars in cash, which is his full proportion of all his estate." It would be difficult to place a different construction on these two gifts as to the duration of the estate given, and to regard the former as an estate for life, and the latter an absolute estate.

But if the testator intended to limit the duration of the estate given to Mrs. Parker, what is there in the will to fix that limitation for her life? It will not do to say that because other "loans" in the will are limited for life, therefore this was intended to be for life. In fact, of the three other "loans" made in the will, but one of them was for the lives of the loanees. One was a loan during widowhood; and the other per auter vie. Why should one any more than another of these expressly limited loans, regulate the duration of that which is not so limited? It will not do to say that the will must be construed most strongly against the testator, and therefore must be construed as giving an estate for the life of Mrs. Parker, which is the best limited estate she could have. I know of no such rule of construction as applied to wills. But if it were so applicable, the effect in this case would be to make her estate absolute. There is, however, a rule of construction applicable to wills, which is

pertinent to this case, "that an heir at law can only be disinherited by
483 *express devise or necessary implication, and that implication has been defined to be such a strong probability, that an intention to the contrary cannot be supposed." 1 Jarm. on Wills 465. If the gift to Mrs. Parker were construed to be a gift for life, she would be disinherited not only by implication, but by implication on implication. First, by implying an intention to give a limited and not an absolute estate; and secondly, by implying a limitation for life. There is not a word in the will on which the latter implication can be based. To sustain it, words must be imported into the will; and I know of no rule of law which will authorize such an importation. All we can do is to construe the language of the testator: we cannot add to it. His language gives or loans an estate to his daughter, and there stops. If he really intended to give or loan that estate for life only, the answer is voluit sed non dixit.

The first inclination of my mind was to reverse the decree and send the case back, in order that the extrinsic facts and surrounding circumstances might be brought into the case by depositions or the report of a commissioner. It seemed to me that the terms of the bequest presented a case of "equivocation," according to the language of Lord Bacon, and rendered it proper for the court to look for aid, in the construction of the will, to the surrounding circumstances of the case. But further reflection has satisfied me that that course is unnecessary, if not improper. For while I can well imagine a state of facts which would render the positions I have taken in the construction of the will by itself, perfectly impregnable, I can conceive of none which could so far weaken these positions as to make it necessary to abandon them. Suppose, for example, it were proved that at the date of the will, Mrs. Parker had a family of children; that no advancement had ever been made to her; that she
484 *was the testator's only married child; that she was a dutiful child, between whom and her father the warmest affection subsisted; and that the portion given her by the will, considering the gift as absolute, was certainly not more than "her full proportion of all his estate." Could the mind resist the belief that whatever may have been his meaning in the use of the word "loan" instead of the word "give" in the bequest to her, he could not have intended thereby to disinherit her; and that if he had intended anything so unnatural, he would not have left his intention to mere implication, but would have expressed it in plain and unambiguous language, such as he used in every other instance in which he intended to give a limited interest. On the other hand, if the facts supposed do not exist, but the contrary, I do not perceive that the will would admit of any other construction than that which I have adopted, without such an interpolation of words as would in my judgment be wholly unwarrantable.

I am therefore for reversing the decree with costs, and dismissing the bill.

ALLEN and LEE, Js., concurred in the opinion of Moncure, J.

DANIEL and SAMUELS, Js., thought that the decree should be amended so as to give the legatee the money for the life of the wife, and requiring security for its return at her death. And being thus amended, should be affirmed.

Decree reversed with costs, and bill dismissed.

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485 *Hopkins, Brother & Co. v. Richardson.

October Term, 1852, Richmond.

1. **Pleading and Practice — Demurrer — Sustained — Amendment—Effect.***—Upon a demurrer to a count in a declaration on the ground of duplicity, the demurrer is sustained; and then the plaintiff, with the leave of the court, amends the count. He cannot object in an appellate court that the court below erred in sustaining the demurrer.

2. **Bonds—Assignment†—Considerations—Case at Bar.**—R assigns the bond of G to K without consideration, and K transfers it to H as collateral security for goods purchased of H on a credit, upon the understanding that if R does not acknowledge his liability as assignor of said bond, H may return it and look out for other security. R being called on by H to know if he was responsible as assignor of the bond, assured H in writing that he was aware of no offset or objection to said bond, nor of anything to affect his liability as assignor thereof. H therefore did not return the bond and apply for other security. When the time for payment for the goods arrived G was insolvent. This was not a sufficient consideration to support an action of *assumpsit* by H against R.

3. **Same—Same—Guarantee of Payment‡—Statute of Frauds—Case at Bar.**—R assigns the bond of G to K to enable K to purchase goods on the credit of his assignment, and guarantees the payment of

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***Pleading and Practice — Demurrer — Sustained — Amendment—Effect.**—Where a party amends his pleadings after a demurrer to it has been sustained, he waives his right to except to the rulings of the court, on the ground that the demurrer was wrongfully sustained. For this proposition the principal case is cited and followed in the following cases: Darracott v. C. & O. R. R. Co., 83 Va. 290, 2 S. E. Rep. 511; Harris v. N. & W. R. R. Co., 88 Va. 562, 14 S. E. Rep. 535; Connell v. C. & O. R. R. Co., 93 Va. 55, 24 S. E. Rep. 467; Birckhead v. C. & O. R. R. Co., 95 Va. 649, 29 S. E. Rep. 678.

†**Bonds—Assignment.**—See monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409; also, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801. The principal case is cited in Welsh v. Ebersole, 75 Va. 659; 2 Va. Law Reg. 79; 5 Va. Law Reg. 114.

‡**Contract to Pay Debt of Another—New and Original Consideration.**—See a discussion of this question in a *foot-note* to Noyes v. Humphreys, 11 Gratt. 636,

the bond, by the endorsement on the back thereof, signed with his name: And K purchases goods of H on the credit of that assignment and guarantee. This is not an undertaking for the debt of another to which the statute of frauds and perjuries will apply.

4. **Same—Same—Right to Go against Assignor—Insolvency**—R assigns the bond of G to K by endorsing his name in blank thereon for the purpose of enabling K to buy goods on the faith of his endorsement, and H sells goods to K upon the faith of the same, and before the time of payment for the goods arrives G becomes insolvent. H may maintain an action of *assumpsit* against R either as assignor or guarantor of the bond.

5. **Same—Same—Statements of Assignor—When Competent Evidence.**—R assigns the bond of G to K to enable K to purchase goods on the credit of R's assignment, and K purchases goods of H upon the credit thereof. In an action by H against R upon that assignment, the statements of K to H in relation to said assignment, pending the negotiation for the goods and the transfer of the bond of G, are competent evidence against R; but the statements of K at a subsequent period are not competent evidence against R.

6. **Same — Same — Same — Same.** — Declarations of R made during the conversation and consultations in relation to his assignment of the bond of G to K, though made a day or two before the bond was assigned, are competent evidence
486 *for R as a part of the *res gestæ*, to show that he did not make the assignment under such circumstances, or with such intent, as would render him liable upon the assignment to the holder of the bond.

7. **Instructions—Evidence Tending to Prove Supposed Case.**§—If there is any evidence before a jury tending to prove a case supposed in an instruction asked for, and the instruction propounds the law correctly, it should be given.

8. **Appellate Practice—Admission of Improper Plea.**‖—The admission of an improper plea is error, and the appellate court will not enquire whether or not the plaintiff could be injured by its admission.

This was an action of assumpsit in the Circuit court of Clarke county by Hopkins, Brother & Co. v. John Richardson. The case is sufficiently stated in the opinion of Judge Lee. On the trial there was a verdict and judgment for the defendant; whereupon the plaintiffs applied to this court for a supersedeas, which was awarded.

Patton, for the appellants.
Morson, for the appellee.

LEE, J. This was an action of assumpsit brought in the Circuit court of Clarke county by the plaintiffs in error against the defendant. The declaration contained five counts. The defendant appeared and filed a general demurrer to the third count and a special demurrer to the second and fourth counts, assigning for cause in the latter that each of those counts contained

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where the principal case is cited. The principal case is also cited, for the latter part of the proposition there laid down, in Skinker v. Armstrong, 86 Va. 1015, 11 S. E. Rep. 977; 2 Va. Law Reg. 465; Hooper v. Hooper, 32 W. Va. 536, 9 S. E. Rep. 941.

§**Instructions—Evidence Tending to Prove a Supposed Case.**—On this question see the principal case cited and approved in Early v. Garland, 13 Gratt. 1, and *note*, where there is a discussion of the subject and a collection of the authorities. For the proposition there laid down see the principal case cited and approved in the following cases: Anable v. Com., 24 Gratt. 568; Smith v. Snyder, 77 Va. 441; Central Lunatic Asylum v. Flanagan, 80 Va. 117; Harman v. Cundiff, 82 Va. 247; Snodgrass v. Com., 89 Va. 686, 17 S. E. Rep. 238; N. Y., etc., R. R. Co. v. Thomas, 92 Va. 611, 24 S. E. Rep. 264; Michie v. Cochran, 93 Va. 648, 25 S. E. Rep. 884; C. & O. R. R. Co. v. Anderson, 93 Va. 657, 25 S. E. Rep. 947; Washington, etc., R. R. Co. v. Lacey, 94 Va. 468, 26 S. E. Rep. 834; Carpenter v. Chemical Co., 98 Va. 182, 35 S. E. Rep. 358; Gas Co. v. Wheeling, 8 W. Va. 372; State v. Betsall, 11 W. Va. 729; Osborne v. Francis, 38 W. Va. 323, 18 S. E. Rep. 595; Carrico v. W. Va. Cent., etc., R. Co., 39 W. Va. 101, 19 S. E. Rep. 576; *foot-note* to McDowell v. Crawford, 11 Gratt. 377. See *foot-note* to Farish v. Reigle, 11 Gratt. 697.

Same—Weight of Evidence.—See, on this subject, *foot-note* to Davis v. Miller, 14 Gratt. 1, where the principal case is cited. See also, citing the principal case, Cornett v. Rhudy, 80 Va. 716; Richmond & Danville R. Co. v. Noell, 86 Va. 24, 9 S. E. Rep. 473; Tyler v. C. & O. R. R. Co., 88 Va. 894, 13 S. E. Rep. 975; B. & O. R. R. Co. v. Skeels, 3 W. Va. 560.

‖**Appellate Practice—Admission of Improper Plea.**—In The First National Bank of Wellsburg v. Kimberlands, 16 W. Va. 596, it is said: "In the case of *Hopkins, Bro. v. Richardson, 9 Gratt. 486*, it was decided: 'The admission of an improper plea is error; and the appellate court will not enquire, whether or not the plaintiff could be injured by its admission.' JUDGE LEE in this case says: 'Nor is it any answer to the objection, to say that the plea, even if bad, could do the plaintiff no harm by being in the record. That is an enquiry upon which the court should scarcely enter, nor should it speculate upon the effect of an improper plea in prejudice of the plaintiff's rights. If it be insufficient and no answer to the action, it should be rejected, when objected to, nor should the plaintiff be put to an issue upon it.' The views of JUDGE LEE were cited approvingly by JUDGE HAYMOND, in delivering the opinion of this court, in Griffie v. McCoy, 8 W. Va. 206. In my judgment the refusal to reject a plea, which the court ought to reject, is a good ground for reversal, unless, when all the facts have been certified by the court below, it appears affirmatively to the court that the plaintiff could not be injured by having had to try his case on such improper plea." See, in accord, citing the principal case, Griffie v. McCoy, 8 W. Va. 205; Flint v. Gilpin, 29 W. Va. 744, 3 S. E. Rep. 36; State v. Peck, 32 W. Va. 614, 9 S. E. Rep. 922. See also, Van Winkle v. Blackford, 28 W. Va. 670; 2 Barton's Law Pr. (2d Ed.) 1334.

In State v. Bruce, 26 W. Va. 158, it is said: "This proposition is no doubt true, provided it appears from the whole record before us, that the defendant was not prejudiced by the error of the court refusing to sustain his demurrers to the second counts of the indictments. It is certainly the law, that where the court has committed an error in the pleadings, this court will presume the person against whom such error was committed was prejudiced and the burden is on the opposite party to show by the record that there was no such prejudice. *Hopkins v. Richardson, 9 Gratt. 485.*"

two separate, distinct and complete causes of action. The plaintiffs joined in these demurrers, and the same having been argued, the court held the third count insufficient, and the general demurrer to it was sustained. The court also expressed the opinion that the objection made to the second and fourth counts was well taken; but leave was given to the plaintiffs to amend those counts. Of this leave the plaintiffs availed themselves by striking out of each of those counts what was supposed to constitute one of the two distinct 487 causes of *action which it was alleged were improperly blended in one count; and the defendant then demurred generally to those two counts thus amended. On consideration of the demurrers to these amended counts, the court held the counts good, and the demurrers were overruled. The defendant also pleaded non assumpsit to each count of the declaration, and a special plea to the second and fourth counts, which though objected to was allowed by the court. And the jury having rendered a verdict for the defendant upon the issues joined, the plaintiffs obtained a supersedeas from this court.

The petitioners assign various causes of error in the said judgment, and amongst the rest, they complain that the court improperly sustained the special demurrers first filed to the second and fourth counts. I think it however unnecessary to consider those counts as first framed, or to determine whether they were obnoxious to the charge of duplicity or not; because the plaintiffs, by availing themselves of the leave given to amend and striking from the counts what was supposed to render them double, must be held to have waived the question and to have been content to stand upon the counts as amended; and they cannot now be entertained here to make the objection that the Circuit court erred in its opinion that those counts were justly obnoxious to the charge of duplicity. If they had desired to test the correctness of that opinion and to obtain the benefit of the counts as originally framed, they should have allowed the special demurrers to be sustained and the counts held for naught, instead of amending them to conform to the opinion of the court, as they elected to do.

The plaintiffs in error also complain that the court erred in sustaining the demurrer to the third count in the declaration. This count alleges that Richardson being the holder of a bond on Gibson, which is 488 described by *its date, amount and time of payment, assigned the same to Kirby by a written assignment on the back thereof, subscribed with his proper name. That the said Kirby afterwards proposed to the plaintiffs in Baltimore, that if they would sell goods, &c. to the firm of Bushnell, Kirby & Co. of which he, Kirby, was a partner, he would assign the said bond to them as collateral security for the payment of the same; and at the same time he, Kirby, represented to the plaintiffs that Richardson was liable as the assignor of the bond for the payment thereof if the money could not be made out of Gibson. That in consideration of the premises, the plaintiffs sold to said Bushnell, Kirby & Co. goods to the amount of 3254 dollars 88 cents, on a credit of six months, with the understanding that if Richardson did not acknowledge his liability as assignor of said bond, the plaintiffs were to be at liberty to return it to Bushnell, Kirby & Co. and "look out for other security." That Kirby did assign said bond to the plaintiffs for the purpose aforesaid, for value received; of all which Richardson, &c. had notice. That afterwards the said Richardson, being called upon by plaintiffs to know if he was responsible as assignor of said bond, assured the plaintiffs in writing that he was aware of no offset or objection to said bond, nor of anything to affect his liability as assignor thereof. That in consideration of the premises, the plaintiffs did not endeavor to obtain other security from said Bushnell, Kirby & Co., and did not bring suit against them for the amount of the goods, but forbore to do so, and retained the bond of Gibson for a long time, to wit, six months. That when said bond became due and payable, the said Gibson was notoriously insolvent, and so continued to be, so that no part of the amount thereof could be made out of him; and that he had not paid the same either to the said Kirby or to the plaintiffs; nor had the said Bushnell, 489 Kirby & *Co. ever paid the plaintiffs the amount of the goods so sold as aforesaid: of all which Richardson had notice. By virtue whereof, it is charged the said Richardson became indebted to the plaintiffs in the amount of the goods so sold to Bushnell, Kirby & Co. as aforesaid, with interest; and being so indebted, in consideration thereof promised to pay the same when afterwards requested. Now it appears to me that this count lacks that indispensable element of a good declaration in assumpsit, an averment of a good and sufficient consideration for the promise imputed to the defendant. The consideration stated is the legal liability which it is averred had devolved upon the defendant by reason of the premises set out in the count; and the question is, whether such legal liability is made out. It is not alleged that any consideration passed from Kirby to Richardson for the assignment of Gibson's bond by the latter, nor that the said assignment was accompanied by any agreement to guarantee the payment of the bond, or any intention declared on the part of Richardson to enable Kirby to purchase goods on the credit of his liability as assignor to make good the amount if Gibson proved insolvent. The plaintiffs parted with their goods without first conferring with Richardson on the subject, and not on the faith of his liability, because they took the bond as collateral security only, reserving expressly the right to look out for other security if Richardson should not acknowledge his liability as assignor. The written

assurance given by Richardson after the goods had been sold, that he knew nothing which could affect his liability as assignor of the bond, could not serve by relation back to the date of the sale, to create a good cause of action against him. At most, it only amounted to evidence tending to show that his assignment to Kirby was under circumstances which would make him liable to Kirby's assignee: but 490 it could not *of itself constitute a right of action in assumpsit. And even if this written admission had contained an express promise to pay the debt claimed, yet made at the time it was, and under the circumstances attending it, it would have been, like the promise in the case of Bank of Washington v. Arthur, 3 Gratt. 173, of no effect, for want of any consideration that would be sufficient to support an action founded upon it. Whether by giving this assurance in writing, and thus inducing the plaintiffs (as would seem to be intended by the allegations of the count) to forbear endeavoring to get other security for their debt, or bringing suit against Bushnell, Kirby & Co., the said Richardson may have made himself liable in a special action on the case for the damages thereby sustained by the plaintiffs, is a question not necessary now to be decided. The count is not and could not have been properly framed with that view. It is as it must have been in this action, a count in assumpsit, and charging Richardson as having rendered himself liable and indebted, and averring a promise to pay upon such indebtedness. And as I think no such indebtedness can be deduced from the allegations of the count, I am of opinion that it was insufficient, and that the court did not err in sustaining the demurrer to it.

To the second and also to the fourth count in the declaration, the defendant tendered a special plea, averring that the promise or guaranty in each of those counts alleged, was a special promise to pay the debt of another person, to wit, the said Samuel Gibson, and that no promise or agreement relating to the same, nor any note or memorandum thereof was in writing, or signed by the defendant or any one by him thereunto authorized. The plaintiffs objected to the filing of these pleas, but the court overruled the objection and permitted them to be filed; and the plaintiffs were compelled to reply. And 491 the admission of these pleas *is assigned as one of the grounds of error in the said judgment.

The second and fourth counts in the declarations, to which these pleas were filed, both allege that the defendant being the holder of the bond ou Gibson, to enable Kirby to use the same in the purchase of goods for Bushnell, Kirby & Co., upon the faith and credit of the defendants' liability as assignor, and of his guaranty of the bond, did assign the same to the said Kirby, and did guarantee the payment thereof, by writing endorsed on the said bond and signed with his proper name; and that the plaintiffs sold the goods on the credit thereof. Now these pleas neither traverse the matter of fact alleged in the counts, nor yet confess and avoid them by others; and the only purpose which they could serve, as it seems to me, was to raise the question whether the allegations of each of these counts made out a case of liability on the part of the defendant. For this purpose they were entirely unnecessary, and as the counts were framed, I regard them as wholly inapplicable and inappropriate, the statute of frauds having no application, as I think, to such a contract of assignment and guaranty as that stated and alleged in each of these counts. It may properly be said that it was not the debt of Gibson which the defendant assumed to pay by his undertaking upon that occasion, but a debt of his own in effect, or one created upon the faith and credit of his assignment and guaranty, when the goods were sold, and which but for his undertaking would have had no existence; although it was of course contingent upon the failure or inability of Gibson to pay the amount of the bond, just as is the liability of every assignor of the bond of another, for whatever value. I think, therefore, that these pleas were no answer to the plaintiffs' action, and that the court erred in permitting them to be filed. Nor is it any answer to the ob- 492 jection to say, that the pleas, *even if bad, could do the plaintiffs no harm by being in the record. That is an enquiry upon which the court should scarcely enter, nor should it speculate upon the effect of an improper plea in prejudice of the plaintiffs' rights. If it be insufficient and no answer to the action, it should be rejected when objected to, nor should the plaintiffs be put to an issue upon it.

Another ground of error assigned by the plaintiffs is, that the court below improperly refused to give the instruction to the jury asked for by them on the trial of the cause. After all the evidence had been given to the jury, they moved the court to instruct the jury that if they believed from the evidence that Richardson assigned the bond on Gibson to Kirby by endorsing his name in blank thereon, that Kirby might use the same so endorsed in the purchase of goods upon the faith of the bond and of Richardson's liability as assignor, and that the plaintiffs sold the goods upon faith of said bond and of said Richardson's liability, and that Kirby assigned the bond to plaintiffs in consideration of the goods, and also that Gibson was notoriously insolvent when the bond fell due, then it was immaterial whether Kirby paid a valuable consideration to Richardson for said bond or not, and that the plaintiffs were entitled to recover the value of the goods. The court, however, refused so to instruct the jury; and the plaintiffs excepted. It is doubtless correct, as argued by the counsel for the defendant in error, that the assignment of a chose in action not assignable at common law, does not make the assignor liable without a valuable consideration for

the assignment; and that the assignment being in writing does not necessarily import that it was for valuable consideration. Hall v. Smith, 3 Munf. 550; Wood's adm'r v. Duval, 9 Leigh 6; Breckenridge v. Auld, 1 Rob. R. 148. And the distinctions which were adverted to between the 493 *endorsement of negotiable instruments and common law obligations and other instruments not negotiable, are well established by the authorities. But it certainly cannot be maintained that if the holder of a bond endorse it in blank with intent to assign it, and to enable his assignee to get credit upon faith of the bond and of his assignment of it, and the assignee do succeed in getting such credit on faith thereof, and take up money or goods for the same, and the obligor prove insolvent, the assignor will not be liable to the party making the advances because he may have received no value for his assignment from his immediate assignee. In such a case the assignor may be regarded as authorizing his assignee to take up the money or goods on faith of the bond and of his assignment, and to write over his name an assignment for value received to the person making the advances; or as authorizing a guaranty of the payment of the bond to be written over his name, conforming to the true intent and purpose with which it was endorsed on the bond.

The bill of exceptions does not state the opinion of the court upon the legal questions involved, nor the particular grounds on which the court declined giving the instruction; but simply that the court refused to give it. It may be presumed, however, that the reason for the refusal was that the court thought there was no sufficient consideration for creating a liability on the part of Richardson, or that he was protected by the operation of the statute of frauds. It is true that to render Richardson liable upon his assignment or guaranty, there must have been good and sufficient consideration. But this need not be a benefit resulting to Richardson himself, the party promising. A loss or inconvenience sustained by the other party at the instance or with the consent, express or implied, of the party promising, is a good and sufficient consideration. Chitty on Contracts, p. 29, and authorities cited in the 494 *note. In this case the plaintiffs' parting with their goods to Kirby, upon the faith of the defendant's endorsement made for the purpose intended, was an ample consideration for his liability. Nor, as it seems to me, and as I have already intimated, is the case one of a promise to pay the debt of another that would fall within the operation of the statute of frauds. Every assignment of a bond or note, even for a full value, might in the same sense be said to create a promise to pay the debt of another. It seems to fall rather within the third class of cases mentioned in Story on Prom. Notes, § 457, where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties, which class of cases, the author adds, is not within the statute of frauds. The distinction between this class of cases and those in which the promise is regarded as an undertaking for the debt of another within the statute of frauds, is also recognized in 1 Saund. 211, n. 2, and by Ch. J. Kent, in delivering the opinion of the court in the case of Leonard v. Vredenburg, 8 John. R. 29-36. But if even a memorandum in writing signed by the defendant be held indispensable, I would, under the authority of the case of Ulen v. Kittredge, 7 Mass. R. 233, not hesitate to regard the endorsement of the name of the assignor in blank upon the bond for the purpose indicated, and which gave authority to write a guaranty in conformity to the intention with which the endorsement was made, and of which parol testimony was clearly admissible, as a full compliance with the requisition of that statute on this subject. Numerous cases are to be found in the reports of the decisions of this and other courts, from which the liability of the assignor of a bond or other instrument not negotiable, in such a case, is to be deduced beyond all doubt or question. Of these I will content myself with referring to 495 the following: *Hansbrough v. Baylor, 2 Munf. 36; Goodall v. Stuart, 2 Hen. & Munf. 105; Mackie v. Davis, 2 Wash. 219; Orrick v. Colston, 7 Gratt. 189; Violett v. Patton, 5 Cranch's R. 142; De Wolf v. Rabaud, 1 Peters' R. 476; Townsley v. Sumrall, 2 Peters' R. 170; McDonald v. Magruder, 3 Peters' R. 470; Josselyn v. Ames, 3 Mass. R. 274; Ulen v. Kittredge, 7 Mass. R. 233; Tenney v. Prince, 4 Pick. R. 385; Moies v. Bird, 11 Mass. R. 436. Other cases upon the subject will be found cited in the note to sections 457, 459, 474, of Judge Story's work on Promissory Notes. In some of the cases referred to, it was made a question whether the endorsement in blank upon the instrument had the effect to create a direct original liability upon the party making the endorsement, or only the collateral contingent liability of a guarantor; and the result of the various authorities would seem to be in relation to a blank endorsement of an instrument not negotiable, that where it is not a part of the original transaction, but subsequently made, then in the absence of controlling proofs, it is deemed a mere guaranty, and the endorser liable only as a guarantor. Dean v. Hall, 17 Wend. R. 214; Story's Prom. Notes, § 480. The true intention of the parties is, however, always the subject of elucidation by proof, which may be by parol, of the facts and circumstances which took place at the time of the transaction; and the interpretation to be placed upon the endorsement will be always just such as will carry that intention into effect. Story's Prom. Notes, § 479.

The instruction moved for in this case, as I understand it, was to this effect, that if the jury should believe from the evidence, that

the defendant assigned the bond on Gibson to Kirby by endorsing his name in blank thereon, for the very purpose of enabling Kirby to buy goods upon the faith of his endorsement, and that the plaintiffs sold
496 the goods on the faith of the *same, and that Gibson was notoriously insolvent when his bond fell due, then the defendant was liable to the amount of the value of the goods sold, the same being less than the amount due upon the bond: And I cannot doubt that it correctly propounded the law upon the subject. But it is insisted that the purpose of Richardson, in making the assignment, did not import a guaranty; and that if the instruction is to be construed as assuming an intent to guarantee on his part, it was rightly refused because there was no proof of such guaranty, and the instruction was upon an abstract proposition; which, according to the well settled rule, the court was not bound to give. It is certainly correct that no court is required to instruct the jury upon abstract questions of law not presented by the proofs in the cause. But this function of determining whether any proof has been given of the hypothetical case or not, and if none, of refusing to give the instruction asked for upon it, is one to be exercised with proper care and great caution. In a plain case of a total absence of evidence tending to make out the supposed case, the court may well refuse to give any instruction based upon it. But where there is such evidence, of however little weight it may appear to be to the court, or however inadequate in its opinion, to make out the case supposed, it is best and safest for the court not to refuse to give the instruction asked for if it propound the law correctly. In this case it cannot be said that there was no evidence tending to make out the case supposed in the instruction asked for. The purpose of Richardson, in endorsing the bond of Gibson, which the evidence offered by the plaintiffs tended to prove, did, as it seems to me, import an intent to guarantee; and to what extent this evidence would be credited by the jury, and how far it was weakened by the countervailing testimony offered by the defendants, and
497 the true inferences to be *drawn as to Richardson's purpose and intention, were matters properly for the consideration of the jury. If they should be satisfied Richardson did intend to make himself responsible as assignor of the bond to any one who should make advances to Kirby upon faith of his name, the plaintiffs were entitled to the benefit of the opinion of the court that they were in that case entitled to recover: but if they should be of a different opinion, then the instruction was inapplicable and of course could not prejudice the defendant.

The Circuit court, on the motion of the defendant, instructed the jury that they were not to regard any of the evidence of statements or declarations made by Kirby or any other person in the absence of the defendant, as even tending to prove the liability of the defendant in this action; and that they were only admissible for the purpose of discrediting the testimony of Kirby, who had been examined as a witness on the part of the defendant: And the plaintiffs excepted to the opinion of the court giving this instruction. If this instruction is to be interpreted as directing the jury to disregard all the declarations and statements proven to have been made by Kirby as well at the time of the negotiation for the goods with the plaintiffs as afterwards, (and a formal exception is taken to the deposition of Ross, the witness who proved what passed between Kirby and the plaintiffs at the time of the negotiation for the goods,) then it would be clearly erroneous, inasmuch as what passed between Kirby and the plaintiffs at the time of the negotiation touching the purchase of the goods and the transfer of the bond on Gibson, would be unquestionably proper evidence, being part of the res gestæ, the whole of which, according to the well settled rule, should be given to the jury. But it may be presumed that the Circuit court intended to refer to the other declarations and statements which were proved to
498 have been made by *Kirby in regard to this transaction, after the sale of the goods and the assignment of the bond; and if the instruction is to be so understood, there can be no doubt of its correctness. Charlton v. Unis, 4 Gratt. 58. All these latter statements of Kirby clearly fell within the rule which denies to the unsworn declarations of a third person the weight of legal evidence. It would have been well however, if the instruction had been somewhat more guarded in its terms, and had discriminated more clearly between the statements made by Kirby at the time of the negotiation for the goods and those made at other and different times, in the absence of Richardson, lest the jury might have been misled by the broad and comprehensive terms used by the court, and supposed that they were to disregard everything that Kirby may have stated, upon any occasion, when Richardson was not present.

It is also alleged on the part of the plaintiffs, that the court erred in permitting the answer of the witness McCormick to the first question propounded to him to go in evidence to the jury. This evidence was offered by the defendant for the purpose of showing the circumstances under which he assigned the bond of Gibson to Kirby, and to make out, if he could, that they were not such as to render him liable as assignor or otherwise to make good the amount of the bond if not made out of Gibson. It consisted of conversations between the witness, Kirby and defendant upon the subject of the proposed partnership, and of the defendant's aiding his son in law Kirby to enter into the business, in which the defendant spoke of letting him have the bond of Gibson, or 2000 dollars of it, if he could make use of it to establish himself in business, but declared that he would not make himself liable in any way; but that Kirby

must see Gibson and ascertain if the bond could be made available. I do not think, however, that the objection to this 499 testimony *was well founded: For, although these conversations and statements did not occur at the time the bond of Gibson was assigned by the defendant to Kirby, yet they took place so recently before and whilst the measure was the subject of discussion and negotiation, that they may be fairly considered as part of the res gestæ, deriving their credit not from that to be attached to the speaker, but from their connection with the circumstances of the transaction; and were therefore admissible in evidence as such, according to the well settled doctrine upon that subject. 1 Stark. Ev. 46; 1 Greenl. Ev. § 108. They would, of course, not receive the same weight and consideration with the jury as if it had appeared that they had occurred exactly at the time of the assignment and delivery of the bond to Kirby; but yet they might serve to a certain extent to elucidate the true character of that transaction, and were, therefore, not improperly permitted to go to the jury, to have such weight with them as they might deem them entitled to.

It is unnecessary to consider the question already glanced at, how far the plaintiffs were prejudiced by the decision of the court overruling his objection to the pleas of the statute of frauds, and suffering them to be filed, nor whether, for this cause, the judgment should be reversed; inasmuch as, in the view which I take of the case, the judgment must be reversed for the refusal of the court to give the instruction to the jury asked for by the plaintiffs. These pleas being, however, no answer to the plaintiffs' action, should be stricken out, and the new trial be had upon the general issue joined in the cause.

I am of opinion that the judgment should be reversed with costs to the plaintiffs in error; that the two special pleas, the one to the second count in the declaration, the other to the fourth count, should be held for naught and set aside; that the 500 cause should *be remanded to the Circuit court for a new trial to be had therein, with directions that if, upon such new trial, the plaintiffs shall give substantially the same evidence as upon the former trial, and shall renew their prayer for the instruction to the jury that was then refused, the same shall be given; and also, that if the same instruction be asked for on the part of the defendant, touching the purpose for which the evidence of the statements and declarations of Kirby were to be considered by them, the said Circuit court shall take care to explain to the jury that the statements and declarations embraced within the scope of the instruction are not those made by Kirby at the time of the negotiation for the goods with the plaintiffs, which are to be regarded by them as evidence without the restriction imposed by the instruction, but are those proven to have been made by the said Kirby on other and different occasions.

SAMUELS, J., concurred in the results of Lee's opinion; but he thought that although the special pleas filed to the second and fourth counts were not good pleas under the first section of the statute of frauds, in relation to the promise or undertaking for another, under which they seem to have been filed, yet that they would have been good pleas under that section in relation to a contract not to be performed within one year.

MONCURE, J., understanding the opinion as to the special pleas to refer to the section of the statute of frauds in relation to the promise being in writing, concurred in Lee's opinion.

ALLEN and DANIEL, Js., concurred in the opinion of Lee, J.

501 *The judgment was as follows:

The court having maturely considered the transcript of the record of the judgment aforesaid, together with the argument of counsel thereupon, it seemeth to the court that the Circuit court erred in permitting the special pleas to the second and fourth counts in the declaration to be filed, the same having been objected to by the plaintiffs: and that it also erred in refusing to give to the jury the instruction asked for by the plaintiffs on the trial of the cause; and also in not, with more distinctness, confining the application of the instruction given on motion of the defendant, to the statements and declarations of the said Kirby other than those made by him at the time of the negotiation with the plaintiffs for the purchase of the goods and the transfer of the bond on Gibson; which last mentioned statements and declaration were, in the opinion of this court, proper evidence to be considered by the jury without the restriction imposed by the terms of the said instruction if intended to be applicable to them also.

Therefore it is considered by the court that the said judgment be reversed and annulled, and that the defendant in error pay plaintiff in error his costs, &c. And it is further considered that the verdict of the jury be set aside; that the special pleas to the said second and fourth counts of the declaration be held for naught, and, with the issues thereon joined, be set aside: and that the cause be remanded to the said Circuit court for a new trial to be had upon the other issue joined therein, with directions that if, upon such new trial, the plaintiffs shall give substantially the same evidence as on the former trial, and shall ask for the same instruction that was then refused, the same shall be given: and if the same instruction shall be asked for on the part of the defendant that was given on the former trial, that the court, on 502 giving the same, *shall confine the application thereof to the statements and declarations of the said Kirby other than those proved to have been made at the

the defendant assigned the bond on Gibson to Kirby by endorsing his name in blank thereon, for the very purpose of enabling Kirby to buy goods upon the faith of his endorsement, and that the plaintiffs sold
496 the goods on the faith of the *same, and that Gibson was notoriously insolvent when his bond fell due, then the defendant was liable to the amount of the value of the goods sold, the same being less than the amount due upon the bond: And I cannot doubt that it correctly propounded the law upon the subject. But it is insisted that the purpose of Richardson, in making the assignment, did not import a guaranty; and that if the instruction is to be construed as assuming an intent to guarantee on his part, it was rightly refused because there was no proof of such guaranty, and the instruction was upon an abstract proposition; which, according to the well settled rule, the court was not bound to give. It is certainly correct that no court is required to instruct the jury upon abstract questions of law not presented by the proofs in the cause. But this function of determining whether any proof has been given of the hypothetical case or not, and if none, of refusing to give the instruction asked for upon it, is one to be exercised with proper care and great caution. In a plain case of a total absence of evidence tending to make out the supposed case, the court may well refuse to give any instruction based upon it. But where there is such evidence, of however little weight it may appear to be to the court, or however inadequate in its opinion, to make out the case supposed, it is best and safest for the court not to refuse to give the instruction asked for if it propound the law correctly. In this case it cannot be said that there was no evidence tending to make out the case supposed in the instruction asked for. The purpose of Richardson, in endorsing the bond of Gibson, which the evidence offered by the plaintiffs tended to prove, did, as it seems to me, import an intent to guarantee; and to what extent this evidence would be credited by the jury, and how far it was weakened by the countervailing testimony offered by the defendants, and
497 the true inferences to be *drawn as to Richardson's purpose and intention, were matters properly for the consideration of the jury. If they should be satisfied Richardson did intend to make himself responsible as assignor of the bond to any one who should make advances to Kirby upon faith of his name, the plaintiffs were entitled to the benefit of the opinion of the court that they were in that case entitled to recover: but if they should be of a different opinion, then the instruction was inapplicable and of course could not prejudice the defendant.

The Circuit court, on the motion of the defendant, instructed the jury that they were not to regard any of the evidence of statements or declarations made by Kirby or any other person in the absence of the defendant, as even tending to prove the liability of the defendant in this action; and that they were only admissible for the purpose of discrediting the testimony of Kirby, who had been examined as a witness on the part of the defendant: And the plaintiffs excepted to the opinion of the court giving this instruction. If this instruction is to be interpreted as directing the jury to disregard all the declarations and statements proven to have been made by Kirby as well at the time of the negotiation for the goods with the plaintiffs as afterwards, (and a formal exception is taken to the deposition of Ross, the witness who proved what passed between Kirby and the plaintiffs at the time of the negotiation for the goods,) then it would be clearly erroneous, inasmuch as what passed between Kirby and the plaintiffs at the time of the negotiation touching the purchase of the goods and the transfer of the bond on Gibson, would be unquestionably proper evidence, being part of the res gestæ, the whole of which, according to the well settled rule, should be given to the jury. But it may be presumed that the Circuit court intended to refer to the other declarations and statements which were proved to
498 have been made by *Kirby in regard to this transaction, after the sale of the goods and the assignment of the bond; and if the instruction is to be so understood, there can be no doubt of its correctness. Charlton v. Unis, 4 Gratt. 58. All these latter statements of Kirby clearly fell within the rule which denies to the unsworn declarations of a third person the weight of legal evidence. It would have been well however, if the instruction had been somewhat more guarded in its terms, and had discriminated more clearly between the statements made by Kirby at the time of the negotiation for the goods and those made at other and different times, in the absence of Richardson, lest the jury might have been misled by the broad and comprehensive terms used by the court, and supposed that they were to disregard everything that Kirby may have stated, upon any occasion, when Richardson was not present.

It is also alleged on the part of the plaintiffs, that the court erred in permitting the answer of the witness McCormick to the first question propounded to him to go in evidence to the jury. This evidence was offered by the defendant for the purpose of showing the circumstances under which he assigned the bond of Gibson to Kirby, and to make out, if he could, that they were not such as to render him liable as assignor or otherwise to make good the amount of the bond if not made out of Gibson. It consisted of conversations between the witness, Kirby and defendant upon the subject of the proposed partnership, and of the defendant's aiding his son in law Kirby to enter into the business, in which the defendant spoke of letting him have the bond of Gibson, or 2000 dollars of it, if he could make use of it to establish himself in business, but declared that he would not make himself liable in any way; but that Kirby

must see Gibson and ascertain if the bond could be made available. I do not think, however, that the objection to this 499 testimony *was well founded: For, although these conversations and statements did not occur at the time the bond of Gibson was assigned by the defendant to Kirby, yet they took place so recently before and whilst the measure was the subject of discussion and negotiation, that they may be fairly considered as part of the res gestæ, deriving their credit not from that to be attached to the speaker, but from their connection with the circumstances of the transaction; and were therefore admissible in evidence as such, according to the well settled doctrine upon that subject. 1 Stark. Ev. 46; 1 Greenl. Ev. § 108. They would, of course, not receive the same weight and consideration with the jury as if it had appeared that they had occurred exactly at the time of the assignment and delivery of the bond to Kirby; but yet they might serve to a certain extent to elucidate the true character of that transaction, and were, therefore, not improperly permitted to go to the jury, to have such weight with them as they might deem them entitled to.

It is unnecessary to consider the question already glanced at, how far the plaintiffs were prejudiced by the decision of the court overruling his objection to the pleas of the statute of frauds, and suffering them to be filed, nor whether, for this cause, the judgment should be reversed; inasmuch as, in the view which I take of the case, the judgment must be reversed for the refusal of the court to give the instruction to the jury asked for by the plaintiffs. These pleas being, however, no answer to the plaintiffs' action, should be stricken out, and the new trial be had upon the general issue joined in the cause.

I am of opinion that the judgment should be reversed with costs to the plaintiffs in error; that the two special pleas, the one to the second count in the declaration, the other to the fourth count, should be held for naught and set aside; that the 500 cause should *be remanded to the Circuit court for a new trial to be had therein, with directions that if, upon such new trial, the plaintiffs shall give substantially the same evidence as upon the former trial, and shall renew their prayer for the instruction to the jury that was then refused, the same shall be given; and also, that if the same instruction be asked for on the part of the defendant, touching the purpose for which the evidence of the statements and declarations of Kirby were to be considered by them, the said Circuit court shall take care to explain to the jury that the statements and declarations embraced within the scope of the instruction are not those made by Kirby at the time of the negotiation for the goods with the plaintiffs, which are to be regarded by them as evidence without the restriction imposed by the instruction, but are those proven to have been made by the said Kirby on other and different occasions.

SAMUELS, J., concurred in the results of Lee's opinion; but he thought that although the special pleas filed to the second and fourth counts were not good pleas under the first section of the statute of frauds, in relation to the promise or undertaking for another, under which they seem to have been filed, yet that they would have been good pleas under that section in relation to a contract not to be performed within one year.

MONCURE, J., understanding the opinion as to the special pleas to refer to the section of the statute of frauds in relation to the promise being in writing, concurred in Lee's opinion.

ALLEN and DANIEL, Js., concurred in the opinion of Lee, J.

501 *The judgment was as follows:

The court having maturely considered the transcript of the record of the judgment aforesaid, together with the argument of counsel thereupon, it seemeth to the court that the Circuit court erred in permitting the special pleas to the second and fourth counts in the declaration to be filed, the same having been objected to by the plaintiffs: and that it also erred in refusing to give to the jury the instruction asked for by the plaintiffs on the trial of the cause; and also in not, with more distinctness, confining the application of the instruction given on motion of the defendant, to the statements and declarations of the said Kirby other than those made by him at the time of the negotiation with the plaintiffs for the purchase of the goods and the transfer of the bond on Gibson; which last mentioned statements and declaration were, in the opinion of this court, proper evidence to be considered by the jury without the restriction imposed by the terms of the said instruction if intended to be applicable to them also.

Therefore it is considered by the court that the said judgment be reversed and annulled, and that the defendant in error pay plaintiff in error his costs, &c. And it is further considered that the verdict of the jury be set aside; that the special pleas to the said second and fourth counts of the declaration be held for naught, and, with the issues thereon joined, be set aside: and that the cause be remanded to the said Circuit court for a new trial to be had upon the other issue joined therein, with directions that if, upon such new trial, the plaintiffs shall give substantially the same evidence as on the former trial, and shall ask for the same instruction that was then refused, the same shall be given: and if the same instruction shall be asked for on the part of the defendant that was given on the former trial, that the court, on 502 giving the same, *shall confine the application thereof to the statements and declarations of the said Kirby other than those proved to have been made at the

the better right to the land in controversy: And he will not be permitted to abandon on the trial the right which he has set out in his caveat as that under which he claims, and prove a different right.

3. **Land Warrants—Entry—Void for Uncertainty.**‡—A party can only make an entry of so much land as will be covered by the warrants under which it is made. And if the entry is made by specified boundaries, and these boundaries contain so much more land than his warrants authorize him to enter, that the quantity he is authorized to enter may be laid off on different lines of the entry, so that they will not embrace any part of the same land, the entry is void for uncertainty.

4. **Same—Same—Same.**—If another person make an entry calling for the same boundaries as the first entry, and entering all the lands embraced in these boundaries not covered by the first entry, as the first entry is void for uncertainty, so the second entry is also void for uncertainty.

5. **Same—Same—Same.**—The party making his first entry, having procured other warrants, sufficient to cover all the lands within the boundaries specified in the first entry not covered by the warrants under which the first entry was made, makes a second entry of all the lands within these boundaries not covered by his first entry. The first entry being void for uncertainty, the second entry is also void.

6. **Same—Same—Same.**—The two entries of the first locator being in fact distinct entries, they cannot be considered as one entry, covering the whole land, and thus avoid the objection of uncertainty in the entry.

7. **Same—Same—Case at Bar.**—The first locator having stated to the surveyor that if there was more land within the specified boundaries of his entry than the warrants he then held would cover, he intended to purchase other warrants for the purpose of covering any such surplus, a knowledge of such intention by a second locator making an entry within said bounds, will not avoid his entry, or give to the first locator a better right to the land either under his prior entry, or under a subsequent entry made under other warrants.

509 *These were cross caveats in the Circuit court of Norfolk county. The first was filed by Baugh and Seguine to the issue of a patent to Harper and Weston for a tract of 7429 acres, 2 roods and 12 perches of land lying in the Dismal Swamp in the county of Norfolk. The second was filed by Harper and Weston to the issue of a patent to Baugh and Seguine for 6455 acres, 2 roods and 12 perches, part of the same land. The cases were tried together before the same jury, and the same facts are found in both cases. Baugh and Seguine in their caveat, rest their claim upon two entries made by them with the surveyor of Norfolk county, one made on the 29th of July 1845, under a warrant for 6000 acres, and the other made on the 7th of August following, under a warrant for 1190 acres. Harper and Weston in their caveat, rest their claim upon an entry made by them with the same surveyor on the 7th day of December 1844. The facts are stated in the opinions of the judges.

The court below rendered judgments upon the verdict in favor of Baugh and Seguine in both cases; and thereupon Harper and Weston applied to this court for a supersedeas, which was awarded.

Samuel Taylor, for the appellants.
T. Taylor and Patton, for the appellees.

MONCURE, J. I am of opinion that Harper and Weston are entitled to a grant for the 7429 acres, 2 roods and 12 perches of land claimed by them, and am therefore compelled to dissent from the opinion of the court in these cases.

A caveat is substantially and emphatically an equitable proceeding; and these being cross caveats, in which the caveators claim on the ground of "a better right," the decision of their conflicting claims must depend on the result of a comparison
510 of their respective *equities; unless, indeed, it shall appear that there is no equity on either side; in which case it would be proper to dismiss both caveats according to the opinion of the court.

If the parties have any equity to compare, all will agree that that of Harper and Weston is superior. They seem to have acted bona fide. They discovered that there was a tract of waste and unappropriated land in the Dismal Swamp, and desired to acquire title thereto in the mode prescribed by law. They did not, and until there was a survey could not, know the quantity of land contained in the tract. "From the nature and situation of the land, lying as it does in an almost impervious swamp, often covered with water," it was difficult, if not impossible, to make anything like a correct estimate of the quantity. They had two land warrants amounting together to 1110 acres, which they say they supposed would cover it; and accordingly, by virtue of those two warrants, they made an entry for the said tract on the books of the principal surveyor of Norfolk county, on the 7th of December 1844, minutely setting out in the entry the abuttals of the land. And one of them stated to the surveyor at the time of making the entry, that if there was any land within the boundaries of the entry above the quantity expressed in their warrants, he intended to purchase additional warrants to cover the surplus. The surveyor, or his deputy, proceeded in due time to make the survey; but after making some progress, it was ascertained that the quantity of the tract would greatly exceed that of the two warrants. Before the survey was concluded, and perhaps as soon as it had progressed far enough to enable them to ascertain what amount of additional warrant it would be necessary to purchase to cover the surplus, they purchased two other warrants, amounting to 6400 acres,

the principal case cited in Trotter v. Newton, 30 Gratt. 582, 589, and *foot-note*; *foot-note* to Carter v. Ramey, 15 Gratt. 346; *foot-note* to Walton v. Hale, 9 Gratt. 194.

‡**Land Warrants—Entry—Void for Uncertainty.**—See Miller v. Page, 6 Call 28; Depew v. Howard, 1 Munf. 293; McNeel v. Herold, 11 Gratt. 309, and *foot-note*.

more than enough to cover the surplus, 511 and handed *them to the surveyor for that purpose; who made an entry by virtue thereof on the 11th of September 1845, "for all the unappropriated land contained within the bounds of the entry made by them December 7th, 1844; said entry," as was stated in the latter entry, "having been surveyed and found to contain more land than their warrants contained at that time." The survey was finished on the 11th of October 1845, and the plat and certificate thereof were duly returned into the land office, it being stated in the certificate that the survey was made in pursuance of the two entries which were made by virtue of the warrants aforesaid. On this state of facts is founded the claim of Harper and Weston to a patent for the land in controversy.

What are the facts on which the claim of Baugh and Seguine is founded? On the 29th of July 1845, long after the first, and shortly before the last entry of Harper and Weston, Baugh and Seguine made an entry in the books of the same surveyor, by virtue of a warrant for 6000 acres, for all the unappropriated land contained within the same boundaries specified in the first entry of Harper and Weston, stating in the entry that it was intended to comprehend all the vacant land that might be left after Harper and Weston should have surveyed 1110 acres, entered by them December 7th, 1844, within the same boundaries. Before and at the time of making their said entry, Baugh and Seguine knew of the said claim of Harper and Weston, to all the unappropriated land within the said boundaries; and Seguine declared that his object in making the said entry was to retaliate upon the said Harper for some loss to which he supposed Harper had formerly subjected him. On the 7th of August 1845, Baugh and Seguine made another entry in the books of said surveyor, by virtue of a warrant for 1190 acres, for all the unap- 512 propriated land contained within *the bounds of their entry of July 29th, 1845, after said entry should be satisfied. A survey was made in pursuance of these two entries of Baugh and Seguine, in the spring of 1846, and the plat and certificate thereof were returned into the land office. When the surveyor was about to commence the survey for Baugh and Seguine, Harper and Weston were requested to select a location for 1110 acres, the quantity of land mentioned in their warrants, upon which they made their entry of December 7th, 1844; but they refused so to do, and claimed the whole land by virtue of their entry and survey. Baugh and Seguine then had 1110 acres of the land laid off for Harper and Weston, and the balance surveyed for themselves under their entries and warrants aforesaid; and they now claim to be entitled to a patent for the said balance.

Such are the conflicting claims involved in these cross caveats; and the bare statement of them is sufficient plainly to show that Harper and Weston have superior equity, and "the better right;" unless it can be made to appear that their first entry was void, and the entries of Baugh and Seguine valid, or that all the entries are void.

The majority of this court is of opinion that all of them are void, for uncertainty. It must probably be conceded, on the authority of the cases cited in that opinion, that the first entry of Harper and Weston is void for uncertainty; and it follows that the two entries of Baugh and Seguine are void for the same cause. But why is the last entry of Harper and Weston void? There may have been uncertainty as to the precise location of the 1110 acres under the first entry, but there could have been none as to the location of the whole quantity contained in the boundaries under both the entries. The professed and manifest object of Harper and Weston was not to acquire title to 1110 acres, but to all the land 513 in the prescribed *boundaries. Their warrants and entries were but machinery used to effect this acquisition. The first entry was, of necessity, conjectural, and intended to be conditional; or, at all events, to be helped out by another entry or other warrants if necessary. If the second entry does not, as it probably cannot, relate back to the first, so as to override intervening conflicting entries, it ought at least to take effect from its date, and draw down the first entry to its assistance, so as to entitle the parties to a patent or a survey made under both entries. Their first entry, and both of the entries of Baugh and Seguine being void, it was perfectly competent for them, on the 11th of September 1845, to make one entry under all their warrants, which were more than sufficient to cover all the land. If they had done so, all would admit that they would have been entitled to the land. Did they not do so, in substance at least, if not in form also? What more could they have done than they did do? What more can they do than they have done, if now they must run a race with Baugh and Seguine for priority of entry? If after the decision of these cases they shall enter for all the lands under all their warrants before Baugh and Seguine make a similar entry, they will then certainly be entitled to the land. Have they not already done so, in substance at least, if not in form also? Has not every requisition of the law been already complied with, and every object which the law has in view been already attained? The law prescribes no form of entry. It requires the party to lodge the warrant with the surveyor of the county in which the land lies, and to direct the location thereof so especially and precisely as that others may be enabled with certainty to locate other warrants on the adjacent residuum. If this was not done by the first conjectural entry, was it not done by the second entry? Did not the second entry locate the whole land 514 under *all the warrants; and was it not plain after the second entry that there was no adjacent residuum within the

prescribed boundaries? Look to the form of the second entry and the reason therein assigned for making it: that is, the first "entry having been surveyed and found to contain more land than their warrants contained at that time." Showing that the object of Harper and Weston, from the first, was to cover the whole land and have but one survey and patent, however many warrants and entries might be necessary to be used in effecting the object. The survey is then completed, and the plat and certificate, under both the entries and all the warrants, are returned into the land office for a patent. Do they not afford sufficient ground for a patent? Has not the applicant, plainly and irrevocably, appropriated his warrants and applied them to this identical land; and is not the contract between him and the commonwealth complete, remaining only to be finally executed on the part of the commonwealth by the issuing of the patent? Look to the form prescribed by law for the patent. It issues upon the survey and mentions the consideration money, the date of the survey, and the bounds of the land as therein set out. All the information required for the issuing of the patent is furnished by the plat and certificate; the amount of consideration, the numbers and amounts of the different warrants, the date of the survey, and the bounds and quantity of the land. What then can the register say against the issuing of the patent; and what better case can be made before him? There was never intended to be more than one entry of this land by Harper and Weston. Their object, as we have seen, was to acquire the land by one proceeding and title. Their second entry, as it is called, is but a repetition of the first, under the authority of their subsequently acquired as well as their former warrants. There is a unity of object 515 in both *of the entries. They are not conflicting, and it seems to be incongruous to call them two entries. Harper and Weston did not wish to yield the advantage they may have acquired by their prior entry; and it was not necessary for them to do so in order to give validity to the second, as an entry under all the warrants. The first entry, if void at all, was void not because it was not sufficiently specific as to the tract of land which was intended to be thereby acquired, but because Harper and Weston had not paid for as much land as was embraced in the tract, and therefore had not then a right to appropriate the whole tract. When, however, they had purchased other warrants sufficient, with those they before had, to cover the whole, and made their second entry, connecting it, as they did, with their former, all ground of objection to their right was removed. Full justice had then been done to the commonwealth by paying for all the land in the tract, and full legal notice had then been given to all other persons wishing to acquire the same land, not only of the identity of the tract, but of its having been fully paid for. The second entry, in the form in which it was made, as effectually gave this notice as if the first had been formally withdrawn and the second made as an original independent entry under all the warrants.

These views of the question seem to me to be reasonable, and are opposed to no decision that I have seen, unless it be the case of Young v. Wilson, 1 A. K. Marsh. R. 609, cited in the opinion of the majority of the court. If that case were plainly opposed to the views I have expressed, I would not be inclined to follow it, great as is my respect for the court by which it was decided. Nothing short of a "binding authority" would induce me to say, that to entitle Harper and Weston to a patent for the land they claim, it is necessary for them to do over again what they have in 516 effect *already done, especially when the consequence might be a loss of all the land to them and a corresponding gain to their adversaries. It does not appear from the report of that case, according to my recollection of it, that the two warrants under which the two entries were made, were together sufficient in quantity to cover all the land embraced in the bounds of the entries. Indeed the contrary would rather seem to be inferrible from the facts stated. Nor does it appear, if I remember rightly, that the party intended from the first to acquire title to a specific tract of land, and used his warrants and entries only for the purpose of effecting that intention. He may have intended by his first entry only to acquire title to the number of acres mentioned in his warrant; but finding that some land would be left in the entry after satisfying the warrant, he may then have intended by his second entry to appropriate so much of the residue as his second warrant would cover. He may have contemplated separate surveys and patents. These features, if they exist, as I suppose, in that case, rendered the entries void for uncertainty, according to the cases cited in the opinion of the majority. But none of them exist in these cases, in which, as we have seen, the forms of the entries, and the whole res gestæ plainly manifest an intention on the part of Harper and Weston from first to last to acquire title to the identical tract of land in controversy, which their warrants were more than sufficient to cover.

I am therefore for declaring that Harper and Weston are entitled to the land in controversy, and that a patent should be issued to them therefor, and not to Baugh and Seguine for any part of it. As to the form of the judgment which ought to be rendered by this court in the cases, I might have some difficulty. Perhaps I would have to agree with the rest of the court in dismissing both caveats. Of course I would 517 concur *in the dismission of the caveat of Baugh and Seguine, for we all agree that they show no right, and must go out of court, whether their adversaries have any right or not. As to the necessity or propriety of dismissing the caveat of Harper and Weston, there may be room for

doubt. The only reason specifically assigned by them for their caveat is their prior entry of December 7, 1844. No reference is made in the caveat to their entry of September 11, 1845. They no doubt supposed that the controversy depended on the relative priority of the conflicting entries. They did not anticipate that any of them would be considered by this court as void for uncertainty, and therefore they did not see the propriety of relying on an entry subsequent to those of their adversaries. The assignment of reasons in their caveat, was in fact however a mere matter of form. The grounds of their claim were well understood by their adversaries, who had previously entered a caveat against the issuing of a grant to them on a survey, plat and certificate which fully set out those grounds. The two caveats were tried by the same jury, who found the same special verdict, mutatis mutandis, in each case. All these entries and all other material facts were found in the verdicts. Judgments on the verdicts were pronounced by the same court at the same time. And the judgments now come up together to be reviewed by us. Substantially they are one case, and involve but one question; and it might be admissible, under the peculiar circumstances, to dispose of them as one case, and to regard everything appearing in one as part of the other also. This however is a question of little importance and only involves a matter of costs. It would perhaps be more correct to regard the cases as separate, and to dismiss the caveat of Harper and Weston also, upon the ground that the reasons assigned therein are insufficient. But whatever may be the proper form of the judg-
518 ment to *be given by us in the cases, it ought, I think, expressly to declare that Harper and Weston and not Baugh and Seguine are entitled to a patent for the land; and thus to put an end to all controversy on the subject between the parties.

ALLEN, J. This is a contest for land under adverse claims. The appellees filed their caveat against the issuing of a grant upon an entry and survey made for the appellants; and the appellants thereafter filed their caveat against the issuing of a grant to the appellees. Each caveat is filed upon the ground of better right in the caveators to the land in controversy, and sets out the nature of the right on which the caveators respectively claim the land. The 17th section of the general land law, 1 Rev. Code 325, provides that every person having a land warrant, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the chief surveyor of the county, &c.; and he shall direct the location thereof so specially and precisely, as that others may be enabled, with certainty, to locate other warrants on the adjacent residuum; which location shall bear date the day on which it shall be made, and shall be entered in a book, &c. The 38th section, p. 329, gives the caveat, providing amongst other things, that if any person shall obtain a survey of land to which another hath by law a better right, the person having such better right may enter a caveat to prevent his obtaining a grant, until the title can be determined; such caveat expressing the nature of the right on which the plaintiff therein claims the said land. In the construction of this statute it has been always held, so far as I can perceive, that the caveator must show a better right to the land in controversy. He cannot recover upon the ground of the weakness of his adversary's claim; and that in such controversies the
519 validity of the plaintiff's *title is necessarily the first subject of enquiry. Hunter v. Hall, 1 Call 206; Walton v. Hale, supra 194; Hendricks v. Bell, 1 Bibb's R. 138; Justices of Allen County v. Allen, 2 A. K. Marsh. R. 31; Whitley v. Shirley, 3 Id. 131. The law required the caveat to express the nature of the right on which the plaintiff claims the land. The object of the caveat is in part to notify the caveatee of the grounds on which the caveator claims the better right, that he may come prepared to controvert it; and it would be a surprise on him to permit the caveator to abandon at the trial the right which he had set forth in his caveat as that under which he claimed, and prove a different right. Such a course would lead to injustice, and is in conflict with the terms of the statute, which requires the nature of the better right to be expressed in the caveat. In the case of the Justices of Allen County v. Allen, 2 A. K. Marsh. R. 31, the court held in the construction of the act regulating proceedings in caveats in that state, which enjoins upon those entering caveats to express therein the cause why a grant should not issue, that the plaintiff can only rely on the points set forth in the caveat as to the cause thereof. The principle of that decision would apply with greater force to the construction of the provision in the act of 1819. The caveator cannot be ignorant of the better right under which he claims, and he is subjected to no hardship in being required to rely at the trial upon the right so expressed. But he may be ignorant of all the objections to the claim of the caveatee.

The location, to comply with the law, must be made so especially and precisely, as that others may be enabled, with certainty, to locate other warrants on the adjacent residuum. The entry confers an equitable right to a portion of the public domain; it withdraws it as long as the entry is in force, from other waste and un-
appropriated land; its calls should
520 therefore be so *special and precise, as to enable other adventurers, by the use of proper diligence, and the application of those rules of construction established by the courts, to ascertain by a survey and lay off the land so appropriated. The calls of the entry must give notice to subsequent locators, what land has been appropriated. The fact that the locator may be able by proof to identify the land will not suffice,

if there is nothing in the calls of the entry to point to and set apart some specific tract of land. In McArthur v. Browder, 4 Wheat. R. 488, it was argued that as the words of the entry were the words introduced into the grant, if they were too vague to appropriate the land when used in the entry, they must be too vague to appropriate it when used in the grant. In commenting on this argument, Ch. J. Marshall, in delivering the opinion of the court, remarked: "When lands are granted, a description which will identify them is all that is necessary to the validity of the grant. But identity is not all that is necessary to the validity of an entry. The law requires that locations should be made with such certainty that subsequent purchasers may be enabled to locate the adjacent residuum. All grants are founded on surveys: They recite surveys, and all that is required in ejectment is to prove that the land claimed is that which was surveyed. More is required in a contest respecting an entry. Nothing is more common than for courts to declare an entry void for uncertainty, notwithstanding the clearest proof that the land claimed and that located are the same."

Bearing these rules in mind, it remains to enquire whether the caveators in each of the caveats under consideration have that better right, the nature of which has been expressed in the caveats filed by them respectively. The better right so expressed depends upon the validity of the locations made by them; and in determining that question the entries must be considered *in the order in which they were made. It appears from the facts found by the jury, that the appellants Harper and Weston, on the 7th of December 1844, by virtue of two land warrants belonging to them, one for 920 acres, the other for 190 acres, making together 1110 acres, entered for all the unappropriated land contained within the following boundaries, viz: Beginning at a blackgum standing near the intersection of two ditches, &c., &c. (describing the land by metes and bounds), the boundaries being the lines (with perhaps one exception), of adjacent tracts called for, to the beginning; the quantity supposed 1110 acres. It is further found that the appellants claimed the whole of the land within their entry of the 7th December 1844, as waste and unappropriated at the time they made their entry. That there was no evidence showing that the same or any portion thereof was otherwise than waste and unappropriated at that time, and that the quantity of land within the bounds of the said entry of December 7, 1844, as ascertained by the survey, was 7429 acres, 2 roods and 12 perches; and the certificate of survey is found and made part of the verdict. The first question which arises upon the facts so found is, whether this entry was sufficiently special and precise to comply with the requisitions of the statute; and if not, how far it is aided by the other facts found by the jury? Any person may acquire title to so much of the waste and unappropriated land of the commonwealth by paying the price fixed by law. Upon payment of the price a warrant is granted by the register, specifying the quantity of land, and authorizing a surveyor to lay off and survey the same. This warrant the purchaser is to lodge with the surveyor when he locates it; and the surveyor, after making his survey, is to deliver to his employer a fair and true plat and certificate of survey, expressing, among other things, the quantity contained, and *also the nature of the warrant and rights on which such survey was made. The locators, when they made their entry of the 7th December 1844, were the owners of warrants amounting to 1110 acres; that quantity of land they had purchased and were entitled to withdraw from the public domain. By their entry they located and described a body of land containing within the boundaries specified 7429 acres, 2 roods and 12 poles. It is manifest that the surveyor would not have been authorized to survey for them that quantity of land under the warrants lodged with him. If the fact appeared on the plat and certificate of survey, it would show upon its face a want of authority in the surveyor to make it. If not authorized to survey the whole, how could he survey a part so as to satisfy the calls of the entry? Each call is entitled to the same consideration. There is nothing to confine the locator to one in preference to the others. A subsequent locator could not, by the use of any diligence, be enabled with certainty to locate other warrants on the adjacent residuum. The law conferred no authority on him to require the first locator to designate which of the calls of his entry he would abandon or adhere to. The consequence would be that any adventurer, though the purchaser of but 100 acres from the commonwealth, could by making his entry by specific boundaries, and including a much larger quantity therein, withdraw the excess from the public domain for an indefinite period, and until it suited his convenience to acquire land warrants sufficient to cover all.

The validity of such an entry has been the subject of judicial decision in numerous cases in Kentucky, where, as Judge Tucker remarked in Hardman v. Boardman, 4 Leigh 386, we can trace back the interpretation of this law almost to the time when it began first to be put into operation. The first case on this point which I find, is the case of Bush v. Jameson, 3 *Bibb's R. 118. It seems to be the leading case on this question, and so far as I have been able to trace it, has been recognized and followed in all the subsequent cases in the Kentucky Reports involving the same proposition. The entry there called to begin at a beginning corner of another survey, to be bounded by three lines described in the entry, and to include all the vacant lands in the boundaries described for quantity. The court, after some remarks on the want of certainty in the description, says: "Another objection occurs

to the entry which we are clearly of opinion is fatal. The two traces and the line of the survey called for, compose a triangle of nearly equal sides, in which is contained more than three times the quantity called for in the entry. That no one could lawfully appropriate more than the quantity to which he was entitled, is a position too clear to admit of controversy; otherwise the absurd consequence would follow, that upon a warrant of 1000 acres or less the whole vacant land of the county might have been appropriated." It had been urged that the line of the survey, the first line called for in the entry, should be taken as the base, and the survey extended so far along the two traces as would include the quantity. This was decided to be inadmissible, "as by the terms of the entry all the vacant land in the boundaries mentioned was included in the location; that there was no reason for preferring the line of the survey, first called for in the entry, to the other sides of the triangle. From necessity one line of a survey must be made before another; and there was nothing to indicate any intention in the locator to prefer the line first called for as a base, to the other lines. That the case differed materially from the case of an entry which gives a definite base, and calls for an indefinite extension of the lines from the base, so far as will include the quantity of vacant land. In the latter case, the lines extending 524 *from the base being indefinite as to their extent, may be limited by construction; but in the case then before the court, all the lines of the triangle being equally definite, no one of them more than another can be controlled by construction."

In Marshall v. Russell, 1 A. K. Marsh. R. 271, the boundaries called for contained about double the quantity of land to which the entry was entitled. The court refer to Bush v. Jameson, and hold that in conformity with that decision the entry could not be sustained, though a surplus of a few acres ought not to vitiate the whole entry. That if the whole of the boundaries were described by sensible objects, so that there could be no reason for one to yield to or control the other, the entry could only be good for so much as would be covered in common by surveys of the proper quantity made upon each of the boundaries. But if the boundaries were so extensive that surveys might be made on different parts of the boundaries without covering any land in common, the entry would be good for none. See also Young v. Wilson, 1 A. K. Marsh. R. 609; State v. McDowel, 2 A. K. Marsh. R. 184; Helm & Reed v. Crawford, 3 A. K. Marsh. R. 570.

In the entry under consideration specific boundaries are called for, and the locator designed to appropriate all the land included therein. Every call is entitled to equal consideration. An inspection of the plat and certificate of survey shows that the boundaries were so extensive that surveys of the quantity called for might be made on different parts of the boundaries without covering any of the land in common. The entry could be sustained at any one of the several places called for in the absence of the others; and the calls make the whole too uncertain to attach itself to any particular. For all or any of these causes, the cases referred to show that the entry is bad for uncertainty.

525 *The decisions of the courts of Kentucky upon the construction of the land law of May 1779, from which the provisions of the act of 1819 on this subject are derived, have always been regarded with the highest respect by this court and the Supreme court of the United States, though not entitled to the weight of authority. Upon the point presented by the entry of the appellants of the 7th December 1844, the construction put upon the law seems to me to be the only one it will bear, and should be followed. That entry tested by the principles established by all the cases referred to, must be regarded as being void for uncertainty. If the entry does not comply with the law and is void for uncertainty, I do not perceive how it can be aided by any other facts found by the jury.

In their caveat the appellants claim to have the better right to the whole of the land embraced in the entries of the caveatees, that the land embraced in the entries of the caveatees was not waste and unappropriated, because the appellants had made an entry on the 7th of December 1844, embracing all the lands subsequently entered by the caveatees. The nature of the right on which the appellants claimed the land is expressed to be their entry of the 7th of December 1844; and that failing them, nothing remains upon which their caveat can rest. But if we could look beyond the nature of the right expressed in their caveat, there is nothing, as it seems to me, which could affect the judgment of the court upon the caveat filed by them.

It is found that one of the appellants at the time he made his entry with the principal surveyor, on the 7th of December 1844, stated to him, that if the boundaries contained more land than the quantity expressed in their warrants, he intended to purchase additional warrants to cover the whole. That the appellants never waived their title to any portion of the land 526 contained *within the boundaries of their entry of the 7th December 1844, but frequently and publicly spoke of the land as being valuable, and of their claim to the whole; and that the appellees before their entry, knew of the claim of the appellants to all the unappropriated lands within said boundaries; and that one of the appellees declared that his object in making the entry of the appellees was to retaliate on one of the appellants for some loss he supposed said appellant had subjected him to.

These matters are, as it seems to me, beside the controversy, and have no bearing upon the rights of the parties. The field for acquiring a right to the waste land of the commonwealth, is open to all; a declaration of an intention to purchase a warrant

is of no avail, he must be the holder of the warrant before he can take any step to acquire any portion of unappropriated land. When he enters, he does so at his own hazard. It is a race of diligence between the different adventurers. Notice of an intention to enter, or of an entry which is void on its face, cannot affect the conscience of the subsequent locator. Neither the intention to enter nor the void entry can confer any right, and he must show a better right. Nor can the motives which may have operated on the adverse claimant have any influence upon a question like this, upon the trial of a caveat; a remedy not devised to investigate questions of fraud, nor appropriate for such enquiries; but mainly intended where the better right is the point in question, and the land has not been previously granted, to enquire which party, if either, has so proceeded under the land law, as to entitle himself to a patent. Questions of fraud in fact, whereby one party got the legal advantage to the prejudice of another's equitable right, could be more properly determined in another mode of proceeding, in which a direct issue could be raised.

527 *But it is argued that other facts were found by the jury which will in some way aid the defective entry of the appellants. It is found that the appellees, caveatees in the cross caveat filed by the appellants, made two entries embracing the land in controversy, one dated the 29th of July 1845, and the other the 7th of August 1845, and that the appellants having ascertained that the boundaries called for in their entry of the 7th December 1844, included so large an excess over the quantity their warrant authorized them to locate, after the entries of the appellees, viz: on the 8th of September 1845, purchased more land warrants, and on the 11th of September 1845, made an entry in pursuance of these warrants in these words: "September 11th, 1845, Samuel Weston and John Harper this day enter by virtue," &c. (reciting the two warrants of the 8th September,) "for all the unappropriated land contained within the bounds of the entry made by them December 7th, 1844, said entry having been surveyed and found to contain more land than their warrants contained at that time.

This does not purport to be an amended entry. It is a new, separate and distinct entry, which if valid, could have been surveyed and carried into grant, although the first entry had been withdrawn or abandoned. It was not the intention of the appellants to interfere with or withdraw their first entry, and then re-enter under all their warrants. This would have been abandoning the priority which they supposed their first entry gave them, and have let in the entries of the appellees. Even if it had been designed as an amended entry, and so appeared on its face, it could only retain its original character, so far as it was unchanged by the amendment, and so far as it was changed, it would be a new entry, so that at last supposing the entries of the appellees to have been valid, this subsequent entry treating it as

528 an amendment, *could not have availed in this contest; for as to all, except the quantity expressed in the warrants recited in the first entry, it was a new entry subsequent to the entries of the caveatees and appellees.

But the entry itself, treating it as it was manifestly designed, as a distinct entry, made in virtue of the warrants therein recited, and having no other connection with the first, except so far as it calls for the objects named in the first, is liable to the same objection for uncertainty. It calls for all the unappropriated land within the bounds of the first entry. The first entry is shown not to have appropriated any particular part; and until it could be fixed upon some particular part of the land included in the bounds called for, no one could point out the surplus to be covered by the second entry. The first entry might be invalid, or be withdrawn or abandoned; and in that event, the second would be equally uncertain with the first; there being a large surplus within the boundaries, and nothing to show what particular portion was covered by the entry.

The question arising on this point has, like the first, been decided by the courts of Kentucky. In the case of Young v. Wilson, 1 A. K. Marsh. R. 610, the boundaries described in the first entry contained nearly double the quantity of the entry. The second called to include the surplus land within the boundaries described in the first entry. The court say: "The first entry could not appropriate the whole of the land thus described; and as it pretends to appropriate no one part in preference to any other, it is manifestly void for uncertainty, according to the principles settled in Bush v. Jameson. The second entry, considered as a separate and distinct one, for the quantity therein mentioned, is upon the same principles, equally uncertain and void. But it is contended that the two entries should be taken together

529 as one entry, for the *whole quantity mentioned in both, having effect from the date of the second entry. To thus consolidate the two entries, would be confounding things which are separate and distinct, and doing that for the locator which he has not thought proper to do for himself. For the second entry only purports to be a location of the quantity of 330 acres, and does not profess to modify in any manner the first entry, but leaves it as was originally made." I have given the words of the court, as the case in all its material circumstances, is precisely like the present; and as it seems to me, disposes of the questions in conformity with the clear requisitions of the law. I think the appellants have failed to establish either the right expressed in the caveat, or to show by the facts found, any better right in themselves to the land in controversy, or any part of it.

And as it regards the appellees, the caveators in the first caveat, the authorities

referred to are equally decisive against the validity of their entries. They caveat on the ground of the better right, and the nature of their right as expressed, is a claim by virtue of two entries. The first dated the 29th July 1845, for 6000 acres for all the unappropriated land contained within the following boundaries: "Beginning, (describing the boundaries called for in the entry of the appellants of the 7th December 1844,) quantity supposed 6000 acres. The above entry is intended to comprehend all the vacant land that may be left in the above named boundaries after Harper and Weston shall have surveyed 1110 acres entered by them December 7, 1844, within the same boundaries." This entry is liable to the same comments as the second entry of the appellants. Its locality depends upon the locality of the entry of the appellants; and like it is too uncertain until identity can be given to the first. The entry under consideration cannot be said to appropriate any one part in preference 530 *to the other. The second entry of the appellees was intended to cover a surplus remaining after satisfying the entry of the appellants of the 7th December 1844, and the first entry of the appellees, and is still more uncertain than their first; for locality cannot be given to it until locality is given to the two preceding entries, as it is made dependent on both. I think therefore that all the entries, as well of the appellants as of the appellees referred to and found by the jury in each case, were invalid and void for uncertainty; and that a judgment should have been entered, (both causes having been heard together,) declaring that the entries as well on the part of the caveators as the caveatees in the original and cross caveat were void for uncertainty; and dismissing each caveat with costs to the caveatees.

DANIEL, LEE and SAMUELS, Js., concurred in the opinion of Allen, J.

Judgments reversed: And both caveats dismissed.

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531 *Thomas v. Dawson & Wife.

January Term, 1853, Richmond.

1. **Commissioner's Report*—Recommitment—Case at Bar.**—In a suit by distributees against an administrator the accounts having been referred a report is returned before the defendant's evidence is filed. He excepts to the report, and files an affidavit showing a sufficient excuse for not sooner taking his evidence, and asks for a recommitment of the report. Under these circumstances, though the testimony may sustain the defendant as to the subject of controversy, it would not be proper to dismiss the bill: But the plaintiffs should have an opportunity to disprove the testimony, and is also entitled to an account of administration. The report should be recommitted.

2. **Appellate Practice—Presumption—Case at Bar.**—Neither the bill nor the answer referring to the wife of the intestate, and there being no proof that she is alive, the appellate court will presume she is dead, in a bill by the children of the intestate against the administrator.

Bernard Dawson and Elizabeth his wife filed their bill in the Circuit court of Prince William county against Wileman Thomas, administrator of John Lowe deceased, in which they stated that the plaintiff was the daughter of John Lowe; that Thomas had qualified as Lowe's administrator, but had returned no inventory or account of sales. That he had received a large claim due said Lowe from the government of the United States for military services, amounting to between nine and ten hundred dollars. That he rendered no account and paid over nothing to the plaintiffs. And they prayed for a settlement of his administration account, and for general relief.

In May 1846 Thomas filed his answer. He states that John Lowe came from Maryland to Prince William in 1785, where he lived up to the time of his death, when he was upwards of four score years of age. That he was very old, very infirm, 532 and very *poor, and had been fed and clothed and treated with kindness by the defendant. That, having served as a soldier in the war of the revolution, he was entitled to a pension; and proposed to the defendant to undertake the prosecution of his claim to it, proposing to give to him the arrears up to the time of its establishment as recompense for establishing the claim, and to reserve to himself as a support such pension as might accrue subsequently. That this proposition was accepted, and defendant expended much time, labor and expense in prosecuting the claim, and in the course of its prosecution employed two agents to whom he paid 150 dollars. That the arrears of the pension were 982 dollars, out of which he paid the said 150 dollars, and the residue he has retained to reimburse his large outlay of money in prosecuting the claim, and as a compensation for his various contributions to the relief of Lowe, and for his services. That the defendant's intestate left very little property; that it was inadequate to discharge his funeral expenses and the debts due from him and paid by the defendant: It sold for 27 dollars and 42 cents. That defendant can neither admit nor deny that the plaintiff Elizabeth is the child and heir of John Lowe; he has heard she is not; or that the plaintiff Bernard is her husband. Of these facts defendant demands proof.

In October 1846 there was a decree for an account of Thomas' administration on his intestate's estate. In April 1847 the commissioner returned his report, in which he charged the administrator Thomas with the two sums of 27 dollars 42 cents and of 982 dollars, and credited him with the 150

*See monographic *note* on "Commissioners in Chancery" appended to Whitehead v. Whitehead, 28 Gratt. 376.

the defendant assigned the bond on Gibson to Kirby by endorsing his name in blank thereon, for the very purpose of enabling Kirby to buy goods upon the faith of his endorsement, and that the plaintiffs sold
496 the goods on the faith of the *same, and that Gibson was notoriously insolvent when his bond fell due, then the defendant was liable to the amount of the value of the goods sold, the same being less than the amount due upon the bond: And I cannot doubt that it correctly propounded the law upon the subject. But it is insisted that the purpose of Richardson, in making the assignment, did not import a guaranty; and that if the instruction is to be construed as assuming an intent to guarantee on his part, it was rightly refused because there was no proof of such guaranty, and the instruction was upon an abstract proposition; which, according to the well settled rule, the court was not bound to give. It is certainly correct that no court is required to instruct the jury upon abstract questions of law not presented by the proofs in the cause. But this function of determining whether any proof has been given of the hypothetical case or not, and if none, of refusing to give the instruction asked for upon it, is one to be exercised with proper care and great caution. In a plain case of a total absence of evidence tending to make out the supposed case, the court may well refuse to give any instruction based upon it. But where there is such evidence, of however little weight it may appear to be to the court, or however inadequate in its opinion, to make out the case supposed, it is best and safest for the court not to refuse to give the instruction asked for if it propound the law correctly. In this case it cannot be said that there was no evidence tending to make out the case supposed in the instruction asked for. The purpose of Richardson, in endorsing the bond of Gibson, which the evidence offered by the plaintiffs tended to prove, did, as it seems to me, import an intent to guarantee; and to what extent this evidence would be credited by the jury, and how far it was weakened by the countervailing testimony offered by the defendants, and
497 the true inferences to be *drawn as to Richardson's purpose and intention, were matters properly for the consideration of the jury. If they should be satisfied Richardson did intend to make himself responsible as assignor of the bond to any one who should make advances to Kirby upon faith of his name, the plaintiffs were entitled to the benefit of the opinion of the court that they were in that case entitled to recover: but if they should be of a different opinion, then the instruction was inapplicable and of course could not prejudice the defendant.

The Circuit court, on the motion of the defendant, instructed the jury that they were not to regard any of the evidence of statements or declarations made by Kirby or any other person in the absence of the defendant, as even tending to prove the liability of the defendant in this action; and that they were only admissible for the purpose of discrediting the testimony of Kirby, who had been examined as a witness on the part of the defendant: And the plaintiffs excepted to the opinion of the court giving this instruction. If this instruction is to be interpreted as directing the jury to disregard all the declarations and statements proven to have been made by Kirby as well at the time of the negotiation for the goods with the plaintiffs as afterwards, (and a formal exception is taken to the deposition of Ross, the witness who proved what passed between Kirby and the plaintiffs at the time of the negotiation for the goods,) then it would be clearly erroneous, inasmuch as what passed between Kirby and the plaintiffs at the time of the negotiation touching the purchase of the goods and the transfer of the bond on Gibson, would be unquestionably proper evidence, being part of the res gestæ, the whole of which, according to the well settled rule, should be given to the jury. But it may be presumed that the Circuit court intended to refer to the other declarations and statements which were proved to
498 have been made by *Kirby in regard to this transaction, after the sale of the goods and the assignment of the bond; and if the instruction is to be so understood, there can be no doubt of its correctness. Charlton v. Unis, 4 Gratt. 58. All these latter statements of Kirby clearly fell within the rule which denies to the unsworn declarations of a third person the weight of legal evidence. It would have been well however, if the instruction had been somewhat more guarded in its terms, and had discriminated more clearly between the statements made by Kirby at the time of the negotiation for the goods and those made at other and different times, in the absence of Richardson, lest the jury might have been misled by the broad and comprehensive terms used by the court, and supposed that they were to disregard everything that Kirby may have stated, upon any occasion, when Richardson was not present.

It is also alleged on the part of the plaintiffs, that the court erred in permitting the answer of the witness McCormick to the first question propounded to him to go in evidence to the jury. This evidence was offered by the defendant for the purpose of showing the circumstances under which he assigned the bond of Gibson to Kirby, and to make out, if he could, that they were not such as to render him liable as assignor or otherwise to make good the amount of the bond if not made out of Gibson. It consisted of conversations between the witness, Kirby and defendant upon the subject of the proposed partnership, and of the defendant's aiding his son in law Kirby to enter into the business, in which the defendant spoke of letting him have the bond of Gibson, or 2000 dollars of it, if he could make use of it to establish himself in business, but declared that he would not make himself liable in any way; but that Kirby

must see Gibson and ascertain if the bond could be made available. I do not think, however, that the objection to this 499 testimony *was well founded: For, although these conversations and statements did not occur at the time the bond of Gibson was assigned by the defendant to Kirby, yet they took place so recently before and whilst the measure was the subject of discussion and negotiation, that they may be fairly considered as part of the res gestæ, deriving their credit not from that to be attached to the speaker, but from their connection with the circumstances of the transaction; and were therefore admissible in evidence as such, according to the well settled doctrine upon that subject. 1 Stark. Ev. 46; 1 Greenl. Ev. § 108. They would, of course, not receive the same weight and consideration with the jury as if it had appeared that they had occurred exactly at the time of the assignment and delivery of the bond to Kirby; but yet they might serve to a certain extent to elucidate the true character of that transaction, and were, therefore, not improperly permitted to go to the jury, to have such weight with them as they might deem them entitled to.

It is unnecessary to consider the question already glanced at, how far the plaintiffs were prejudiced by the decision of the court overruling his objection to the pleas of the statute of frauds, and suffering them to be filed, nor whether, for this cause, the judgment should be reversed; inasmuch as, in the view which I take of the case, the judgment must be reversed for the refusal of the court to give the instruction to the jury asked for by the plaintiffs. These pleas being, however, no answer to the plaintiffs' action, should be stricken out, and the new trial be had upon the general issue joined in the cause.

I am of opinion that the judgment should be reversed with costs to the plaintiffs in error; that the two special pleas, the one to the second count in the declaration, the other to the fourth count, should be held for naught and set aside; that the 500 cause should *be remanded to the Circuit court for a new trial to be had therein, with directions that if, upon such new trial, the plaintiffs shall give substantially the same evidence as upon the former trial, and shall renew their prayer for the instruction to the jury that was then refused, the same shall be given; and also, that if the same instruction be asked for on the part of the defendant, touching the purpose for which the evidence of the statements and declarations of Kirby were to be considered by them, the said Circuit court shall take care to explain to the jury that the statements and declarations embraced within the scope of the instruction are not those made by Kirby at the time of the negotiation for the goods with the plaintiffs, which are to be regarded by them as evidence without the restriction imposed by the instruction, but are those proven to have been made by the said Kirby on other and different occasions.

SAMUELS, J., concurred in the results of Lee's opinion; but he thought that although the special pleas filed to the second and fourth counts were not good pleas under the first section of the statute of frauds, in relation to the promise or undertaking for another, under which they seem to have been filed, yet that they would have been good pleas under that section in relation to a contract not to be performed within one year.

MONCURE, J., understanding the opinion as to the special pleas to refer to the section of the statute of frauds in relation to the promise being in writing, concurred in Lee's opinion.

ALLEN and DANIEL, Js., concurred in the opinion of Lee, J.

501 *The judgment was as follows:

The court having maturely considered the transcript of the record of the judgment aforesaid, together with the argument of counsel thereupon, it seemeth to the court that the Circuit court erred in permitting the special pleas to the second and fourth counts in the declaration to be filed, the same having been objected to by the plaintiffs: and that it also erred in refusing to give to the jury the instruction asked for by the plaintiffs on the trial of the cause; and also in not, with more distinctness, confining the application of the instruction given on motion of the defendant, to the statements and declarations of the said Kirby other than those made by him at the time of the negotiation with the plaintiffs for the purchase of the goods and the transfer of the bond on Gibson; which last mentioned statements and declaration were, in the opinion of this court, proper evidence to be considered by the jury without the restriction imposed by the terms of the said instruction if intended to be applicable to them also.

Therefore it is considered by the court that the said judgment be reversed and annulled, and that the defendant in error pay plaintiff in error his costs, &c. And it is further considered that the verdict of the jury be set aside; that the special pleas to the said second and fourth counts of the declaration be held for naught, and, with the issues thereon joined, be set aside: and that the cause be remanded to the said Circuit court for a new trial to be had upon the other issue joined therein, with directions that if, upon such new trial, the plaintiffs shall give substantially the same evidence as on the former trial, and shall ask for the same instruction that was then refused, the same shall be given: and if the same instruction shall be asked for on the part of the defendant that was given on the former trial, that the court, on 502 giving the same, *shall confine the application thereof to the statements and declarations of the said Kirby other than those proved to have been made at the

being charged with the price of the land purchased by him, was in advance to the estate on the 31st of December 1832, the time to which the report is brought down, 219 dollars 34 cents. Jopling had not acted since the other report was made.

It appears that the land sold for 5961 dollars 9 cents, upon four annual payments, of which the part purchased by Eubank amounted to 1601 dollars 98 cents; and of that he had paid but 267 dollars; and he and his surety were insolvent, and there was then a suit pending by the executors against him and a person claiming as a purchaser from him, to subject the land to the payment of the purchase money: This suit had been commenced in 1822. Abram Carter's purchase money amounted to 967 dollars 61 cents, and John Carter's to 3391 dollars 50 cents, more than a moiety of the whole by 410 dollars 96 cents.

The slaves were divided in 1819 as before stated, and were then valued at 13,900 dollars; Burrus receiving one-half of them. The personal property bequeathed to Elizabeth Carter and John Elliott, which was sold and applied to the payment of debts, amounted to 1350 dollars 10 cents, and the proceeds of real estate thus applied, to 1376 dollars 18 cents; which, with the interest up to the time of the report as calculated by the commissioner, amounted to 545 5502 dollars 84 *cents. This sum was apportioned among the different legatees, charging to Burrus 1803 dollars 3 cents, and to Mrs. Carter and Elliott 3699 dollars 81 cents, of John Carter's share of which his administrator paid to Elliott 928 dollars 58 cents. To this report of the commissioner the defendant Burrus filed various exceptions based upon what he alleged was an absence of proof to sustain items of credit to the executors in the account settled by the commissioner in the creditor's suit against the executors. They need not be further noticed here.

The cause came on to be heard on the 5th day of February 1834, when the court held that all the legacies were general legacies, and that the legatees must abate ratably for the payment of debts. That the sale of the land by the executors was but a mode of division of that subject between the devisees of Elizabeth Carter and Elliott, and that although the husband John Carter assented to the sale, yet he was no further bound than for the excess of his purchases over his moiety of the whole amount of the sales arising from that subject. That if the executors had so conducted any sale of land, the purchase money of which had not been paid, as not to have retained a lien upon it, they and their sureties would be held responsible for it to Elliott, the person entitled. That the exceptions to the commissioner's report be overruled, and that the executors be held responsible to Elliott for so much as was paid by them out of his property towards the debts of the estate, which should have been detained by them out of the moiety of the slaves delivered by them to Burrus; leaving them to their remedy over against him. And it was decreed accordingly that the injunction granted in the cause should be perpetuated with costs, for all but the sum of 641 dollars 42 cents, with interest from the 31st of December 1832, till paid; as to which sum it was dissolved, but without 546 *damages; that being the sum appearing to be due from John Carter on the judgments enjoined and otherwise, after abating from his legacies his due proportion for the payment of all debts that had appeared against Crawford's estate. That the executors should pay to Elliott the sum of 1803 dollars 3 cents, with interest on 1454 dollars 5 cents, a part thereof, from the 31st December 1832, until paid, that being the sum they ought to have abated from the legacy of Burrus. And that Burrus should pay to them the like amount with like interest. That Dawson as administrator de bonis non of Crawford, should pay to Elliott the sum of 641 dollars 42 cents, with interest from the same time. There were other provisions in the decree not necessary to be detailed: And the case of Crawford's adm'r v. Eubank, being still pending, so that all matters between Elliott and the late executors of Crawford could not be then settled, the cause was retained on the docket, to be thereafter, if necessary, further proceeded in.

In the case of Crawford's ex'ors v. Eubank, Dawson, adm'r de bonis non of Crawford, was substituted as the plaintiff in place of the executors in November 1831; and the cause came on to be heard in February 1836, when the court held that the land was liable for the purchase money, and appointed a commissioner to sell it. He made his report in December 1836, showing that the net proceeds of the land was 467 dollars 75 cents; and in May 1837 the sale was confirmed, and the money was received by Elliott.

In 1837 Elliott gave notice to the late executors of Crawford that he should, under the reservation in the decree of the 5th day of February 1834, ask the court for a decree against them for the amount of the purchase money of the land yet due from the Eubanks. Accordingly, at the May term of that year a rule was made upon these parties to show cause why such a 547 decree *should not be made against them. They appeared to this rule; and insisted that at the time of the sale to Eubank he was considered and in fact was a man of considerable property, in good credit generally, and considered a thriving man, as was also his surety Thomas M. Eubank. Many witnesses were examined, the substance of whose evidence is stated by Judge Lee in his opinion; and from all of which it abundantly appears that for the amount of the purchase money of the land his credit was ample, and it is not probable that any vendor would have refused to accept him as a purchaser; though it would generally have been thought that William Pryor, to whom the land was cried out, was the safer man of the two: That,

however, was not universally the opinion.

The case came on to be heard upon the rule on the 19th of May 1838, when the court held that the executors ought not to be held liable for and made to pay out of their own estate the amount of the purchase money of the land sold to Richard Eubank, which had not been collected from him; and discharged the rule with costs.

On the 22d of May, at the same term, the cause came on again to be heard, when the court held that the whole loss arising from the failure of Eubank to pay the amount of purchase money due from him should not fall on Elliott, to whom in the report of the commissioner the nominal amount of the sales of that land is charged, but that the proceeds of the land devised to Elizabeth Carter should lose one moiety; and moreover, that as the amount received by these two legatees was diminished by this loss, the abatement to which they and Burrus should be subjected should be in proportion to the actual receipts of each; and the commissioner was directed forthwith to state an account among the legatees, showing the amount they had each actually received, and when received, and thus ascertain 548 *what was the ratable proportion which each must abate for the payment of the debts; and also to state an account between the devisees of the land, so as to charge upon the devisee Carter one moiety of the money lost by the sale to Eubank. From the decree of the 5th of February 1834, and from the two decrees of May 19th and 22d, 1838, Elliott applied to this court for an appeal. which was allowed.

John Thompson, Jr., for the appellant.
Cooke, for the appellees.

LEE, J. It appeared from the report of the commissioner made in the progress of this cause, that the assets of the estate of John Crawford deceased, other than the property specifically devised and bequeathed by the will of the decedent, were insufficient for the payment of the debts due from the estate, by the sum of 5502 dollars 84 cents; and the question arose how this deficiency was to be supplied. The chancellor was of opinion, and by the decree of the 5th of February 1834, in effect held, that it should be charged equally and ratably upon the land, the slaves and other property disposed of by the will. In this, the appellant alleges the court erred. He insists that the personal estate is the natural fund for the payment of debts, unless the rule be changed by the will of the testator, for which the general charge contained in that of the decedent in this case for payment of debts does not suffice; and that the assets should have been so marshaled that the slaves and other personal property should first have been applied to supply the deficiency before any portion of the proceeds of the sale of the real estate should have been withdrawn for that purpose. The order in which the different funds or subjects of property constituting the 549 estate of a deceased testator, *and which are liable to the payment of debts, will be applied, seems to be pretty clearly settled by the various adjudications that have been made upon the subject. The first to be so applied, is the personal estate at large not exempted by the terms of the will or necessary implication. Next to it, real estate or an interest therein expressly set apart by the will for payment of the debts. Next, real estate descended to the heir. After it, property, real or personal, expressly charged with payment of debts, and then subject to such charge, specifically devised or bequeathed. If these prove inadequate, then general pecuniary legacies, and after them, specific legacies, both classes ratably; and in the last resort, real estate devised by the will. 2 Jarman on Wills 546, and authorities cited; 4 Kent's Com. 420, et seq.; 1 Story's Eq. Jur. § 577. Subject to the modification indicated by this classification, and in the sense which it explains, it is the general rule that the personal estate is the primary fund for the discharge of the debts, and is to be first applied and exhausted, even in payment of debts for which the real estate may be expressly charged by mortgage. Co. Litt. 208 b., note 106; Howel v. Price, 1 P. Wms. 291; Cumberland v. Codrington, 3 John. Ch. R. 224, 257; King v. King, 3 P. Wms. 358. That the devisee of real estate not charged with the payment of debts, is entitled to have the assets marshaled against the claimants of the other funds of the estate in the order stated, including specific legatees, is well settled by the authorities. 2 Jarman on Wills 601; Clifton v. Burk, 1 P. Wms. 678; Forrester v. Leigh, Amb. R. 171; Scott v. Scott, 1 Eden's R. 458; Keeling v. Brown, 5 Ves. R. 359; Mirehouse v. Scaife, 2 Mylne & Craig 695, 14 Eng. Ch. R. 696. In the case of Long v. Short, 1 P. Wms. 403, it would seem to have been held that specific legatees and devisees of real property not charged with payment of debts, were 550 *bound to contribute ratably for payment of debts due by specialty. But the authority of this case has been greatly doubted; 2 Jarman 547 n, b; and it would appear to be greatly shaken, if not entirely overthrown by the cases just cited, and especially the case of Mirehouse v. Scaife, 2 Mylne & Craig 695, in which the distinction endeavored to be maintained between specific and residuary devisees is utterly repudiated, and the principle applicable to both held to be identical.

This exemption of real estate devised extends as well to the case of a deficiency of personal assets for the payment of legacies as of debts; the legatees having no right to call upon the devisee to contribute to the payment of their legacies, unless the real estate be expressly charged. Hayes v. Leaver, 2 Jarman on Wills, 547 n.

But in either case the right thus asserted on the part of the devisee to hold the estate devised, as against the legatees, free from

liability for debts or legacies, is to be confined to the case of a devise of real estate not charged with the payment of debts or legacies; for it is equally clear that where the estate devised is so charged, it is applicable before legacies, and the legatees have the right to have the assets marshaled in their favor. The legacies not being charged with the payment of debts while the real estate devised is so charged, the legatees will be regarded as more the objects of the testator's bounty than the devisee; and where the personal estate is not sufficient to pay both the creditors and the legatees, the latter will be entitled to charge the real estate devised so far as the personal estate had been applied in payment of debts. Foster v. Cook, 3 Bro. C. C. 347; Lutkins v. Leigh, Cas. Temp. Talb. 53; Forrester v. Leigh, Amb. R. 171; Norman v. Morrell, 4 Ves. R. 769; Aldrich v. Cooper, 8 Ves. R. 381, 396; Livingston v. Livingston, 3 John. Ch. R. 148, 153. Nor is there any 551 *distinction in this regard between specific legatees and pecuniary legatees, the right to marshal the assets in the case supposed being affirmed equally in favor of the latter as of the former. Forrester v. Leigh, Amb. R. 171; Wythe v. Henniker, 2 Myl. & Keene, 365, 8 Cond. Eng. Ch. R. 162.

The principle which lies at the foundation of the right of a legatee or devisee to marshal the assets, is as has been intimated, the presumed intention or inclination of the testator in his favor. But where, as in the case now in judgment, the testator has charged his whole estate, as well the real property devised as the personal bequeathed, with the payment of his debts, there can be no stronger presumption of an inclination in favor of the devisee than of the legatee, both being equally the objects of the testator's bounty; and between persons so taking, equity will not interfere unless the testator has shown clearly some ground of preference or priority of the one over the other. 1 Story's Eq. Jur. § 565. And if in such a case the property other than that specifically devised and bequeathed, prove inadequate to meet the charge, it should seem that equity to supply the deficiency, would apply its maxim that equality is equity, and levy it equally and ratably upon the property so devised and bequeathed. The principle of contribution in such a case for the purpose of meeting the common charge resting alike upon the different subjects of property disposed of among the several objects of the testator's bounty, is dictated by a plain and obvious rule of justice, and is, I think, fully sanctioned by authority. In the case of Carter v. Barnadiston, 1 P. Wms. 505, the testator being seized in fee of two different manors, by his will charged all his real estate with the payment of his debts, and devised the two manors to different persons. He afterwards mortgaged one of these manors to secure the payment of the sum of 4,000 pounds and interest, 552 and then died. *The lord chancellor held that the devisee of the mortgaged manor was entitled to call upon the devisee of the other, to contribute to the payment of the mortgage debt. So in the case of Heveningham v. Heveningham, 2 Vern. R. 355, (also stated in 1 Eq. Cas. Ab. 117,) where the testator charged his real estate with the payment of his debts, and then devised different portions to several persons, it was held that the devisees should contribute ratably according to the value of the respective subjects devised to them, to satisfy the charge. The same principle is recognized in the cases of Growcock v. Smith, 2 Cox's Cas. 397, and Harris v. Ingledew, 3 P. Wms. 98, (both cases of a devise of freehold and copyhold estates charged with payment of debts,) and also in the opinion of the lord chancellor in the case of Aldrich v. Cooper, 8 Ves. R. 381, and in Livingston v. Livingston, 3 John Ch. R. 148. And there is no distinction mentioned between the case of a charge by will upon real estate only and where the estate charged consists of personal as well as real estate. In both cases the doctrine is the same; and it seems to be settled that although personal property is applicable in payment of debts before real property, when neither species is expressly charged by the terms of the will, yet when both are equally and expressly charged, they stand on the same footing, and each must contribute its ratable share towards the common burden.

The distinction between the natural or primary fund for the payment of debts and other and auxiliary funds to be only so applied when necessary, is not here admitted; the intention imputed to the testator being to place all the objects of his bounty on equal terms, and to distribute the burdens as well as the benefits equally and ratably among them. Thus in the case of Irvin v. Ironmonger, 2 Russ. & Myl. 531, (13 Cond. Eng. Ch. R. 157,) the testator charged 553 all *his property with the payment of his debts, and subject to the charge, disposed of the estate consisting of freehold, copyhold and leasehold, and personal property, among different persons. The master of the rolls, Sir John Leach, held the legatees and devisees should contribute ratably to the common charge. And the same principle was affirmed in the case of Chase v. Lockerman, 11 Gill & John. 185, where it was adjudged that devisees and specific legatees should contribute ratably for the payment of debts due by specialty; otherwise in respect to debts due by simple contract, the legatees not being entitled to call upon the devisees to contribute to them. In the case of Roberts v. Walker, 1 Russ. & Mylne 752, (4 Cond. Eng. Ch. R. 644,) the testatrix by her will created a mixed and general fund from the proceeds of real and personal estate, and directed that fund to be applied in payment of debts and legacies. And one of the questions raised in the case was whether the debts and legacies should be paid out of the personalty as far as it would go, to the exemp-

tion of the real estate, or whether they should be charged upon the real and personal estate proportionally. Sir John Leach, master of the rolls, held that in such a case a testator must be regarded as in effect directing that the real and personal estates out of which the general fund has been raised, shall answer the prescribed purpose for which it was raised, pro rata, according to their respective values. This same doctrine is held in the case of Kidney v. Coussmaker, 1 Ves. jr. R. 444, in which Lord Thurlow says, that where a testator combines real with personal estate generally, the burdens of the personal estate would be also placed upon the estate combined with it; and he adds that "there are many cases for that." The principle of these cases is also recognized in the cases of Stocker v. Harbin, 3 Beavan R. 479; Salt v. Chattaway, 3 Beavan R. 576; 554 *(cited 2 Jarman on Wills 551, 552,) and Adams v. Brackett, 5 Matc. R. 280. In the case last cited, although the court thought that the real and personal estate were not so blended and combined as to create a charge on the real estate devised by the will of the testator, yet it is distinctly admitted that where they are blended and combined, what is a charge upon the one is a charge upon the other; and the real estate must bear a proportionate share of the burden. In the case of Dunk v. Fenner, 2 Russ. & Mylne 557, 13 Cond. Eng. Ch. R. 170, the court held that the testator had blended the real and personal estate into a common fund, and charged it with the declared purposes of the will; and that the annuity and legacies given by the will should be charged upon and paid out of the real and personal estate in proportion to their respective values.

The only case I have found that I deem irreconcilable with the doctrine of the cases to which I have referred, is that of Hoye v. Brewer, 3 Gill & John. 153, in which the court seem to have gone upon the assumption that although both the personal and real estate be expressly charged with the payment of debts, yet the personalty must first be exhausted before the land can be made liable. But, whatever respect may be due to this decision, I yet think the reason and justice of the case and the weight of authority are the other way.

In what I have said I have treated the case as if it were of a devise of the real estate by the testator John Crawford, in specie. But it is to be observed that he does not give the land itself to Mrs. Carter and her son John Elliott, the appellant, but he directs it to be sold, and the proceeds to be equally divided between them. And this serves somewhat to throw light upon what is to be regarded as the intention of the testator. The slaves he bequeaths 555 specifically, one-half *to Mrs. Carter and the appellant and the other half to John C. Burrus. And, upon my first examination, I thought it worthy of consideration whether there was not an intention manifested to exempt the slaves from any liability to debts. Further reflection has, however, satisfied me that under the rules furnished by the adjudicated cases for the solution of such a question, there is no sufficient indication of the intention of the testator to exempt the slaves or any part of the estate from liability to the debts; and that in providing for the deficiency of the assets, other than the property devised and bequeathed by the will of the testator, to pay the debts due from the estate, it was just and proper to levy for it equally and ratably upon the land, the slaves and the other property disposed of by the will. I am of opinion, therefore, that there is no error in the decree in this respect.

The appellant next complains that the court erred in the decree of the 19th of May 1838, pronounced on the rule sued out against the executors of John Crawford deceased, under the reservation contained in the decree of the 5th of February 1834, in not holding the executors liable for the original amount of the purchase money of the parcel of land conveyed to Richard Eubank, after deducting the amount which it brought at the sale made under the decree in the chancery cause, instituted to subject it to the purchase money remaining unpaid. It appears that on the 12th of November 1818, the executors of John Crawford deceased, by virtue of the power given them by the will, made sale of the real estate of their testator at public auction, at which a tract of 320 acres was knocked off to one William Pryor upon a credit; that on the same evening, and before the sale to Pryor was further effectuated, by agreement of the parties, one Richard Eubank was accepted and received as the purchaser of 199½ acres of the tract cried off to 556 Pryor, *and it was agreed that when that portion of the land should be laid off by a survey, the said Eubank was to give his bonds, with security for the amount of the purchase money. In the following spring, to wit: On the 24th of April 1819, the survey having been made in the mean time, the said Richard Eubank executed his bonds, with John M. Eubank as his surety, for the purchase money; the said bonds being payable at different times, and the one last payable, falling due on the 1st of June 1822; and a deed of conveyance appears to have been executed at the same time by the executors, to the said Richard Eubank for the land, though it was not produced for record till the 2d of August 1824. Of these bonds, that first falling due was paid; upon the second and third, a suit was brought, judgment obtained and executions issued, which were returned "no effects." Upon the fourth bond (that falling due latest) no suit was brought; the said Richard Eubank and his surety John M. Eubank, having become in the mean time insolvent, and a suit upon that bond being deemed a useless experiment. But in October 1822, a bill in chancery was filed, seeking to assert a lien upon the land for the unpaid purchase money.

In February 1836, after a protracted litigation, the pretensions of the complainants in this cause were sustained by the court, and a decree pronounced, directing a sale of the land by a commissioner for the purpose of raising the balance of the purchase money. A sale took place, yielding only the sum of 467 dollars 75 cents net, to be applied to the debt, and leaving a balance of the purchase money still unpaid. For this balance the appellant contends that the executors of John Crawford should be held responsible, insisting that their release of Pryor, the original purchaser, a highly responsible man as they considered, and their accepting Eubank, a less re-
557 sponsible man in his stead, *and their failure to take from Eubank an express lien for the purchase money when they executed a conveyance to him for the land, constituted such neglect of duty as amounted to an abuse and breach of the trust confided in them, and that they should be held to make good the loss which has followed.

It is not easy to say in a great variety of cases what the precise duty of a trustee is; and the acts and omissions for which a trustee will be held responsible as for violations of the trust reposed, have not been classified or defined with any great accuracy or precision. In a general sense a trustee is bound by his implied obligation to perform all those acts which are necessary and proper for the due execution of the trust which he has undertaken. But as he is supposed to take upon himself the trust as a matter of honor, conscience, friendship or humanity, and according to the general doctrine on the subject, is not entitled to any compensation for his services without some stipulation to that effect, he would seem to be upon principles analogous to those applicable to the law of bailments, bound only to good faith and reasonable diligence, and as in the case of a bailee without reward, liable only for gross negligence. 2 Story's Eq. Jur. § 1268. With regard to the rules by which trustees should be governed in the management of trust funds, the laying out of money in securities, or allowing trust money to remain in the hands of those from whom it is owing, Lord Hardwicke remarked, (Ex parte Belchier, Amb. R. 219,) that these rules should not be laid down with such strictness as to strike terror into mankind acting for the benefit of others and not their own. In the case of Knight v. Lord Plimouth, 3 Atk. R. 480; S. C., 1 Dickens' R. 126, the same learned judge says: "Suppose a trustee having in his hands a considerable sum of money places it out for the benefit of the cestui que trust, in the funds which afterwards sink in their value, or on
558 *security at the time apparently good, but which afterwards turns out not to be so, was there ever an instance of a trustee being made to answer for the actual sum so placed out? I answer, no. If there was no mala fides, nothing wrongful in the conduct of the trustee, the court will always favor. For as a trust is an office necessary in the concerns between man and man, and which if faithfully discharged is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept of it. To add hazard or risk to that trouble, and to subject a trustee to losses which he could not foresee would be a manifest hardship, and would be deterring every one from accepting so necessary an office." These observations are cited with approbation by Judge Story, (2 Eq. Jur. § 1272,) though he adds that it would be difficult to affirm that the courts of equity have always proceeded upon so broad and liberal a basis. Chancellor Kent also in the case of Thompson v. Brown, 4 John. Ch. R. 619, 628, expresses his concurrence in them, and he declares that where there is no just imputation of mala fides, and the fault is at most but an error of judgment and a want of sharp sighted vigilance, it would have the appearance of great rigor, and be hardly reconcilable with the doctrines of the court to hold a trustee responsible: And he adds, that that court had always treated trustees acting in good faith with great tenderness. So in the case of Hart v. Ten Eyck, 2 John. Ch. R. 62, the same chancellor speaks of the defendants as administrators and trustees who by the nature of their undertaking were charged with the execution of disinterested and burdensome trusts: And he adds that he should always be extremely averse to hold such characters responsible on slight grounds where there is evidence of fair and upright intention; but if the facts necessarily lead to the conclusion that they had been guilty of gross negli-
559 gence or of premeditated and *fraudulent concealments and dispositions of the trust funds, it would be his duty to animadvert upon such conduct with the freedom and severity due to truth and justice. The cases of Wilkinson v. Stafford, 1 Ves. jr. R. 32, and Vez v. Emery, 5 Ves. R. 141, may also be referred to as supporting the proposition that trustees acting with reasonable care and prudence, and with the best judgment they can form upon the occasion, will be protected notwithstanding an unforeseen loss of the trust subject. And to the same effect is the opinion of the master of the rolls in the case of Powell v. Evans, 5 Ves. R. 839, in which he declares that the court should act with great tenderness towards executors who are called upon to execute often onerous and difficult trusts, and are entitled to great indulgence unless neglect be fully proved: And he added, that he was greatly averse to charge executors who intended fairly to discharge their duty; and that he was very cautious not to hold them liable upon slight grounds. Many other cases and opinions of learned judges might be cited tending to the same conclusions; and the fair result of the views which they present and the reasoning they adopt is, that where a trustee has acted in good faith in the exercise of a fair discretion, and in the same manner in which he probably

would have acted if the subject had been his own property and not held in trust, he ought not to be held responsible for any losses accruing in the management of the trust funds.

In Virginia it is true, for the most part, some compensation is allowed to executors and other trustees for their services, yet I am not aware that any different or more stringent rule has been adopted by which the measure of their responsibilities is to be determined, than that which seems to prevail in the chancery of England and New York; and I very much doubt whether a wise policy should ever require more of a trustee than that he should act in 560 good faith and with *the same prudence and discretion that he is accustomed to exercise in the management of his own affairs. A trust is an office of honor, confidence and friendship; and if more than what I have indicated were required of the trustee, it would cease to be of that character, and would become one of hazard, speculation and profit; and the evils and inconveniences alluded to by the learned judges whose opinions I have before cited, would speedily be realized. As at present advised, therefore, I should not feel disposed to extend the responsibilities of trustees beyond the limits by which they would seem to be bounded in the cases to which I have referred; and where they have intended to discharge their duties fairly, I think they should be treated with tenderness, and due caution taken not to hold them liable upon slight or uncertain grounds, lest, by a different policy, men of integrity and who would be actuated by the proper views, may be deterred from taking upon themselves an office so necessary in the concerns of life, from fear of the anxiety, trouble and risk which it involves.

In the case under consideration there is not the slightest ground upon which to impute anything like mala fides on the part of the executors in the transaction now called in question. After the land had been cried off to Pryor at his bid, during the same day and before the sale had been carried into effect by the execution of the bonds required of the purchaser, while the transaction was thus in fieri and incomplete, the executors acquiesced in an arrangement by which, as to 199½ acres of the tract bid in by Pryor, Richard Eubank was allowed to take the place of Pryor as the purchaser thereof; and subsequently, for a proportionate part of the purchase money, his bonds were accepted by the executors with John M. Eubank as his surety; and the transaction was treated as a sale by the executors of the 199½ acres directly 561 to Richard *Eubank. Substitutions of this character of a third person in the place and stead of the actual bidder at sales made by executors, commissioners and other trustees, are of very common occurrence; and if the bonds of the third party so substituted, with the sureties offered by him, be such as the trustee making the sale would, under the surrounding circumstances, be justified in receiving if he were himself the actual bidder, I do not perceive any well founded objection to the transaction. If the executors had refused to acquiesce in the proposed arrangement, and Pryor had then refused to complete his purchase by giving his bonds with security, (instead of those which he tendered of the Eubanks,) the alternative left to them would have been either to bring a suit in chancery against Pryor to enforce a specific performance of the contract, (a measure of doubtful expediency,) or to put up the land again for sale: And if the latter course were adopted, and Eubank had become the purchaser at the same price at which it was struck off to Pryor, the result would have been just the same. Now, in such a case, I do not think it can be doubted upon the evidence that the executors would have been justified in receiving the bid of Eubank, and accepting his bond with John M. Eubank as his surety for the purchase money. The testimony proves that at the time of this transaction both Richard Eubank and John M. Eubank were in thriving circumstances and in good credit; and that for the amount of the purchase money of this land they could have got credit as readily as any men in the neighborhood, and no one who was acquainted with them would have hesitated to trust them for that amount. The effort to prove that these men were, or were deemed to be, unworthy of credit for the amount in question at the time of the sale has, I think, entirely failed; and I think it cannot be doubted that the executors 562 thought at the time that *Richard Eubank and John M. Eubank were abundantly good for the amount; and the property of which they were in possession and their general reputation in the neighborhood justified them in so believing. Had the land been their own instead of a trust subject, they would have doubtless done as they did, and so would most other men in the community. It turns out, however, that they were mistaken; that those parties were not entitled to the high credit which they enjoyed, and they failed before this debt could be collected. But to make the executors liable for this mistake would be a harsh measure, and not in consonance with the spirit usually manifested in the court of chancery towards fiduciaries under such circumstances.

But it is said the failure of the executors to take a specific lien upon the property for the purchase money to be paid by Eubank was such a breach of duty as to render them chargeable. I am aware that upon this subject a somewhat strict rule has been laid down in some of the cases in the English chancery: Adye v. Feuilleteau, 1 Cox's R. 24; Ryder v. Bickerton, 3 Swanst. R. 80; Holmes v. Dring, 2 Cox's R. 1. Though in the case of Harden v. Parsons, 1 Eden's R. 145, Lord Northington advanced a more liberal doctrine, holding, as he did, that a lending of trust moneys on personal security only was not per se such gross negli-

gence as to amount to a breach of trust; and that to charge a trustee, other circumstances crassæ negligentiæ, must be shown; and in Smith v. Smith, 4 John. Ch. R. 281, Chancellor Kent expresses the opinion that there may be cases in which a trustee would be exonerated by taking personal security. And if in this case the failure of the executors to take an express lien on the property had in fact prevented a resort to it as a security for the debt, I should have felt more difficulty in holding the executors ex-
563 cused for such an omission. *But it is to be observed it had not that effect; for though the executors did execute and tender a deed for the land they considered as embraced within Eubank's bounds, yet they claimed that that deed never was accepted by Eubank, and that the legal title still remained in them. And this is rendered probable by the fact that a negotiation and agreement took place between Eubank and the executors, by which the latter agreed to make to Eubank another and an unexceptionable deed for the land, and Eubank agreed to execute a deed of trust upon it at the same time for the unpaid balance of the purchase money. These deeds were accordingly prepared, and the parties met for the purpose of executing them. They disagreed, however, and Eubank refused to execute the deed of trust according to the agreement, and so the matter stood. Another circumstance tends to confirm the statement of the executors; which is that, although the deed tendered to Eubank and to which he objected because it omitted, as he alleged, a small piece of land to which he thought he was entitled, was executed in 1819, yet it was never produced by Eubank for record till 1824, some time after the suit brought against him by the executors to subject the land, and in which they alleged that this deed had not been accepted. How this may have been, however, or what were the views taken of the case by the court, it is not material to examine or consider; for certain it is, the court did sustain the pretensions of the executors, and by its decree pronounced on the 2d of February 1836, held that there was a lien upon the land sold to Eubank for the unpaid purchase money, and directed it to be sold, (though "subject," as the decree expresses it, "to the contingent right of dower of the wife of the said Richard Eubank,") and the proceeds applied to the discharge of the same. Thus the fail-
ure of the executors to take a direct
564 lien upon the land *did not occasion a loss of such security as it could afford, because it was actually still held bound for and sold to raise the purchase money. It is true it brought at the sale comparatively a small sum, leaving a large balance still unpaid, owing, as the appellant contends, to the great delay which had taken place during a protracted litigation, the depreciation of the value of the property in the mean time, and the supposed outstanding incumbrance of the contingent right of dower in the wife of Eubank, subject to which the sale was directed to be made. But I think it can scarcely be reasonable or just to visit upon these executors the consequences of delay proverbially incident to all litigation, as it does not appear to have been attributable to any neglect or failure on their part to prosecute the suit with proper diligence; and indeed we see that from some period either during or prior to the year 1831 their authority to act, and control over the subject, had ceased in consequence of their powers as executors having been revoked, and Dawson, the sheriff of Amherst, substituted in their place as administrator. Still less would it be right, as I think, to hold them responsible for the act of the court in directing the sale to be made subject to the supposed contingent dower right. That the wife of Eubank could assert no right to dower in this land to the prejudice of the vendor's lien, may be affirmed under the authority of the case of Wilson v. Davisson, 2 Rob. R. 384; but if the court erred in directing the sale to be made subject to such supposed right, it was a matter which the executors could neither control nor correct, even if they had not long before the decree ceased to be parties to the cause by the substitution of Dawson's name as that of plaintiff in place of theirs.

Upon the whole, after the fullest reflection that I have been enabled to bestow on
565 the subject, although *I have not found myself entirely free from doubt, I have yet come to the conclusion that under all the circumstances disclosed in this case, it would be, perhaps, harsh and rigorous, and not in consonance with the mild spirit and liberal principles which have prevailed in the courts of equity in expounding the duties and measuring the liabilities of fiduciaries, to require these executors to make good out of their private estates, the loss which has unfortunately occurred in the administration of this trust subject. I think, therefore, the Circuit court did not err in discharging the rule sued out by the appellant seeking to fix such liability upon them.

The third ground of error assigned is, that the decree of the 22d of May 1838 improperly saddles the loss of so much of the purchase money of the Eubank land as could not be made, wholly upon the petitioner, which is alleged to be unjust and in violation of the will of the testator. This objection is evidently founded upon a mistake in point of fact, or a misapprehension of the purport and effect of the decree. For it declares that the court is inclined to the opinion that the whole loss should not fall upon the appellant, but that the proceeds of the lands devised to Elizabeth Carter, his codevisee, should lose one moiety. It is also declared to be the opinion of the court, that it would be unjust that Elliott should be made to abate ratably and in proportion with his colegatees and devisees and at the same time to charge upon him an additional sum for the lost land money, which it was stated was the effect of the

commissioner's report. And the court was further of opinion it would not be just that the deficiency should be visited wholly on Mrs. Carter and Elliott, the devisees of the realty, but that it should be borne ratably and in proportion to value of what each actually received from the estate of the testator, together with the defendant 566 *John C. Burrus. The commissioner was accordingly directed to restate the accounts according to the principles thus indicated, and also to state a further account as between the devisees of the real estate, with a view to a final settlement of the whole. But as explained by the counsel, this objection to the decree of the 22d of May 1838 is claimed to be well taken, because it repeats the supposed error in the decree of the 5th of February 1834, of rating the real estate with any portion of the debts of the testator. In this view, this objection has been already fully considered on the first ground of error assigned, and I have nothing further to add to the already too protracted observations on that subject.

The remaining ground of error assigned is the omission of the commissioner in his report of the 30th of August 1832, to bring into the account the balance found to be due from the executor William Jopling, and also the balance found to be due from the executors Abraham Carter, Joseph R. Carter and William Jopling, jointly, upon the account stated in the case of Camden v. Jopling, which account he professes to adopt and make the basis of his report. But I do not think it material to stop to consider this objection, because if found to be well taken it should not lead to a reversal of either of the decrees, inasmuch as under the broad terms of the order directing the accounts to be recast there is ample room and verge enough to supply any such omissions as those complained of or to correct any errors apparent on the face of the former report.

The defendant John C. Burrus in the Circuit court took numerous exceptions to the report of the commissioner, all of which were overruled by the court. The counsel for the appellant here has elaborately examined these exceptions, contending that they were all properly overruled, be- 567 cause, as he has explained, if *the court should reverse the decrees complained of, it would be to the prejudice of Burrus, and the court would then go on to correct any errors against him that may appear to have been committed. But as Burrus has not appealed from the decrees affecting him, and as in the view I take of the case the relations in which he stands to the other parties as settled by those decrees, are not to be disturbed by the reversal of either of them, I think this court is not called upon to pass upon his exceptions to the report, and I therefore dismiss them without further remark.

I am of opinion that the decrees of the 22d and the 19th May 1838, and that of the 5th February 1834, should all be affirmed, with costs to the appellees.

ALLEN and MONCURE, Js., concurred in opinion with Lee, J.

SAMUELS, J., dissented.

Decree affirmed.

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568 *Fones v. Rice & als.

January Term, 1853, Richmond.

1 **Fraudulent Conveyances—Case at Bar** *—A deed conveying land void as to creditors, though in lieu of slaves given by parol by the grantor to the grantees, they never having taken and retained possession of the slaves: And this especially when the grantor was largely indebted at the time of the gift of the slaves.

2. **Same—Same**—In such case the grantees being females and having married, the deed will be void as to the husbands unless they show that the marriages took place before the creditors recovered their judgments.

3. **Same—Setting Aside Deed—Case at Bar**—The grantor having, when taken on a *ca. sa.* in another case, conveyed this land and two other tracts, to the sheriff on taking the oath of insolvency, and it not appearing whether that debt had been satisfied without selling the lands so conveyed, and enquiry should be directed on that point before setting aside the deed; and if the said two tracts are not necessary to pay that debt, they should be first applied to satisfy the plaintiff in this suit.

This was a suit in chancery in the Circuit court of Buckingham county, by George Fones, against John C. Patterson and others, to set aside a conveyance of land made by Patterson to his two daughters. In November 1841, Fones and Nelson A. Patterson became the sureties of John C. Patterson in a forthcoming bond, which was forfeited, and upon which an execution was sued out and levied on the property of Fones, when he paid it off. It appears that the original judgment was recovered against John C. Patterson in April 1841.

In February 1840, John C. Patterson executed a deed by which he conveyed to his daughters Mary L. and Cicily M. Patterson, 100 acres of land. The deed is expressed to be on the consideration of one dollar and natural love and affection. Of these grantees, Mary L. afterwards married Thomas B. Rice and Cicily M. married Richard Lowry; but it does not appear at what time these marriages took place. At the 569 *time of the execution of this deed, Patterson was greatly embarrassed in his circumstances, if not insolvent.

There was an effort to prove that the deed was on a valuable consideration, and there is proof that in 1837 or 1838, Patterson made a formal parol gift of six young negroes to

*The principal case is cited and approved in Herring v. Wickham, 29 Gratt. 637, and *note*. See also, monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

his daughters, who were then living with him; but it certainly does not appear that the negroes were removed from the place, or that the daughters either took or retained possession of them. When Patterson was about to acknowledge the deed in the clerk's office, he stated to the same witness that he was obliged to sell property to pay his debts, and he had agreed with his daughters to give them the land for the negroes he had given them.

It appeared that in June 1842, Patterson was taken on a ca. sa., when he took the benefit of the act for the relief of insolvent debtors, and executed a deed by which he conveyed to the sheriff the tract of land he had conveyed to his daughters, and two other small tracts of twenty and fifteen acres. The sheriff who was a party to the suit, stated in his answer that the execution upon which this surrender was made, had been in part paid off.

When this cause came on to be heard, the court below dismissed the bill as to Rice and wife, and Lowry and wife, and gave the plaintiff a decree against John C. Patterson for the sum of 267 dollars 6 cents, with interest from the 9th of October 1845 till paid; and if the money was not paid by John C. Patterson within thirty days, then there was a decree against the other surety Nelson A. Patterson, for one-half that sum. Fones applied for and obtained an appeal to this court from that decree.

Darneale, for the appellant.
Stanard and Bouldin, for the appellees.

570 *DANIEL, J., delivered the opinion of the court.

The court is of the opinion that the deed in the bill mentioned of the 8th of February 1840, between the appellees John C. Patterson and his two daughters Mary L. and Cicily M., was fraudulent and void as to creditors. The deed purports to be made "in consideration of the sum of one dollar, but more especially by virtue of the love and affection that he (the grantor) has for his said two daughters;" and was executed at a time when according to the proofs in the cause the grantor was greatly embarrassed and indebted, most probably to the extent of the value of his whole estate. And the effort to found the deed on a valid exchange of slaves for land has wholly failed; the evidence tending to prove a parol gift by the said John C. Patterson to his said two daughters, in 1837 or 1838, of certain slaves, which, in the joint answers of Rice and wife, Lowry and wife and Nelson A. Patterson, it is averred were exchanged for the land conveyed by the deed aforesaid, falling short of proving any such possession of the slaves by the said daughters as would confer on them a valid title thereto; and it also appearing that at the date of said alleged gift the said John C. Patterson was so indebted as to render any gift by him of his property, however complete in form, void as to his creditors.

The court is also of opinion that the intermarriages between the appellees Mary L. and Thomas R. Rice, and Cicily M. and Richard Lowry, since the execution of the deed aforesaid, do not, under the circumstances in this case, stand in the way of the appellant's right to subject the land in said deed embraced, to the satisfaction of his demand. For whatever might have been the effect of such intermarriages on the rights of the parties, if they had been relied on and shown to have occurred before the date of the judgment, to the lien of which the appellant seeks to subject said land, they could have presented no
571 impediment to the assertion *of such lien, if they occurred after the date of the judgment. And it was incumbent on the said appellees, if they intended to rely on such matter, to have set it forth in their answers, and to have shown that said intermarriages were prior in date to the said judgment. For these reasons the court is also further of opinion that the decree of the Circuit court of the 18th September 1846 is erroneous and ought to be reversed: And the same is accordingly reversed with costs. And the court would now proceed to render a decree, subjecting the land conveyed by the deed aforesaid of the 8th of February 1840 to the satisfaction of the appellant's debt. But as it appears from the deed made by John C. Patterson to the sheriff on taking the oath of an insolvent debtor at the suit of Smith, (filed as an exhibit by Reuben B. Patterson, with his answer,) that the said deed embraces not only the tract of 100 acres conveyed by the deed of the 8th February 1840, but also one other tract of 20 acres, and one other of 15 acres; and as the court is of opinion that though the deed of the 8th February 1840 is void as to creditors it was good as between the parties thereto, and that it would be proper to subject the two last mentioned tracts of land in the first instance, before resorting to the tract of 100 acres conveyed by said last mentioned deed; and as the said Reuben B. Patterson in his answer admits that the execution of Smith has been in part satisfied, but does not state to what extent, and it does not appear what is the amount now sue upon said execution; and the court is of the opinion that before a sale of the land is made it is proper that such amount should be ascertained; and is further of opinion that the cause is not in a proper situation for a final decree, and that it ought to be remanded for further proceedings; the cause is accordingly so remanded. And it is adjudged, &c., that the appellant recover his costs, &c.

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572 *Dabney & als. v. Cottrell's Adm'x & als.

January Term, 1853, Richmond.

Wills—Construction—Case at Bar.*—C was twice married. By his first wife he had three daughters, all

*The principal case is cited and approved in Dillard v. Dillard, 97 Va. 438, 34 S. E. Rep. 60.

of whom had been married previous to the date of his will: two were then living, and the third had died leaving two children. By his second wife, who survived him, he had seven children, all of them infants at his death. By his will he gave to each of his two married daughters a slave, and to each of the children of the third a legacy of $100. He then gave to his wife and his children by her, his plantation on which he then resided, all his slaves not specified above, specific articles of personal property, all his plantation utensils, household and kitchen furniture, "and all the money;" and the balance of his estate to be sold and his debts paid, and the remainder if any, to be equally divided among all his children. C had resided on the same farm for years. It was divided into several fields and was cultivated by him. Some years before his death coal was found on this farm and was for a time raised by himself. He then leased the field in which the coal was, to third persons, the field being surrounded by a ditch and fence and supposed to contain about forty acres, reserving to himself the right to cultivate all the leased premises except so much as might be necessary for pit operations, clover lot and mule pounds, not to exceed ten acres. This lease was determined the year before C's death, and in the spring after its termination he cultivated the field. The whole tract without the coal was estimated at $2500; the coal in the land was estimated at $5000. At the time of C's death he had deposited in the savings bank about $1500, and there was in the house in cash $115. He owed very little. HELD:

1st. Same—Same—Same—The whole tract including the coal land passed to the widow and C's children by her under the will.

2d. Same—Meaning of Word "Money."*—Under the words "and all the money" the money in the savings bank passed.

This was a suit instituted in the Superior court of chancery for the Richmond circuit by Richard Dabney and Susan his wife and others, children of William Cottrell deceased, against the administratrix of Cottrell and his children by his second marriage.

The case is fully stated in the opinion
573 of Judge Allen. *The decree in the court below being against the plaintiffs, they applied to this court for an appeal, which was allowed.

Lyons, for the appellants.

R. T. Daniel and Gilmer, for the appellees.

ALLEN, J. William Cottrell, late of Henrico county, departed this life early in the year 1838, leaving a will dated the 7th January 1836, which was admitted to probat on the 9th July 1838. He had been twice married. By his first wife he had three daughters, all of whom had been married previous to the date of his will; two were then living, and the third had died, leaving two children. By his second wife, who survived him, he left seven children, all of whom were infants, and so continued down to the period when the decree in this case was pronounced. By the three first clauses in his will, the testator bequeathed a slave to each of the two married daughters, children of the first marriage; and a legacy of 100 dollars to each of the children of the third daughter. The fourth clause was in the following words: "I give to my present wife Susan and my children by her, my plantation on which I now reside, together with all my slaves not specified above," (several articles of personal property particularly described,) "all my plantation utensils, my household and kitchen furniture, and all the money; and the balance of my estate I wish sold, and all my just debts paid; and the remainder, if any, to be equally divided among all my children." The present controversy grows out of a difference as to the extent of the devise and bequest contained in this fourth clause of the will; the subsequent provisions of the will having no bearing on the question.

The bill filed on behalf of the first set of children and the descendants of the
574 one who had died, alleges *that the testator at the date of his will and at his death, was seized of very valuable coal mines and a large coal field unexplored, covering in the whole ten acres of land, which were not a part of the plantation on which he resided, but had been for some time worked and leased as separate property, and was so leased at the death of the testator. These coal mines and coal field it is alleged, constituted his coal property, separated by bounds and fences from the plantation, and used and leased as separate property, which it was not his intention to devise to his widow and children of the second marriage, to the exclusion of those of the first, who were equally dear to him. And it is contended that this coal property either passed under the residuary clause aforesaid, and should be sold and divided among all his children; or as to it he died intestate.

It is further alleged that the testator owned at the time of his death a considerable personal estate not described in the will, and liable to sale and distribution under the fourth clause of his will; and had large sums of money due to him from private individuals, and from a company entitled the "Savings Institution" in the city of Richmond; which money thus due, it is contended was not embraced by the words "and all the money" given by the 4th clause to the widow and children; but passed by the general residuary clause or by operation of law to all the children of the testator and their descendants.

The infants answered generally by guardian, submitting their rights under the will to the protection of the court. The widow and administratrix with the will annexed denies, in her answer, that the testator ever set apart any particular portion of his land as a coal field; he believed, as was the general belief, that all the land contained coal, though he had never worked but a small portion of it for coal, and that
575 *portion he never set apart as distinct property from the balance of his estate: That the land on which he died is all embraced in one plat, having on it seven

different fields, separated by ditches and fences: That the field in which the coal shaft is sunk contains twenty-eight acres; that the same fencing and enclosure was round it long before a coal mine was opened, and has undergone no change; and that the claim to ten acres grows out of the circumstance that when he leased the pits the testator gave to the lessee the right to enclose a part of the field containing twenty-eight acres, for a garden, mule pound and clover lots; reserving to himself the right to use the surface of the residue of the field, and which he cultivated as part of his plantation. The answer denies that the coal pit was leased to any one at the death of the testator; and avers that the children of the first marriage were all grown and settled in life, and that considerable advances had been made to them; and that all the seven children by the second marriage were infants, five of them under ten years of age.

The only evidence concerning this branch of the case is found in the deposition and statement of Jesse Snead; from which it appears that he and another took a lease from the testator for five years, commencing on the first of January 1832: That the land included in the lease was described by metes and bounds, being separated from the other lands of the testator by a ditch and fence enclosure; that the quantity of land rented was, he thought, about forty acres, the lessor reserving to himself the right to cultivate all the leased premises except so much as might be necessary for pit operations, clover lot and mule pounds, not to exceed ten acres: That the field in which the coal mines were had been enclosed for cultivation many years, and before the coal was discovered: That after the discovery of the coal, it had been wrought 576 by the *testator himself until leased to the witness: That he gave notice, in the fall of 1835, of an intention to surrender the lease, and abandoned the possession in Feb'y 1836: That no part of the field was cultivated during his lease, but thinks the testator sowed oats on the leased land in the spring of 1836. He further more estimates the value of the coal in the coal pit field at 5,000 dollars; and the plantation, exclusive of the coal contained in it, at 2,500 dollars.

Upon the hearing the court below held that the land containing the coal mines, passed by the fourth clause of the will by the description of "my plantation on which I now reside," to the widow and her children.

The intention of the testator must be gathered from the terms of the will, and by such lights as surrounding circumstances may throw upon the case; and little aid is to be derived from the construction of other wills. The cases referred to in the argument were all cases in which there were several tenements held by the testator, which were separate and distinct.

Thus in the case of Pullin v. Pullin, 11 Eng. C. L. R. 21, the testator held several distinct messuages in Islington, some of which were under mortgage, others not. The general descriptive words were large enough to have comprehended all his tenements in Islington; but having recited that they were under mortgage, the court held he intended to confine the extent of the Islington property he proposed to pass to the property under mortgage. So in the case of Parkin v. Parkin, 1 Eng. C. L. R. 119, there were two distinct unconnected tenements, one in, the other not in his occupation. The general description would have passed all his real estate to that place, but for the qualifying words then in his own occupation. He intended something by the use of these words, and in the language of Lord Hardwicke in Gascoigne v. Barker, 3 Atk. R. 8, where the testator does not make a certain definitive descrip- 577 tion, *it is very difficult not to construe the subsequent restrictive words as explanatory of the former. The same remarks will apply to the other cases cited. In most, if not all of them, there were separate and distinct tenements or tracts of land.

Where there are distinct tenements, there is something for the restrictive words to operate upon, so as to limit and confine the general description to the tenements referred to in the restrictive words. But in this case the question is whether the testator had ever so separated the coal-pit field, or any part of it, from the rest of his plantation, as to show that when he referred to the plantation on which he then resided he meant to exclude the coal-pit field; and this depends upon the facts in evidence.

The whole of the land was at one time held, used and enclosed as part of his plantation prior to the discovery of coal. This discovery, according to the evidence of Snead, made no change in the occupation or possession up to the time of the lease; the proprietor merely altered his mode of enjoyment. Nor did his lease to Snead separate the property from the residue of the plantation. Authority was given to raise the mineral within a certain boundary, with the right to the exclusive occupation of a portion of the surface not exceeding ten acres, but reserving the right to cultivate the residue of the land embraced within the boundaries of the lease: Thus continuing to hold all the land as part of the same tract for cultivation, with an authority to the lessees to raise the coal, and to have the exclusive possession of so much of the surface as would be necessary to carry on the mining operations. And it would seem probable, from the statement of the witness, that he did cultivate this coal field the year after the lease was abandoned.

The case of Chamberlaine v. Turner, Croke Car. 129, comes nearer to this 578 case than any of those referred *to. There the property was described as the house where A dwelleth at a place named. A was in possession of three rooms only, but the court held that all the house passed. The house was an entirety and

the terms were descriptive, not restrictive. And so here, even if there had been different leases of the same character with the lease to the witness, there is nothing to show that the testator intended to break up his plantation into different holdings; or that, in describing it as the plantation on which he then resided, he intended to restrict the generality of the description to any particular part.

The other circumstances of the case repel the idea that the testator did not intend to comprehend the whole of the land by the terms he used. The evidence shows that the coal was more valuable than the land exclusive of the coal. The testator himself seems to have placed a high value upon it.

The framer of the will seems to contemplate a full disposition of all his estate, and a provision for all having claims upon him; and it would be unreasonable to suppose, under such circumstances, that he intended to die intestate in respect to what he probably regarded as the most valuable portion of his estate; or that he designed to comprehend it under the vague terms contained in the concluding paragraph of the 4th clause of the will in which he directs the balance of his estate to be sold, his just debts paid, and the balance, if any, to be divided, &c. He owed but few debts, as the accounts taken show; and he could not have felt a doubt about there being a balance to divide after the payment of his debts, if he had intended to comprehend in this residuary clause the most valuable portion of his real estate. I think there was no error in the decree of the Circuit court in regard to this branch of the case.

The court further held that by the phrase "all the money" occurring in the 579 fourth clause, the money of *the testator at the time of his death in the savings institution, as well as moneys found in the house, passed to the widow and her children, but not moneys due by bond, judgment, or in stocks or other securities.

The report of the commissioner shows that 115 dollars was found in the house of the testator at his death; that the administratrix received of the savings institution 1573 dollars 3 cents, and that she collected considerable sums on judgments. We can derive no aid in the construction of this clause by the state of the testator's property. It was uncertain when he made his will what money he would have on hand or due to him by securities of any kind at the time of his death. We must ascertain by the will and its context what he intended by the phrase "and all the money." By the previous part of the paragraph he gives to his wife and children by her the plantation on which he now resides, all his slaves not specified before, four horses or mules as she may select, two yoke of oxen, five milch cows to be selected by her, one wagon and gear, one cart, and all his plantation utensils, his household and kitchen furniture, "and all the money;" and the balance of his estate he wished sold and all his just debts paid, and the remainder, if any, to be equally divided among all his children. In this clause nothing precedes or follows the phrase "and all the money," which can limit or qualify the legal definition of the word "money," when used in a will. No locality is fixed; it is not confined to money in the house, and everything which, according to the ordinary acceptation of language in the transactions of men, is treated and dealt with as money, will pass.

In 1 Roper on Legacies 282, it is said that the word "money," unaided by the context, will include cash, bank notes, money at the bankers, notes payable to bearer, &c., because they are not to be considered as choses in action, but money of the 580 person in whose *possession they are. But choses in action, promissory notes not payable to bearer, government stock, &c., will not pass under the word money. Most of the cases on the meaning of this phrase were reviewed by the lord chancellor in the case of Parker v. Marchant, 19 Eng. Ch. R. 355, where it was held that the testator's balance at his banker's passed under the words "ready money." In the cases of Carr v. Carr, 1 Meri. R. 541, and Devaynes v. Noble, Ibid. 528, Sir William Grant held that a balance at a banker's would pass under the word debts. The chancellor reviews these and another case of the same character, remarking that it was justly held in those cases, that such a balance is, and may be recovered as a debt. The money is not to be returned in specie; the engagement is to be ready to pay an equal amount when called for; and therefore it was properly held that it passed under a bequest of debts owing to the testator, it being in point of law a debt, and there being nothing to restrain the operation of the words or to show a contrary intent. "But that in the ordinary use of language money at a banker's is considered as ready money. Everybody speaks of the sum which he has at his banker's as money; my money at my banker's is a usual expression." So in the case of Vaisey v. Reynolds, 5 Russ. R. 12. The testator bequeathed to his wife his book debts, his "moneys in hand," and his stock in trade. Sir John Leach held that a balance at a banker's could in no sense be considered as money on security; but in a reasonable sense it might be considered as money in hand; for it was to be ready when called for. In those cases the balances were upon ordinary banking accounts; and in the case of Parker v. Marchant, the fact was adverted to that it did not appear that any interest was payable upon them, or that they were subject to any limitation, restriction or condition. In every other respect a deposit with a savings institution 581 *would seem to be a stronger case for treating it as money than at a private banker's; for by the rules and regulations of such institutions the money is always to be returned within a certain period after it is called for. It does not appear what were the regulations of this particular institution. But in the ordinary transactions

of life we know that such deposits are not regarded as investments in the common acceptation of the term. The depositor consents to accept of a low rate of interest, because he regards it as a fund upon which he can always rely upon giving a short notice required for the convenience of the depositary. I think therefore there was no error in holding that the moneys of the testator at the time of his death in the savings institution passed to the widow and her children under the phrase "all the money."

It is assigned as error that the court so interpreted the will as to make the bequest to the widow and her children of all the money comprehend not only the money in the house or in bank, subject to the check of the testator, but also all the debts due to him. This seems to be a mistake, as by the decree moneys due by bond or judgment or in stocks or other securities, were decided not to pass to the widow and children by her. The passage before cited from Roper on Legacies shows that the word "money" in its proper and ordinary sense, does not comprehend choses in action. In Hotham v. Sutton, 17 Ves. R. 319, Lord Eldon held that stock does not pass by the word "money."

The same proposition was laid down in Gosden v. Dotterill, 6 Cond. Eng. Ch. R. 495. That was a strong case for the application of the rule, for by excluding the stock there was not money enough to pay the legacies he had given, and an intestacy was created as to the bulk of the property. The master of the rolls had no doubt that it was the intention that the
582 *stock should pass under the term money. But that it was settled that the term "money" would not pass stock unless there is in the will some explanatory context. There is nothing in the context to indicate such intention here unless it be the provision directing the balance of his estate to be sold. But this is the ordinary expression used by testators in a residuary clause directing a sale and distribution of the residuary estate. It may be satisfied by referring it to such portion of the estate as would be a proper subject of sale, and should not of itself be construed as restricting the general words to perishable property the subject of sale. The testator intended that all his estate not specifically devised and bequeathed should pass by the residuary clause; that so much as was the proper subject of sale should be sold, and the proceeds, as well those arising from the sale as collected upon choses in action, should be distributed in the mode prescribed.

The master commissioner by his report allowed the appellants, Dabney and Snead, the hires of the slaves specifically bequeathed to their wives, with interest on the estimated hires. The administratrix excepted to so much of the report as debited her with hires of the slaves, and also for the charge of interest on the hires, they being estimated hires. The court properly overruled the exception so far as it respected the hires, deciding that the administratrix was properly charged with them, but sustained the exception as to interest on the hires upon the ground that they were estimated hires. According to the principles established in the cases of Cross' curatrix v. Cross' legatees, 4 Gratt. 257, and Rosser v. Depriest, 5 Gratt. 6, the administratrix being a fiduciary, was properly charged with the interest on the estimiated hires; and the court erred in sustaining the exception to that extent. For this error the decree must be reversed with costs; but should be affirmed in all other respects.

583 *DANIEL, MONCURE and SAMUELS, Js., concurred in the opinion of Allen, J.

LEE, J., concurred in the opinion, except that he thought the testator intended that debts due to him should pass under the bequests of "all the money;" and that this intention should control the construction of the will.

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584 *Mosby's Adm'r & als. v. Mosby's Adm'r.

Miller v. Jones & als.

January Term, 1853, Richmond.

1. **Wills—Construction—Executors—Powers Coupled with Interest*—Case at Bar.**—Testator by his will says, Whenever my executors think best, they shall sell my land in B, together with all the personal estate thereto belonging, except the slaves, and reserving one hundred and fifty acres of said land, which, with one-fourth of the said slaves, they shall hold in trust for the benefit of my daughter N B, &c. The money arising from the sale of land and other property above mentioned, together with all other moneys remaining in the hands of my executors after payment of debts and legacies, also the remaining three-fourths of my slaves belonging to my said plantation, I desire shall be equally divided between my son B and my daughters M and J. HELD: The will does not confer on the executors a naked power; but it vests in them an interest and a trust; and it is their duty to take possession of the land and to account for the rents and profits until it is sold.

2. **Public Administration—Accounting—Case at Bar.**—One of the executors having died and the other

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*Wills—Executors—Powers Coupled with Interest.—In the principal case where the will directed that, "Whenever my executors think best, they shall sell my land in Buckingham county, together with all the personal estate thereto belonging, except," etc., it was held that the will vested in the executors an interest and a trust, and it was their duty to take possession of the land and to account for the rents and profits until sold. Upon this question of the construction of wills, as to when the power given the executors, is not a mere naked one, but one that is coupled with an interest, see the principal case cited in Mills v. Mills, 28 Gratt. 460; Machir v. Funk, 90 Va. 288, 18 S. E. Rep. 197; Bell v. Humphrey, 8 W. Va. 17, 23; Elys v. Wynne, 22 Gratt. 230; Milhollen v. Rice, 13 W. Va. 534; Irwin v. Zane, 15 W. Va. 655; Dunn v. Renick, 33 W. Va. 481, 10 S. E. Rep. 812. See generally, monographic *note* on "Executors and Administrators."

having been removed, and the administration with the will annexed having been committed to the sheriff, he was under the act of 1819, 1 Rev. Code, ch. 104, § 52, p. 388, authorized as such administrator to execute the power and trust, and is therefore bound to account for the rents and profits. The case, though not within the letter of the statute, being within its spirit and meaning.

3. **Same—Receipt of Rents and Profits by Deputy—Liability of Sheriff.**—The rents and profits of the land having been received by the deputies of the high sheriff, he is responsible for them.

4. **Same—Liable Civiliter for Acts of Deputy Colore Officii.***—If the high sheriff was not authorized by the will to take possession of the land and receive the rents and profits, yet the estate having been committed to the high sheriff, and his deputies having taken possession of the land and received the rents and profits, on the principle that the high sheriff is liable *civiliter* though not *criminaliter* for all the acts of his deputies *colore officii*, he is bound to account for them.

5. **Same—Same—Commissioner's Report—Failure to Except to—Waiver†—Case at Bar.**—Upon a bill filed by the devisees against the high sheriff, charging that these rents had been received by the deputies, and that he was liable for them, his answer admitted the facts, and there was an account charging him with the rents, to which there was no exception, and a decree thereon. Upon a 585 bill of review seeking to *reverse the decree for errors apparent on its face, the error being that the high sheriff was charged with these rents. HELD: That whether the high sheriff was responsible for the rents received by his deputies, either *virtute officii* or *colore officii*, yet if they received them by his authority expressed or implied, he is bound to account for them. And as that authority might have been shown by evidence before the commissioner, and no exception was taken to the report, the charging him for the rents is not an error apparent on the face of the record, which may be corrected by a bill of review.

6. **Same—Same—Case at Bar.**—The deputy who farmed the sheriffalty from the high sheriff executed to him a bond with sureties, with conditions similar to those in the high sheriff's official bond, and with the further condition, that he would save harmless and indemnify the high sheriff, his heirs, executors and administrators from and against all losses and damages which he or they may sustain or be liable for in consequence of any failure or misconduct on the part of said deputy, or any failure or misconduct on the part of any other person or persons who may be employed by the said deputy at any time to assist him in the execution of his duties as deputy sheriff. HELD: That if it was the official duty of the high sheriff to receive the rents and profits; or if the deputies received the rents *colore officii*, though without lawful authority, and the high sheriff was on that ground liable therefor to the devisees, the sureties of the deputy in his bond are bound thereby to the high sheriff for the rents for which he is so liable to the devisees.

In 1837 Benjamin Mosby, Martha Nicholas and Judith M. Smith exhibited their bill in the Circuit court of Powhatan, against Thomas Miller, late sheriff of that county, and as such administrator de bonis non with the will annexed of Littleberry Mosby; charging that said Littleberry, father of the complainants, died in 1809, leaving a will which was recorded in Powhatan, of which a copy was exhibited with the bill, and whereby, among other things, he devised and bequeathed that his executors, whenever they should think best, should sell his land in Buckingham, (except 150 acres thereof,) together with all the personal estate thereto belonging, except the slaves; and that the money arising from said sale, together with all other moneys remaining in the hands of his executors, (after payment of all just demands against 586 his estate, and *the necessary provision made for the legacies mentioned in his will,) and three-fourths of his slaves belonging to the said plantation, as well as any estate or property whatever which might not have been mentioned by him, shall be equally divided between the said complainants: And further charging that the complainant Benjamin, and Josiah Smith (husband of the complainant Judith M.) qualified as executors of the will; that the said Benjamin continued to act as such until the 21st of August 1824, when his authority as executor being revoked, and the said Josiah being then dead, the estate of said Littleberry was committed to the hands of said Miller, sheriff as aforesaid, for administration de bonis non with the will annexed. That the estate which came into the hands of said sheriff, or of Thomas Watkins and Richard Watkins, his deputies, to administer, consisted of the said tract of land in Buckingham, (except as aforesaid,) together with the three-fourths of the slaves belonging thereto, and sundry other personal estate on the said plantation. That the said sheriff, or his said deputies, or one of them, took possession of said land, slaves and other personal estate; sold the whole of the personal estate, except the slaves, in December 1824; hired out the slaves and rented out the land annually from the end of the year 1824 to the end of the year 1830,

*Sheriffs—Liable Civiliter for Acts of Deputy Colore Officii.—There is no proposition better settled, and especially in this state, than that a sheriff is liable *civiliter*, though not *criminaliter*, for all the acts of his deputy *colore officii*, and he is liable in the same form of action as if committed by himself. Sangster v. Com., 17 Gratt. 131, citing the principal case. See, in accord, citing the principal case, Garrett v. Hutchinson, 86 Va. 874, 11 S. E. Rep. 406. See also, citing the principal case, Lafever v. Billmyer, 5 W. Va. 38, for the question of the jurisdiction of the court of equity in matters of accounting.

Same—End of Term—Continued Liability.—On this subject, see principal case cited in Tyler v. Nelson, 14 Gratt. 221, 226, and *note*, where there is a collection of the authorities.

†**Appellate Practice—Commissioner's Report—Objection to—Waiver.**—This court will not disturb the confirmation of a commissioner's report, in the absence of any exceptions to the allowance of the judgment in such report, in the court below. Saunders v. Prunty, 89 Va. 924, 17 S. E. Rep. 231, citing the principal case.

when the authority of said Miller having been revoked, and administration granted to the complainant Benjamin, he came into possession of the land and slaves: And that they had failed and refused to account for and pay what was due to the complainants on account of the administration of said estate by the said sheriff. And praying for a decree for a settlement of the administration account, the payment of the balance due, and for general relief. On the same day on which the bill was exhibited the defendant filed his answer, admitting that while he was sheriff of Powhatan the said estate was committed to his 587 *hands for administration as aforesaid, and stating that during the time of his sheriffalty Thomas and Richard Watkins were his deputies, performed the duties of the office, and had the management of said estate, and received the whole profits and proceeds arising from the rents, hires and sales thereof; he never having himself received any part of said rents, hires or proceeds. That he believed that said Thomas and Richard rented out the land and hired out the slaves for the years 1825, 1826, 1827, 1828, 1829 and 1830, and one of them sold the other personal estate; but he did not know the amount of sales, rents or hires. That he had no objection to a settlement of his administration account before a commissioner of the court; but desired that the commissioner might be directed so to state the account as to show the amount of sales, rents and hires received by each of his deputies Thomas and Richard Watkins, and the amount remaining in their hands respectively. On the same day, by consent of parties, a decree was made for the settlement of the account, to be stated in the manner desired by the defendant as aforesaid.

On the 11th of September 1837 the commissioner made his report, showing that there was due by the defendant to the estate of his testator a balance of 1467 dollars 4 cents, of which there was due on account of the transactions of Richard Watkins the sum of 905 dollars 74 cents, and of Thomas Watkins the sum of 561 dollars 30 cents. To this report there was no exception: And on the 2d of November 1837 a final decree was made confirming the report, and directing a third of the said balance to be paid to each of the complainants, on the execution of refunding bonds according to law.

After the rendition of this decree, to wit, in January 1838, Thomas Miller brought an action at law against the surviving obligors in the official bond of his deputies, 588 *Thomas and Richard Watkins, for the purpose of recovering the amount of the said decree, to which he alleged he had been subjected by reason of their default. An issue was made upon the plea of conditions performed, which was tried in November 1839, when a verdict and judgment were rendered for the plaintiff for the amount of the decree, after deducting therefrom the amount of the rents included therein; the court having instructed the jury that the plaintiff, as administrator as aforesaid, was bound to rent out the Buckingham land, (except 150 acres aforesaid,) but that he was not liable to the legatees for the said rents; and that he had no right to recover the same from the defendants in this action. To which opinion and instruction the plaintiff excepted. Seven exceptions were taken by the defendants to opinions of the court given on the trial, which, however, need not now be noticed.

On the same day on which the judgment was rendered in the action at law, leave was obtained by Thomas Miller to file a bill of review for the purpose of reviewing the said decree of November 2d, 1837, and a supersedeas was awarded to stay the execution thereof. On the 2d of March 1840, the bill of review was accordingly filed. It prayed for a review and reversal of the said decree as to 480 dollars, the amount of the said rents and the interest thereon, solely on the ground that it had been decided in the said action at law that the plaintiff could not recover from the defendants therein, and was not liable to pay the said rents which had been decreed against him as aforesaid. The defendants to the bill of review answered the same, insisting that the said decree was correct, and that there was no ground in law or equity to reverse the same. In August 1841 the two causes, the original case and the bill of review, came on to be heard together; the latter on the 589 bill, answer, replication, *a transcript of the record in the original chancery case, and a transcript of the record in the action at law; when the court, being of opinion that the decree of November 2d, 1837, was erroneous in subjecting Miller to the payment of 480 dollars for the rents, &c. for which neither the sureties of the deputies, Thomas and Richard Watkins, were liable to Miller, nor he to the devisees of Littleberry Mosby, reversed and annulled the said decree, and rendered a decree for the balance thereof, after deducting the amount of said rents, and for the costs of the plaintiff in the bill of review. From this decree of August 1841, the plaintiffs in the original chancery cause, who were defendants in the bill of review, obtained an appeal; and from the judgment rendered in the action at law, the plaintiff therein obtained an appeal; which two appeals came on to be heard together, and present very nearly the same questions for decision, at least so far as relates to the errors assigned by the appellants respectively.

Cooke and Irving, for Mosby's adm'r and als.

Rhodes and Steger, for Jones and als.

S. Taylor, for Mosby's adm'r and Miller.

MONCURE, J., after stating the case, proceeded:

I will first consider the case of Mosby's adm'r, &c. v. Mosby's adm'r, which is the appeal from the decree of August 1841.

The main question in this as well as the other case, is as to the liability of Miller,

as sheriff and committee administrator, for the rents of the Buckingham land received by his deputies, Thomas and Richard Watkins. Before that question is decided, it will be necessary or convenient to consider:

First. Whether the executors, before the death of one and the revocation of the 590 authority of the other, *were not authorized as such to receive the rents of the said land, and accountable therefor to the appellants as residuary devisees and legatees under the 5th clause of the will? That clause gives express and absolute power to the executors as such to sell the land. The words of it are, "Whenever my executors think best, they shall sell my land in Buckingham county, together with all the personal estate thereto belonging, except," &c. There could have been no doubt, therefore, as to their liability for the proceeds of a sale of the land, if one had been made by them. But what were their powers and liabilities in regard to the rent of the land in the mean time, is the question now to be considered: And that question depends upon whether the power given to the executors by the will was a naked power to sell, or was what is called in law a power coupled with an interest. "Where the devise is merely a power to the executor to sell, there the heir may enter and take the profits until the executors have sold; and after the sale the purchaser may enter on the heir." But where the power is coupled with an interest in the land, "the heir cannot intermeddle with it; and the executors, after the death of the devisor, may enter into the land and take the profits and make sale according to the devise; because the devise takes away the descent, and vests the estate of the land in the executor." 1 Lomax on Executors 219.

Many nice and refined distinctions have been taken between forms of devise which have the effect of conferring a naked power, and those which have the effect of conferring a power coupled with an interest. The ordinary forms of devise are: 1. "I devise my land to my executors to sell;" or, 2. "I devise my land to be sold by my executors;" or, 3. "I devise that my executors shall sell my land," or "that my land shall be sold by my executors," which is the 591 same thing. The *first form of devise has been conceded by all to have the effect of giving an interest in the land. Lord Coke thought that the 2d form had the same effort. And Lord Hale and Hargrave thought the 3d form had also the same effect. But Sugden has clearly shown by authority, that the opinions of Hale and Hargrave, and even of Coke, are unfounded; and that all of the above forms, except the first, are appropriate to confer a power only, and not an interest also. See Sugden on Powers, chap. 3, § 1, p. 128-152.

The form of the devise in this case is, "that my executors shall sell my land," &c.; and being the 3d of the above forms, is appropriate for conferring a naked power.

But the question is always one of intention on the whole will; and the mere form of the devise may be controlled by the context. In the language of the Supreme court of the United States in Peter v. Beverly, 10 Peters' R. 532-564, the courts, (in the American cases at least) have generally applied to the construction of such powers the great and leading principle which applies to the construction of other parts of the will, to ascertain and carry into execution the intention of the testator. In the case of Osgood v. Franklin, 2 John. Ch. R. 1, the question was whether a sale made by a surviving executor was good; and that question depended upon whether the will conferred on the executors a naked power, or a power coupled with an interest. The form in which the power of sale was conferred in that case, was the 3d of the above forms; and was appropriate for conferring a mere power of sale. But Chancellor Kent, while he acknowledged the rule of the common law, was equally satisfied that the case was not governed by it. In the first place he was of opinion that there was in that case, "an interest sufficient to feed the power and keep it alive in the hands of the surviving executors. 592 *The executors were vested by the will with an absolute interest in an undivided moiety of the whole residuary estate on which the power was to operate; and they were also directed to keep the whole of this residuary estate as much as possible on interest or rents, for the general benefit. This authority to lease, and this interest in the subject itself, must be sufficient to exempt the power from the character of a mere naked authority to a stranger. It is not necessary that the interest coupled with the power, should be a legal interest. An equitable estate is sufficient, and is regarded in this court as the real interest; nor does the character of the power depend on the quantity of interest." In the next place he was of opinion that there was "a trust charged on the executors, in the direction given to them to distribute the proceeds of the residuary estate: And according to the settled doctrine of the court, the trust does not become extinct by the death of the trustees. It will be continued in the survivor and cannot be permitted in any event to fail of execution for want of a trustee." Either of these grounds he considered sufficient to support the sale made by the surviving executor, and he therefore decided it to be a good sale.

The case of Franklin v. Osgood was carried to the Court of errors, where the decision of Chancellor Kent was affirmed by a large majority of the court. 14 John. R. 527. Indeed it does not appear that any of the court dissented from the principles of construction laid down by the chancellor. The minority differed from the majority in regard to what was the intention of the testator, according to the ordinary rules of construction applied to his will. Platt, J., who delivered the opinion of the majority, said, "There is also another class of cases

which clearly show that where the terms made use of in creating the power, detached from the other parts of the will, 593 confer merely a naked *power to sell, yet the other provisions of the will evince a design in the testator that at all events the lands are to be sold in order to satisfy the whole intent of the will, then also the power survives. In this latter case, it is not a naked power, in the sense of Lord Coke's general rule, but is coupled with other trusts and duties which require the execution of the power to sell." And although if the testator had used merely the words of the section by which the power of sale was given in that case, without any qualifying word or dependent provisions in the will, he would have had no doubt that the authority ought to be construed strictly; yet, looking at the whole will, and construing this section in connection with others, and in reference to all the provisions of that instrument, his mind was irresistibly led to the conclusion that it best accorded with the intention of the testator that the power should survive to the only remaining executor. See also the cases of Jackson v. Ferris, 15 John. R. 346; and Lessee of Zebach v. Smith, 3 Binn. R. 69.

In the case of Peter v. Beverly, 10 Peters' R. 532, the Supreme court unanimously approved the same rules of construction. The opinion of the court was delivered by Mr. Justice Thompson, who had delivered the opinion of the minority of the Court of errors in the case of Franklin v. Osgood. And after reviewing the cases, he concludes by expressing a very decided opinion that the power to sell given by the will in that case, was a power coupled with an interest, which survived and might be executed by the surviving executor, though the form of words by which the power was given was appropriate for conferring a naked power. The observations of the court in that case are very applicable to this; but being of the same character with those I have 594 quoted from the case of *Franklin v. Osgood, it is unnecessary to notice them any further.

The cases which I have cited are entitled to the greatest consideration, having been very ably argued, and decided by judges of great eminence. The rules of construction announced therein, are reasonable; and will, I doubt not, be acted on by most, if not all, of our American courts. See 3 Greenleaf's Cruise on Real Property, vol. 6, p. 361, note 1, where the opinion of Thompson, J., on this subject, in Peter v. Beverly, is cited at length. See also 4 Kent 326. Then the question in this case is, whether, on the principle of the cases cited, the power of sale was a mere naked power, or a power coupled with an interest? Did the testator intend that his executors should merely have power to sell this land, or that they should also, in the mean time, hold it for the benefit of his residuary devisees? Which construction would be more apt to carry out the manifest object and scheme of the will.

The testator obviously did not design that until a sale of the land it should devolve on his heirs. He intended to break the descent and give the land, with all the other subjects embraced by the residuary clause, to his residuary devisees and legatees from the time of his death. He did not mean to put it in the power of his executors to defer ad libitum the period for the enjoyment of the land by the devisees. His object in giving them a discretion as to the time of selling, was to benefit, and not to injure, the residuary devisees. In the language of Jarman, in his Treatise on Wills, vol. 1, p. 540, "it seems hardly supposable that the testator could mean that the actual enjoyment by the object of his bounty should be liable to be deferred for an indefinite period, by difficulties attending the execution of the trust, or the want of activity in the trustees in effectuating a conversion. To pre- 595 vent *such a consequence, a liberal construction has obtained in these cases, and the legatee, until the execution of the trust, takes an interest in the unconverted property, corresponding to that which he would have been entitled to in the proceeds, if the conversion had taken place." The residuary devisees, then, were entitled to the rents accruing before the sale of the land. But was it intended that they or his executors should hold possession of the land until the sale? I think that the words and whole scope of the 5th clause of the will show that the executors were intended to have and hold possession of the land from the time of the testator's death. They were not only to sell the land, but all the personal estate thereto belonging, except the slaves, and sell both at the same time; that is, whenever they might think best: And the money arising from the sale, together with all other moneys remaining in their hands, (after the payment of debts and legacies,) and three-fourths of his slaves belonging to said plantation, and any estate or property he may have failed to mention, were to be equally divided between his three residuary devisees. He did not expect the devisees to hold any of the property jointly, but intended that all of it should be divided, and they should receive their several portions. The land he intended should, be divided not in kind, (which would probably have been inconvenient,) but by a sale and division of the proceeds: and though he gave his executors a discretion as to the time of sale, yet he doubtless expected the sale to be made in a short time, perhaps one or two years after his death, and before a division was made of the other property. He certainly intended that his executors should have immediate possession of the slaves and other personal estate belonging to the land; and why not the land itself? especially when the personal estate, except the slaves, was to be sold together, or at 596 the same time, with the *land? Could he have intended that one hand should hold the land, and another the personal property belonging to the land? He seems

to have contemplated, as a matter of course, that his executors would hold all; and he therefore uses the general language, "Whenever my executors think best they shall sell," &c. He certainly intended that his executors should take immediate possession of all the Buckingham land; for he directs them to lay off 150 acres of it as they might think proper, so as to include the dwelling house; and he expressly directs them to hold that part of the land, and certain slaves, in trust for the benefit of his daughter Mrs. Binford during her life. He gave no direction in regard to the holding of the other part of the land in trust, because he expected it to be shortly sold. I think it is difficult to read the will without being satisfied that the testator intended, 1st, that his heirs at law should have no interest in the land devised by the 5th clause of his will; 2dly, that his three residuary devisees should be exclusively interested therein (except the 150 acres); 3dly, that his executors should take immediate possession thereof, and sell it in a reasonable time thereafter; and 4thly, that they should hold it in the mean time, of course for the benefit of the residuary devisees. It follows that the executors were authorized as such to receive the rents of the land, and accountable therefor to the residuary devisees.

It also appears from the cases of Franklin v. Osgood, Jackson v. Ferris, and Peter v. Beverly, before cited, that two of the executors in this case, being also residuary devisees, (one of them in his own right and the other in right of his wife,) they had a sufficient interest in the land to feed the power of sale, and make it a power coupled with an interest.

Secondly. One of the executors having died, and the authority of the other 597 having been revoked, before *the land was sold, was the administrator de bonis non with the will annexed authorized to receive, and accountable for, the rents which thereafter accrued?

At common law, the proceeds of land directed by will to be sold, were not in any case a testamentary subject. If the executors were authorized by the will to make the sale, they acted in relation to that subject only as trustees. In the language of Green, J., in Jones v. Hobson, 2 Rand. 483-499, "It was a trust superadded to the office of executor and not inseparable from it. For even if they refused the administration and to be executors, they might still execute the will in relation to the lands; and if there were more than one executor, and one refused and the other proved the will, they must both join in the execution of the trust." If one refused to join, it was necessary for the parties interested to resort to a court of equity for relief. To obviate this inconvenience the statute 21 Hen. 8, c. 4, was enacted; which in effect provided that where lands are willed to be sold by executors, and part of them refuse to be executors, and to accept the administration of the will, all sales by the executors that accept such administration, shall be as valid as if all had joined. The provision will be found at length in 2 Wms. on Ex'ors 623. This statute was in force in Virginia until 1785; when it was enacted that "the sale and conveyance of lands devised to be sold, shall be made by the executors or such of them as shall undertake the execution of the will, if no other person be thereby appointed for that purpose; or if the person so appointed shall refuse to perform the trust, or shall die before he has completed it." 12 Hen. St. 150, § 52. This was re-enacted in 1792, with this additional provision: "but if none of the executors named in such will shall qualify, or, after they have qualified, shall die before the sale and conveyance of such lands, then, in these cases, the sale 598 *and conveyance thereof shall be made by such person or persons to whom administration of the testator's estate with the will annexed shall be granted." Rev. Code of 1803, p. 166, § 45; 1 Rev. Code of 1819, p. 388, § 52. And thus stood the law from that time until after the period during which the transactions in this controversy arose. The object of our statute was to extend the policy of the statute of Hen. 8; and to render a resort to a court of chancery for the appointment of a trustee unnecessary, by authorizing the duly qualified personal representative of a testator to sell and convey land devised to be sold, unless some other person was appointed in the will for that purpose, and was willing to perform the trust, and completed it in his lifetime. It was considered by the legislature that he who had the execution of the will in regard to the personal estate, should have it also in regard to the real, in the absence of any direction in the will to the contrary; and would be a fit person for the purpose, whether nominated executor by the will or appointed administrator with the will annexed, by the court of probate. This I think is the true view of the statute; and though it is imperfectly penned, and does not reach by its letter some of the cases coming within its spirit, it ought to to be construed according to its spirit. The statute does not reach by its letter the case under consideration. It authorizes an administrator with the will annexed to sell and convey, if none of the executors shall qualify or after they have qualified they shall die before the sale and conveyance. Whereas, in this case, the executors qualified, and one only died, the other having been removed from his office before the sale. But nothing can be clearer than that this case is within the meaning and spirit of the statute. The nomination of the executor is not sufficient; he must qualify. For the same reason his qualification ought to continue until after the 599 sale. The revocation *of his authority places him in the same situation he would have been in if he had never qualified; or is the same thing in effect, as if he had died before the sale. Why should there be any more necessity for resorting to a court of equity to appoint a trustee in one case than in the other? Why would not

the administrator with the will annexed be as fit a trustee in the one case as the other? The stat. of 27 Hen. 8 has received a liberal construction. Upon it Lord Coke observes, that although the letter of it extend only to cases where executors have a power to sell, yet being a beneficial law, it is by construction extended to cases where lands are devised to executors to be sold. Coke Litt. 113, a; 2 Wms. on Ex'ors 624. For various instances in which our statute would probably receive a liberal construction, see 1 Lomax on Ex'ors 364-7, § 18, 21, 22. See also, Brown v. Armistead, 6 Rand. 594. That the legislature passed an act in 1840, (Acts of '39-'40 p. 49,) expressly declaring that if an executor, by reason of his removal from office from any other cause, be disqualified to make sale and conveyance of lands devised to be sold, the same shall be made by the administrator with the will annexed, does not show that the former statute did not, by its spirit, embrace the same cases for which that act was intended to provide. The former statute had not been judicially construed to embrace the case provided for by the latter; which was therefore passed out of abundant caution. The stat. 1 Rev. Code 389, § 58, declaring that an administrator should not be compelled to make distribution without a refunding bond had been extended by judicial construction to executors. Sheppard's ex'or v. Starke, 3 Munf. 29-41; and yet by the act of 1823, the case of executors was expressly provided for. That a discretion is given to the executors in this case to sell, "whenever they might think best," is not inconsistent with the 600 power of the *administrator with the will annexed to make the sale: Brown v. Armistead, 6 Rand. 594, is decisive upon that subject.

I therefore think the administrator with the will annexed was authorized to sell and convey the land; and being authorized to do that, he was authorized to hold the land and receive the rents and profits until the sale. The will created but one trust in regard to the land, which I have endeavored to show was a trust, not only to sell it, but in the mean time to rent it out and receive the rents. This entire trust devolved on the executors during the existence of their authority; and must, if any part of it, devolve on the administrator with the will annexed, not having been completed by the executors, and their authority having ceased. The statute never contemplated a division of the trust, and an apportionment of it between the administrator with the will annexed and a trustee appointed by a court of chancery. While it was intended to save parties from the delay and expense of resorting to a court of chancery for the appointment of a trustee to sell the land, it could not have been intended to subject them to the same delay and expense for the purpose of obtaining the appointment of a trustee to hold the land and receive the rents until the sale. The statute having expressly conferred on the administrator with the will annexed the principal power to sell and convey embraced in the trust created by the will, the power to hold and rent out the land in the mean time embraced in the same trust, would seem to pass as a mere incident to the former.

If what has been said is well founded, the plain result is that Miller is liable as sheriff and committee administrator for the rents of the Buckingham land received by his deputies Thomas and Richard Watkins.

The statute of 1819, which governs this case, expressly declares that a sheriff 601 to whom an estate is *committed for administration, shall be, to all intents and purposes, the administrator, &c. and be entitled to all the rights, and bound to perform all the duties of such administrator. 1 Rev. Code 391, § 67. That such sheriff is bound to complete the administration of his decedent's estate, notwithstanding the expiration of his office before such completion; that he may administer the estate by deputy, and as well after as before such expiration; that he is responsible for the acts and defaults of his deputy in the administration, and that such responsibility extends to the fund arising from the real as well as the personal estate, are propositions which have been well settled by this court in Coke v. Harrison, 3 Rand. 494; Dabney's adm'r v. Smith's legatees, 5 Leigh 13; and Douglass v. Stump, Id. 392. The two last were cases which arose under the statute of 1792, Rev. Code of 1803, p. 167, § 61; under which the sheriff was not "to all intents and purposes the administrator," but administered the estate under the direction of the court, and on different principles from those which governed an ordinary administration. It may be remarked here, that the statute of 1792 tends to show that the legislature contemplated and intended as a general rule that the administrator with the will annexed should sell land directed by will to be sold. It provided that the court should order the sheriff to take the estate into his possession, and sell so much as the payment of debts should make necessary, or as should be perishable, or be directed by will to be sold; and declared all sales and conveyances bona fide made by the sheriff or his deputies, or other officer, in consequence of such order, should be as effectual to the purchasers as if they had been made by the decedent in his lifetime. By the succeeding section "all sales and conveyances of lands theretofore bona fide made by a sheriff or other officer, under any order of court where the lands had been de- 602 vised to be sold, and the *executor had refused to act, were thereby confirmed and made effectual against all persons claiming under the testator." See what is said in regard to the construction of this statute in Douglass v. Stump, 5 Leigh 392. The statute of 1819 uses the same language with that of 1792, in providing that the court shall order the sheriff to take the estate into his possession; then dropping the language of that statute, it proceeds to declare that such sheriff shall

thereupon be to all intents and purposes the administrator, &c. The section confirming sales and conveyances of lands before made by a sheriff, was retained in the statute of 1819. The legislature hardly intended by the alteration made by the statute of 1819, to diminish the authority of the sheriff in regard to the sale of land directed by will to be sold; but doubtless supposed that such authority would be fully preserved by the declaration that the sheriff should, to all intents and purposes, be administrator with the will annexed. Both statutes authorized the court to order the sheriff to take the estate into his possession. The word estate in the former statute clearly embraced the real estate directed by will to be sold; and the same word in the latter statute was no doubt intended to have the same meaning. See 1 Lomax on Ex'ors, p. 367, § 23.

There is another principle on which I think Miller is liable for the rents received by his deputies: And that is that a sheriff is liable civiliter, though not criminaliter, for all the acts of his deputies, colore officii. The doctrine applicable to the ordinary relation of principal and agent, or master and servant, renders the principal or master liable for the misfeasances and negligences of his agent or servant, in all cases within the scope of the agency or employment. Story on Agency, § 308. The former is not liable for the torts or negligences of the latter in any matters beyond the agency or employments, unless he has ex-
603 pressly authorized *them to be done, or subsequently adopted them for his own use and benefit. Hence it is, that the former is never liable for the unauthorized, wilful or malicious act or trespass of the latter. Id. § 456. And even in cases within the scope of the agency or employment, though the agent or servant may be a trespasser, and liable in an action of trespass, the principal or master is not; but is liable only in an action on the case for the damage consequential from his employing an unskillful or negligent agent or servant. McManus v. Cricket, 1 East's R. 106. But on principles of public policy, the liability of a sheriff for his deputy is much more extensive. The acts and defaults of the deputy, colore officii, are considered in law as the acts and defaults of the sheriff, who is liable therefor in the same form of action as if they had been actually committed by himself. He cannot be imprisoned or indicted, but may be fined for the conduct of his deputy. Woodgate v. Knatchbull, 2 T. R. 156. In Saunderson v. Baker, 3 Wils. R. 309, it was decided by the court of common pleas as long ago as 1772, that trespass vi et armis, lies against a sheriff for the act of his bailiff in taking the goods of A. instead of the goods of B. under a fi. fa. Blackstone, justice, "thought the sheriff was answerable in an action of trespass vi et armis for the act of his officer, the law looking upon the sheriff and all his officers as one person; he is to look to his officers that they do their duty; for if they transgress, he is answerable to the party injured by such transgression, and his officers are answerable over to him. There is a difference between master and servant; but a sheriff and all his officers are considered in cases like this, as one person." The principle thus laid down by Blackstone, has been approved and followed in the subsequent English cases. Crowder v. Long, 15 Eng. C. L. R. 309; Smart v Hutton, 28 Id. 367; Raphael v. Goodman, 35 Id. 455.

In Smart v. Hutton, the sheriff's
604 *officer arrested a defendant under a fi. fa. and carried him to jail, where he remained about 20 days. Trespass for assault and false imprisonment was brought against the sheriff. His counsel argued that "there must be some limit to the doctrine that the sheriff is in all cases to be identified with his officer. The officer in this case acted entirely without authority from the sheriff, and with the grossest ignorance." But the Court of king's bench unanimously decided that the action was sustainable. The same principle has been approved and followed in Massachusetts. Campbell v. Phelps, 17 Mass. R. 246; Knowlton v. Bartlett, 1 Pick. R. 271. Also in New York, Walden v. Davison, 15 Wend. R. 575. In the case in 1 Pickering, the court said: "If the act from which the injury resulted was an official act, the authorities are clear that the sheriff is answerable; if it was not an official but a personal act, it is equally clear that he is not answerable. But an official act does not mean what the deputy might lawfully do in the execution of his office; if so, no action would ever lie against the sheriff for the misconduct of his deputy. It means, therefore, whatever is done under color, or by virtue of his office." In this case "there is no doubt that he professed to act as an officer, and that he made the plaintiff believe that he was so acting." The same in substance, is said in the case in 15 Wendell. But the principle has no where been more fully sanctioned than in our own state. White v. Johnson, 1 Wash, 159; James v. McCubbin, 2 Call 273; Moore's adm'r v. Dawney, 3 Hen. and Munf. 127. In James v. McCubbin, a deputy drove one man's property on the land of another, in order that he might levy a distress warrant on it; which he accordingly did. Trespass vi et armis was brought against the sheriff therefor, and was unanimously sustained by the court. Certainly no act of the deputy could have been more willful or unau-
605 thorized *than this. But it was done by color of his office, and the sheriff was therefore held liable. In Moore's adm'r v. Dawney, as in Saunderson v. Baker, and Campbell v. Phelps, before cited, one man's property had been taken under an execution against another, and the sheriff was held responsible in trespass. It may be proper to notice the case of the United States v. Moore's adm'r, 2 Brock. R. 318, which might seem to be opposed to the principle. But the receipt of the money by the deputy marshal in that case, being on the service of the original

process and not under execution, was without color, and probably without pretence of authority, and he could only have acted in receiving it, as the agent of the defendant.

Now let us see if this well settled principle be not applicable to, and decisive of, the question under consideration.

By an order of the County court of Powhatan, the authority of Benjamin Mosby as executor was revoked, and he was directed forthwith to deliver the unadministered estate of the testator into the hands of Thomas Miller, sheriff of Powhatan county, for administration; and the said sheriff was directed to take the said estate into his possession and administer the same according to law and the will of said testator. In obedience to this order Benjamin Mosby delivered the unadministered estate, including the land, to Thomas Watkins, the principal deputy, who, a few months thereafter, to wit, on the 20th of December 1824, publicly sold the perishable property, and rented and hired out the land and slaves for the ensuing year; and continued to rent and hire them out until his death in 1827, when Richard Watkins, another deputy of said Miller, took possession of said land and slaves, and continued to rent and hire them out, and received the rents and hires during the years 1828, 1829, 1830 and 1831, and until the authority of said Miller was 606 revoked *and administration was granted to said Benjamin Mosby, who then came again into the possession of said land and slaves. A list of sales, rents and hires of the said estate, while it was in the hands of said Thomas Watkins, was made out in his handwriting; and a list of rents and hires of the estate, while in the hands of the said Richard, was made out in his handwriting. In the account which was settled in this case of the administration of said Miller on the said estate, the estate was credited with the rents, and charged with the taxes, which annually accrued on the land, and no objection was made thereto by him; but on the contrary, he, in effect, admitted the propriety thereof by desiring that the account should be taken separately as to the said two deputies, so as to show what each was accountable for to him. An administration account had been previously settled before commissioners in the county in which the same credits and charges of rents and taxes were doubtless made; though that account is not a part of the record, but is merely referred to therein.

These facts conclusively show that Thomas and Richard Watkins took possession of the land, rented it out, and received the rents, under color of their office of deputy sheriff; and, whether they were authorized as deputies to do so or not, their principal is, I think, clearly bound for the rents according to the principle and the authorities before stated. Suppose, under the order to take possession of the unadministered estate, they had taken possession of the slave of a stranger and hired it out as part of that estate; would not their principal have been liable for the hires received by them to the owner of the slave? That would in all respects have been like the case of one man's property being taken under an execution against another; in which the sheriff has, over and over again, been held responsible for the act of 607 his *deputy. What difference can it make if, instead of taking and hiring out the slave, they have taken and rented out the land of a stranger, will not the sheriff be as much bound for rent in the one case as he would be for hire in the other? If the deputies in taking possession of the land had acted not only without authority, but with the grossest ignorance of their powers and duties, the sheriff would have been liable according to the case of Smart v. Hutton, before cited. Or if, even so doing, they had knowingly violated their duty and committed a willful trespass, he would have been liable, according to the case of James v. McCubbin, before cited. A fortiori, he is liable in this case, in which, if the deputies were not authorized by law to take possession of the land and rent it out, they at least acted bona fide in so doing, and all parties concerned, including even the court that decided the case, as at first advised, seem to have been under the impression that they were so authorized.

But whether I be right or wrong in the views I have already taken of the case, was not the final decree of the 2d of November 1837 conclusive against the sheriff? And was not the decree of the 8th of November 1842 on the bill of review erroneous in setting the former aside? The original bill charged that the sheriff or his deputies had received the rents, &c., and that the sheriff was accountable therefor to the complainants. The answer of the sheriff admitted that the rents, &c., had been received by his deputies, and did not deny his accountability therefor; but on the contrary stated that he had no objection to a settlement of the administration account, and desired that the commissioner should be directed so to state the account as to show the amount of rent, &c., received by each of his deputies. The rents were accordingly included in the account, and no exception being taken to the commissioner's report, the same was confirmed, and a 608 *final decree rendered thereon. Certainly the report could not for the first time be objected to in this court on the ground that the rents were included in the account. "Reports which are erroneous upon the face of them, although not specially excepted to prior to the hearing, may perhaps be objected to at the hearing or in the appellate court. But it is clear that reports not excepted to cannot be impeached before an appellate court in relation to matters which may be affected by extraneous testimony." 2 Rob. Pr. 383, citing White's ex'ors v. Johnson, 2 Munf. 285, and other cases. In the case of Foreman v. Murray, 7 Leigh 412, which was a suit by a ward against a guardian for a settlement of the guardianship account, the bill insisted that

the guardian should be charged with interest which he had not actually received, and the guardian, by his answer, contested the charge; but he filed no exception to the account reported by the commissioner, which made the charge of interest, and was the foundation of the decree against the guardian. It was held to be too late in the appellate court to object to the decree on this ground. Now if the sheriff be not liable for the rents received by his deputies in this case on the ground that they were authorized to receive them virtute officii, nor even upon the ground that they received them colore officii; yet I think there can be no doubt of his liability if they received them by his authority, express or implied. If the record does not itself show that the rents were received by the deputies by authority of the sheriff, the fact may have been shown to the satisfaction of the commissioner by extraneous testimony; and, on an appeal from the decree upon the report without exception, would be presumed to have been so shown. The same principle applies to a bill of review for error apparent on the face of the decree; of which nature was the bill of review in this case.

And I can conceive of no reason which
609 would authorize *the presumption in the one case and not in the other.

I am therefore for reversing the decree of the 8th of November 1842, with costs, and dismissing the bill of review with costs.

I will now consider the case of Miller v. Jones, &c., which is the appeal from the judgment in the action at law brought by the sheriff against the surviving obligors in the bond of his deputy Thomas Watkins.

The error assigned by the appellant is, that the court instructed the jury that the plaintiff in the action, as administrator aforesaid, was bound to rent out the land, but is not in law liable to the devisees for the rents, and had no right to recover them from the defendants in the action.

I have already endeavored to show not only that the plaintiff was bound to rent out the land, but that, whether so bound or not, he is liable to the devisees for the rents received by his deputies. It now only remains to be considered (at least in regard to the above assignment of error) whether the defendants are liable over to the plaintiff for the said rents which have been recovered of him by said devisees?

That the deputies themselves or their representatives are liable over to the plaintiff for the rents received by them respectively, will not, I suppose, be disputed; and the only question then is, whether the sureties in the bond are liable. Thomas Watkins farmed the office of sheriff from Miller for the two years of his sheriffalty; and was, by himself or his assistant deputies, to perform all the duties of the office of sheriff during that period; and was to give to Miller, at each period of his qualification as sheriff and of said Thomas' qualification as deputy, a bond with such security as Miller might approve, and in a penalty equal to the whole penalties of the

bonds required of Miller as sheriff,
610 conditioned for the faithful *discharge of all the duties of sheriff during the continuance of said Miller in office, and for his indemnity against all losses or damages which he might sustain or be liable for in consequence of any failure or misconduct of said Thomas as deputy, or of any other person who might be employed by said Thomas at any time to assist him in the execution of the duties aforesaid. Thomas and Richard Watkins qualified as deputies for each year of the sheriffalty; the latter having qualified at the instance of and to assist the former as aforesaid. The bond on which the action was brought was the bond of said Thomas and his sureties for the first year of the sheriffalty, and conforms to his agreement with the sheriff aforesaid, both as to penalty and condition; and contains, besides, similar specific conditions to those which were contained in the three official bonds of the sheriff. The estate of Littleberry Mosby was committed to the said sheriff for administration during the first year of his sheriffalty, and while said Thomas and Richard were his deputies, to wit, on the 21st of August 1824. It became then the duty of the sheriff to complete the administration, whether before or after the termination of his office. Thomas Watkins having farmed the office for that year, he and his assistants were bound to perform that duty. And the bond being expressly conditioned for the faithful discharge of all the duties of the office, and for the indemnity of the sheriff as aforesaid, the liability of the obligors, as well sureties as principal, to the sheriff for the rents received by his deputies and recovered of him as aforesaid, seems to follow as a necessary consequence.

But it is argued by the counsel for the appellees that as the estate was committed to the sheriff for administration prior to the act of February 16, 1825, Sup. Rev. Code 215, the sureties of the executors would not have been responsible for
611 rents received by *the latter; and that the sureties of the sheriff or his deputies are therefore not responsible for the rents received by them. I think this is a non sequitur. The sureties of the executors would not have been bound, because the condition of executorial bonds did not extend to land devised to be sold until after the passage of that act. And it was determined by this court, in Jones v. Hobson, 2 Rand. 488, which was decided in 1824, just before the passage of the act, "that the proceeds of land devised to be sold are not, and never were, a testamentary subject; that executors hold such proceeds not in their character of executors, but as trustees; that the literal terms of the executor's oath and bond bind him only in relation to the goods, chattels and credits of his testator; that there is nothing in our legislation on this subject which indicates an intention that the obligation should have a greater extent, but the contrary; and that the sureties of an executor are not respon-

sible for the proceeds of lands sold by him." Prior to that decision the general understanding of the country was probably otherwise; and in a few months thereafter the act of February 1825 was passed. But the condition of the bond of the deputy and his sureties, on which the action was brought in this case, is for the faithful performance of all the duties of the office, and for the indemnity of the sheriff against all losses or damages which he might sustain or be liable for, in consequence of any failure or misconduct of the said deputy or any of his assistants. Therefore, if it was, as I have endeavored to show, the official duty of the sheriff to rent out the land until the sale; or even if the rents were received by the deputies colore officii, though without legal authority, and the sheriff, as I have also endeavored to show, was on that ground liable therefor to the devisees, it follows necessarily that the obligors in the said bond are bound thereby to the sheriff
612 for the rents *which have been recovered against him by the devisees. There is nothing in Jones v. Hobson, 2 Rand. 488, nor in Boyd's ex'ors v. Boyd's heirs, 3 Gratt. 113, which can affect this case, in my view of it; for, according to that view, it is a matter of indifference whether the land be regarded as a testamentary or as a trust subject; or whether the sheriff, in relation thereto, be regarded as an administrator with the will annexed, or as a trustee. In either case the obligors in the bond are liable. See Douglass' ex'or v. Stump, 5 Leigh 392. I cannot conceive on what ground their liability can be denied, if it be admitted, as I think has been established, that the duty of collecting these rents devolved upon the sheriff, that he had a right to perform this duty by deputy, and that for the default of his deputy in respect thereto he is responsible. Why should he not be indemnified against the consequences of that, as well as any other official default of his deputy? He might, and in common prudence ought to have required such indemnity. Whether it was given or not, must be determined by a reference to the bond of the deputy; and on referring to that we see that it uses the broadest possible language, and provides for indemnity against every official default whatever.

Surely it cannot, with any plausibility be argued, that the legislature in declaring that the sheriff (to whom an estate is committed for administration,) "without being required to give any other bond or security than he may have already given, or to take any other oath of office than he hath before taken, shall be to all intents and purposes the administrator," &c., intended to impose any limitation on the broad terms of the sheriff's bond in regard to the administration of estates, and confine them to those subjects to which the narrower terms of executorial and administration bonds extended. Such a construction would
613 be forced *and unreasonable. The legislature intended to make these new administration duties, whether in regard to real or personal estate, a part of the duties of the office of sheriff, the performance of which is secured by his official bond and oath; and therefore when these new duties were imposed by law upon the sheriff, it was declared that no other than his official bond and oath were necessary; and when, in consequence of the decision of Jones v. Hobson, the form of executorial and administration bonds was so changed by law as to extend to real estate devised to be sold, no corresponding change was made in the form of the sheriff's bond, which was already sufficiently extensive. But even if there were any doubt as to the obligation of the sheriff's bond in this respect, there could be none as to that of the deputy's bond, which, besides containing similar conditions to those of the former, contains a condition for the complete indemnity of the sheriff.

If I be right in what I have said, the Circuit court erred in giving the instruction aforesaid. But I doubt whether it would have been right to have given the precise instruction asked for by the plaintiff. In considering the propriety of the instruction which was given I have assumed as true facts which the evidence tended to prove, but the decision of which belonged to the jury. It was proper to do this for the purpose of testing the correctness of the instruction. One of the facts so assumed is that "Richard Watkins was employed by the said Thomas Watkins to assist him in the execution of his duties as deputy sheriff aforesaid within the county of Powhatan." The instruction as asked for, seems to be based upon the same assumption, though the evidence offered to prove the fact was partly oral. Whereas I think the fact should be stated hypothetically in the instruction, as "if the jury shall believe from the evidence that Richard Watkins," &c., as above. With this addition the instructions asked for might have been given.

614 *On the trial of the action seven bills of exceptions were taken by the defendants to opinions of the court overruling motions made by them. And they now complain that the said opinions were erroneous, and pray that the judgment may be reversed with costs to them. I am clearly of opinion that there is no error in any of these opinions, but deem it unnecessary to comment on them in detail as the correctness of most if not all of them is sufficiently shown by what I have already said.

I am therefore for reversing the judgment with costs, setting aside the verdict and remanding the cause for a new trial, with directions not to give the instruction to which the plaintiff excepted on the former trial; but, if required, to give the instruction then asked for by him, with the addition before mentioned.

LEE, J., concurred in the results of the opinion of Moncure, J.

The other judges concurred in the opinion.

Decree and judgment according to the opinion.

615 *Phaup, &c. v. Stratton.

January Term, 1858, Richmond.

Partnership Notes—Execution—Failure to Put in Issue—Effect.*—In debt on a note signed with a partnership name, the declaration charges that the defendants by their partnership name subscribed the note, and there was no affidavit by the defendants or any of them putting the execution of the note in issue. HELD: That they were precluded from showing that the partnership had been dissolved before the note was made, and that the person making it had no authority to execute it for the other partners.

This was an action of debt in the Circuit court of Buckingham county, by John H. Stratton against the surviving partners of the firm of Lancaster, Stratton & Co. The case is stated in the opinion of Judge Samuels. There being a verdict and judgment for the plaintiff, the defendants applied to this court for a supersedeas, which was awarded.

Garland, for the appellants.
The Attorney General, for the appellee.

SAMUELS, J. The first count of the declaration in this case alleges in substance that William Phaup, Peter B. Stratton, Theodorick C. Gannaway, John Saunders, and Nathaniel Lancaster now deceased, late partners trading under the firm of Lancaster, Stratton & Co., in the lifetime of Lancaster, by their note in writing, with their partnership style of Lancaster, Stratton & Co., by them thereto subscribed, bound themselves to pay the plaintiff the sum of 173 dollars 30 cents for value received. The second count in substance alleges that the surviving partners above named, by their note in writing with the name of 616 *Lancaster, Stratton & Co. thereto by them subscribed, bound themselves to pay the plaintiff, when thereto requested, the further sum of 173 dollars 30 cents, for value received. The defendants Phaup and Gannaway being arrested, and the suit abating by the sheriff's return as to the defendants Saunders and Stratton, issues were made up between the plaintiff and the defendants Phaup and Gannaway, on the pleas of payment and nil debet. At the trial the defendants moved the court to instruct the jury that the death of Lancaster, which occurred before the making of the note, operated the dissolution of said partnership unless it was proven that the contrary was to be the case by some agreement between the partners, to which the said Lancaster was a party. And that after the dissolution of the partnership by death or otherwise the powers of one partner to bind the partnership by promissory note wholly ceased; and that if it was proven to their satisfaction that the promissory note was made by Peter B. Stratton after the dissolution aforesaid, it should be held by them not binding upon the partnership unless the plaintiff proved that an authority was given to the said Peter B. Stratton by each and every one of the partners to make the same. The court overruled the defendant's motion. This instruction had reference to the issue on the plea of nil debet, and was intended to obtain the judgment of the court on the genuineness and validity of the note sued on.

The statute of February 5th, 1828, Sup. Rev. Code, p. 265, chap. 206, enacts, among other things, that in a suit brought upon a promissory note in which the declaration shall allege or charge that the defendant made the same and subscribed his name thereto, every such note, with the name or signature thereto subscribed, upon being offered in evidence, shall be deemed and taken to be genuine, and the name or 617 *signature to have been subscribed or made by the person charged therewith without any proof of the handwriting; unless the defendant or some other person shall make affidavit to be filed with the plea that the said note was not made by the person charged therewith. The declaration in this case was that the note was made by the defendants and subscribed by them, by the style of Lancaster, Stratton & Co. It was within the power of defendants to sign in that form. If they, being all present, had consented that one of their number should thus sign the note as the signature of all, and it had been so done, it must have been treated as the signature of all. The declaration tenders an issue upon the factum of the note; and the defendant having failed to take the issue so tendered by omitting to file the affidavit, the factum of the note is admitted by the pleadings. Evidence should not therefore have been heard to disprove the genuineness of the note; or having been improvidently heard, the court might have instructed the jury to disregard it, or might refuse any instruction which would give weight to the evidence thus improvidently admitted.

In neither of the cases of Shepherd, Hunter & Co. v. Frys, 3 Gratt. 442, or Kelly v. Paul, 3 Gratt. 191, did the declaration allege that the paper sued on was subscribed by the defendants. These cases were properly decided without reference to the statute, the terms of which did not extend to the cases.

I am of opinion to affirm the judgment.

ALLEN, J. The true construction of the act of February 5th, 1828, Supp. Rev. Code, p. 265, has been twice the subject of consideration in this court. It was held, in Kelly v. Paul, 3 Gratt. 191, that the act dispensing with proof of handwriting in certain cases only applies where the declaration alleges that the defendant, or the person stated to have made the 618 *writing, subscribed his name thereto.

In the case of Shepherd, Hunter & Co. v. Frys, 3 Gratt. 442, the declaration

*See principal case cited in Archer v. Ward. 9 Gratt. 622; Clason v. Parrish, 93 Va. 27, 24 S. E. Rep. 471; Carlon v. Ruffner, 12 W. Va. 309. See monographic *note* on "Bills, Notes and Checks" appended to Archer v. Ward. 9 Gratt. 622.

did not aver that the note was signed or subscribed by the defendants; and according to the case of Kelly v. Paul, the statute did not apply. It was therefore unnecessary to decide in that case what would have been the effect of the statute if the averment had been made in the declaration. The question, however, was considered and discussed by Judge Baldwin at considerable length, and in that opinion a majority of the court concurred. As the question upon the true construction of this act was one of practice constantly recurring in the inferior courts, it was a matter of general interest that the true construction of the statute should be settled, the court no doubt for that reason was induced to consider and express an opinion upon the question, although not directly presented in the case before it.

Since those decisions there has been a general revision of the laws. By the Code, chap. 171, § 38, p. 651, the construction given to the act of February 5th, 1828, has, I think, been recognized and adopted. It declares that where the declaration avers "that any person made, endorsed, assigned or accepted any writing, no proof of the handwriting shall be required, unless the fact be denied by an affidavit which puts it in issue. This provision of the Code omits the clause in the act of 1828 which declares that every such note, &c., should be deemed and taken as genuine, the only provision upon which, as it seems to me, any doubt can arise. The deliberate opinion of this court upon a mere question of practice, although not directly arising in the case under consideration, when thus sanctioned by the legislature, ought not, I think, to be called in question.

Upon the act itself I am satisfied that the construction given in the case of 619 Shepherd, Hunter & Co. v. *Frys was correct, and that it was not the intention of the legislature in actions upon writings not under seal, to make the omission to file the affidavit equivalent to a plea of non est factum to a suit upon a specialty. If any such intention had been entertained, they would have used very different language.

The title is an act dispensing with proof of handwriting in certain cases: And the effect of the statute is to dispense with the proof of handwriting, and nothing more. The clause "that the writing shall be deemed and taken as genuine," must be construed with reference to the leading intent of the act, and with the preceding and succeeding clauses. When offered in evidence, the writing is to be deemed and taken as genuine, and the name to have been subscribed by the person charged therewith, without any proof of the handwriting: Thus showing that the whole scope of the act was to establish a new rule of evidence; and, as was said in the case referred to, to relieve the plaintiff, not absolutely, but conditionally, from the proof on the trial of the handwriting. So far as the genuineness of the instrument depends on the fact of the signing, the absence of the affidavit is to that extent an admission of the genuineness. But the handwriting being conceded, there may be other objections to the validity of the instrument. Where one of several partners signs a note purporting to be a note of the firm, the fact of its being so signed may appear on the face of the instrument, or be averred in the declaration. The handwriting is genuine, but the authority to sign is another question. That may depend on the proof of the partnership or the evidence of its dissolution. So where a note has been really signed by the party charged therewith, he cannot, according to the statute, make an affidavit that the name was not so made or signed, or that the name or signature was not subscribed by the party 620 charged *therewith in the declaration.

Yet the note may have been obtained by fraud or duress, or be altered or erased, so as to destroy its validity. Can we conceive the legislature intended to cut off all these and similar defences by the omission of the affidavit that the instrument was not so made or signed as in the declaration was charged? In such cases the affidavit could not follow the terms of the statute; it must necessarily be in the nature of a special plea of non est factum. And in some cases the genuineness of the instrument would be, not a question of fact to be sworn to, but a conclusion of law upon the facts set forth: As in the case under consideration, partners acting within the scope of their authority are agents of each other, and what one does by his legally constituted agent he does himself. The note signed by his partner is his note. But whether after a dissolution of the firm by the death of one of the partners, an authority continues in a surviving partner to bind the other surviving partners by a note given in the name of the firm, is a question of law arising on the facts in proof, and having no connection with the proof of the handwriting of the party charged therewith in the declaration.

In this case, as in the case of Shepherd, &c. v. Frys, there was no question as to the handwriting; it was signed in the firm's name. The case turned upon the authority of any one to bind the other surviving partners under the circumstances disclosed: And for the reasons given, and those contained in the opinion referred to, I think that the parties were not precluded from going into that question, notwithstanding the omission to file the affidavit required by the act of February 5th, 1828. I have not thought it necessary to express any opinion as to the correctness of the decision of the court refusing the instruction asked for by the defendants as set 621 forth in the bill of exceptions *taken at the trial; for, according to the opinion of the majority of this court, the defence to which the instruction referred was cut off by the failure to file an affidavit

under the statute; and it was therefore unnecessary to consider that question.

MONCURE and LEE, Js., concurred in the opinion of Samuels, J.

DANIEL, J., concurred with Allen, J.

Judgment affirmed.

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622 *Archer v. Ward.*

January Term, 1858, Richmond.

1. **Pleading—Abatement—Necessary Averment.**†—A plea in abatement of a former action must aver the pendency of the action at the time of filing the plea.

2. **Same—Negotiable Paper—Declaration—Accidental Omission.**—In an action upon a protested negotiable note against the makers and endorsers, the accidental omission of the sum for which the note was given, in the description of it in the declaration, where it appears from other parts of the declaration, is not ground of demurrer.

3. **Negotiable Paper—Genuineness—When It Cannot Be Questioned.**—The declaration averring that the endorser endorsed the note by subscribing his name on the back thereof, and he not having filed an affidavit with his plea according to the statute, he will not be permitted to question the genuineness of the note, or to show that it was altered after it was endorsed by him.

This was an action of debt in the Circuit court of the town of Petersburg, instituted by Montague Ward against Tyler and Hill as makers and John Archer as endorser of a negotiable note. The suit abated as to Tyler by the return of the writ. Archer, who lived in the county of Chesterfield, appeared and pleaded in abatement of the writ the pendency of another suit against him for the same cause of action in the Circuit court of Chesterfield at the time of the emanation of the writ in this case. To this plea the plaintiff demurred, and the court sustained the demurrer.

The declaration contained two counts, the first of which is in the usual form, except that in describing the note it omits to state its amount. To this count the defendant demurred, but the demurrer was overruled by the court. On the trial the defendant asked for an instruction, which was refused by the court, and another instruction was given; and the defendant excepted. The count and the instruction asked and refused are stated in the 623 opinion of Judge Lee. In the *view of the case taken by the court, it was not necessary to consider the propriety of the instruction which was given. There was a verdict and judgment for the plaintiff. And Archer applied to this court for a supersedeas, which was allowed.

Stanard and Bouldin, for the appellant.
Cooke, for the appellee.

*For monographic note on Bills, Notes, and Checks, see end of case.

†See monographic *note* on "Abatement, Pleas in" appended to Warren v. Saunders, 27 Gratt. 259.

LEE, J. The first question to be considered in this cause is that arising upon the demurrer to the plea in abatement of a former action pending, filed by the defendant. It is contended that this plea is defective because it fails to aver that the former action was still pending at the time of the plea pleaded, and in lieu thereof avers that it was pending at the time of the emanation of the writ in this cause. Whether a plea of this character must aver the continued pendency of the former action at the time of the plea pleaded, or will be good if it aver the pendency at the time of the commencement of the second suit, is a question that has given rise to some diversity of opinion and decision. In 1 Bacon's Ab. (edition of 1846), p. 28, title "Abatement," letter M, it is laid down that it is not necessary that both actions should be pending at the time of the defendant's pleading in abatement; for if there was a writ in being at the time of suing out the second, it is plain that the second was vexatious and ill ab initio. In the case of Parker v. Calcord, 2 New Hampshire R. 36, the judge delivering the opinion of the court, says that the second suit is vexatious if the first one were pending at the time the second was commenced, that is if both existed simul et semel, and that all pleas except payment and others founded on something which occurred after the cause of action, refer to the state of things at the origin of the suit; and it was accordingly held that the pendency of a 624 prior suit *may be pleaded in abatement though it were discontinued before the plea was pleaded. The same doctrine is declared in the case of Commonwealth v. Churchill, 5 Mass. R. 174, in which Ch. J. Parsons delivered the opinion of the court. He refers to Sparry's case, 5 Coke 61, and to a case in the 39 Henry 6, pl. 16. The same principle is perhaps to be inferred from Combe v. Pitt, 3 Burr. R. 1423; White v. Smith, 4 Hill 166, and other cases.

On the other hand, the doctrine that the former action must be pending and so averred at the time of the plea pleaded, is supported by numerous and strong authorities. Bezaliel Knight's case, 2 Ld. Raym. 1014; Hawk. P. C. Lib. 2, ch. 26, § 63; Green v. Watts, 1 Ld. Raym. 274; Bishop v. Powell, 6 T. R. 616; Clifford v. Coney, 1 Mass. R. 495; Marston v. Lawrence, 1 John. Ca. 397; Sellon's Prac. 44; Toland v. Tichenor, 3 Rawle's R. 320; Com. Dig. Abatement, H, 24. And it is to be observed, that the remark of Ch. J. Parsons in Commonwealth v. Churchill, 5 Mass. R. 174, that it is not necessary that the plea should aver that the former action was pending at the time of plea pleaded was a mere obiter dictum, because the question did not arise in the case. The plea in that case did allege (as I understand the report of it) that the former action was still pending; and after the plea had been entered, the plaintiff in the former action became nonsuit, and the replication to the plea set

up this nonsuit as an answer to the plea. On demurrer this replication was held bad; and all that this case can be said to decide is, that after plea pleaded, the dismissal of the former suit will not save the writ. And this is all that is decided in the case of Frogg v. Long, 3 Dana's R. 157. It will be found too that in the case from the year books cited in that case, (39 Henry VI, 12, pl. 16,) two of the judges, Moile and Ashton, held that the former writ must be still pending at the time of the plea, or it will not abate the second.

625 *The precedent of pleas in abatement of auter action pendent, to be found in the books, contain the averment that the former writ is still pending. 3 Chit. Pl. (Phil. ed. of 1828,) 903; Lill. Ent. 2, 7, 11; 1 Went. Pl. 8 n; Lutw. 33; Story's Pl. 120, 121. And although as it has been said forms do not make the law, yet they are persuasive evidence of what the law is.

In this conflict of authorities perhaps equally balanced, as the point has never yet been decided in this court, the court should adopt the rule that appears to be most reasonable and convenient. The principle on which this plea rests is expressed in the maxim nemo bis vexari debet pro una et eadem causa. But if at the time of the plea pleaded, the former suit have been discontinued, the vexation has ceased, and (as said by the two judges in the case from the year book before referred to.) the mischief is at an end, and the writ shall not abate. And in such a case it would seem to be useless and unnecessary to turn the plaintiff around to another action, when at the time of the plea pleaded the pending action was as free from the objection of the pendency of a former suit as the new action itself would be when it should be instituted. Cases may arise too in which the plaintiff having brought one suit, might find it necessary in order to render his cause of action effectual, to bring a second before he could dismiss the first either at rules or in court. And if he should take care to dismiss the former before the defendant pleads in abatement it would be unreasonable that his writ should abate because he could not dismiss his first suit before it was necessary to take out his second writ, although he did so before the plea pleaded.

A plea of this character not going to the merits of the case, seeking merely to delay the administration of justice in the particular case, should not be favored by the court. And upon the whole it would seem that the best, most reasonable and convenient

626 rule would *be that the defendant should allege in his plea the pendency of the former action at the time of pleading, and to hold it insufficient if it only allege its pendency at the time of the writ purchased. In this view the Circuit court did not err in holding the plea filed in this case to be insufficient.

The declaration filed in the case consisted of two counts, to the first of which the defendant, after his plea in abatement had been held for naught, filed a general demurrer, which was overruled by the court. Each of these counts was a perfect declaration in itself, a separate and entire debt being claimed in each. The first count claimed of all the defendants the sum of 600 dollars and 75 cents, with interest on 600 dollars part thereof, from the 6th day of September 1845 till paid, which it alleged they owed and unjustly detained. It then alleged that the defendants Tyler and Hill made and subscribed a negotiable note, by which "they promised to pay within four months after the said date" (to wit, the 3d of May 1845 the date of the note,) "to the said John Archer or order, without offset, negotiable and payable at the American Exchange Bank of New York, for value received." It then alleged the endorsement of the note by Archer to the plaintiff, its due presentment for payment at said bank, and that it was duly protested for nonpayment; and that the plaintiff was compelled to pay the sum of 75 cents for costs of protest. By reason whereof it claimed that right and action had accrued to the plaintiff to recover of the defendants the said sum of 600 dollars and the sum of 75 cents, with interest on the said sum of 600 dollars as before demanded.

It is true that in describing the note, the sum for which it was given was (no doubt inadvertently) omitted; still upon the face of the whole count, enough, I think, can be seen to supply this omission. The count claims a debt of 600 dollars and 75

627 cents *as due from the defendants to the plaintiff: Proceeding to show how so due, it alleges that two of the defendants made a negotiable note payable to the other, dated on the 3d day of May 1845, to fall due four months after date; that said note was delivered to the defendant Archer, and by him endorsed to the plaintiff; that it was duly protested for nonpayment, and that 75 cents was paid by the plaintiff for costs of protest. The time from which interest was claimed on 600 dollars was the 6th day of September 1845, the day upon which, with the usual days of grace added to the time for which the note had to run, the note would become absolutely due. I think, therefore, one cannot wink so hard as not to see that 600 dollars was the sum named in the note. The note and the costs of its protest were the two elements of the plaintiff's demand of 600 dollars and seventy-five cents: those costs were alleged to be 75 cents; the remainder or 600 dollars was necessarily the amount for which the note was given. Considering this demurrer to this count, according to the rule prescribed by § 101 of chap. 28 of the Revised Code of 1819, (1 Rev. Code 511,) I think it was properly overruled, because the omission in the description of the note of the sum named was so supplied by the other allegations of the count as not to be of a matter so essential to the action that judgment, according to law and the very right of the case, could not be given.

After the overruling of this demurrer the defendant Archer pleaded nil debet;

and issue was joined thereon. He filed, however, with his plea no affidavit denying his endorsement of the note described in the declaration. At the trial of the case, a note corresponding with that described in the declaration with the name of the defendant Archer endorsed thereon, was read in evidence without objection; and the plaintiff then proved a demand of the 628 amount thereof at the place *of payment, and that it was protested for nonpayment. Evidence was then given tending to show that the note in question had been a blank printed form of the kind usually kept for the use of those doing business at the office of discount and deposit of the Exchange Bank of Virginia at Petersburg, and that the printed words "office of discount and deposit of the," and the printed words "Virginia at Petersburg," had been erased or stricken out with a pen, and in lieu thereof such words written as to make the note payable at the American Exchange Bank of New York. And thereupon the defendant moved the court to instruct the jury that it was incumbent on the plaintiff to prove that the alterations apparent on the face of the note were made before the endorsement of the same by the defendant, or if made afterwards, that they were consented to by the defendant when made, or afterwards ratified by him with knowledge that they had been so made. This instruction the court refused to give, and the defendant excepted; and the refusal of the court to give this instruction is assigned as one ground of error in the said judgment.

It is contended by the counsel for the plaintiff in error, that at common law although if an interlineation appear in a deed and there be no evidence to show how or when it was made, it will be presumed to have been made before the execution, yet that with respect to bills, notes and other negotiable securities the rule is different; and that if an instrument of that character appear on the face to have been altered, it is for the holder to prove, and not for the defendant to disprove, that the circumstances of the alteration were such as to render it still valid and available. They also insist that the alteration of the place of payment of a note or bill is so material as to cast this burden on the holder. But I do not deem it material to enter into the consideration of these questions, 629 because it *appears to me that the plaintiff in error had not placed himself in a condition to raise them on the trial before the jury. The act of February 5, 1828, (Supp. Rev. Code 1819, p. 265,) provides in effect that in an action upon the endorsement of a promissory note, and in which the declaration alleges that the defendant endorsed the same and subscribed his name thereto, such endorsement with the name thereto subscribed shall be deemed and taken to be genuine, and the name to have been subscribed by the person charged therewith, without proof of the handwriting, unless the defendant shall file with his plea an affidavit that the said endorsement was not made by the person charged therewith. The declaration in this case alleges that the plaintiff in error endorsed a note which was described as payable at the American Exchange Bank of New York. If in point of fact the note which he did endorse was a note payable at the office of the Exchange Bank of Virginia at Petersburg, he could with perfect safety and propriety make the affidavit that he did not endorse any such note as the one described in the declaration, and the holder would then undoubtedly be put to proof of the endorsement of the note described in the declaration; and in making that out he would be perhaps required, (though upon this point I mean to express no opinion,) to explain the alteration apparent on the face of the note. If the holder were required to give such an explanation in proof without an affidavit filed, and failed to give it, the effect would be precisely the same as if he had been required to prove the execution of the endorsement and failed so to do. In either case the plaintiff would fail in his action, not being able to give the note in evidence to the jury. By the improper and unauthorized alteration the instrument would have been vitiated and its genuineness destroyed. Why should the defendant be permitted to put the genuineness of the instrument in issue in this 630 *form without the affidavit any more than if he sought to do so by raising a question as to its actual execution?

It is to be observed that in the case of a defendant charged with having made or endorsed the note in question, and having subscribed his name to the note or endorsement, the affidavit which he is to make in order to put the plaintiff to proof of the genuineness of the instrument, is, that the said note or endorsement was not made by him as charged in the declaration. It is not sufficient to make oath that the name subscribed is not his handwriting. For if so, a party who had caused a note to be signed with his name, and in his presence, by a third person, might by such an affidavit raise a question entirely immaterial. But when he files the proper affidavit denying that he made the note, the plaintiff is put to proof of its genuineness, either by proving the handwriting to be his, or that it was signed in his name by another who was thereto properly authorized. I think, therefore, notwithstanding the title of the act in question, and some expressions found in it which I think may be regarded as surplusage, it was the intention of the legislature by the provisions of this act, in a case like the present, in which the endorsement alleged is accompanied by the proper averments, that the instrument should go to the jury as the proper instrument of the defendant, without any proof of the handwriting, or that it was executed by the defendant, or any other proof that might be required if the genuineness of the paper described in the declaration were put in issue by the proper affidavit.

This opinion may possibly seem opposed to the views of the judge whose opinion is given in the case of Shepherd, &c. v. Frys, 3 Gratt. 442; and certainly whenever I might find myself differing from that learned and able jurist, I should be disposed to think I must be in error, and to review my opinion with the utmost care and
631 deliberation. *After all the consideration, however, I have been enabled to bestow upon the subject, I have not been able to bring my mind to a different conclusion. And it is to be observed that in the case of Shepherd, &c. v. Frys, the question did not arise, because the declaration did not aver that the note in question was made or subscribed by the defendants. And the judge, in his opinion, says expressly, that the object of the act was to relieve the plaintiff from the necessity of proving at the trial the genuineness of the instrument on which the action is founded; and that it therefore precludes the defendant from controverting its genuineness unless denied by affidavit filed with the plea. And he also says that the defendant is called on to deny by affidavit or waive the denial of the genuineness of the instrument. And in the latter case the effect of the act is to put the paper in proof before the jury for as much as it is worth upon its face. Now if the genuineness of an instrument depends, as it seems to me it must, not only upon its due execution by the party charged, but also upon its having remained unaltered (in any material particular at least), after its execution, the language of the judge would seem to be broad enough to require an affidavit for the purpose of raising an issue upon the latter point as well as upon the question of due execution.

The view I have taken of this subject renders it unnecessary to consider the correctness of the instruction given to the jury on the motion of the plaintiff. Because how erroneous soever that instruction may have been, still it did not and could not prejudice the defendant, if the erasure and interlineation on the face of the note had not been drawn into question by the pleadings in the cause.

I am of opinion to affirm the judgment.

MONCURE and SAMUELS, Js., concurred in the opinion of Lee, J.

632 *ALLEN and DANIEL, Js., dissented on the last question considered by Judge Lee, for the reasons stated in the opinion of Judge Allen in the preceding case of Phaup &c. v. Stratton. They concurred on the other questions.

Judgment affirmed.

BILLS, NOTES, AND CHECKS.

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Cross References to Monographic Notes.

Action of Debt, appended to Davis v. Meade, 13 Gratt. 118.

Agencies, appended to Silliman v. Fredericksburg, etc., R. Co., 27 Gratt. 119.

Assignments, appended to Ragsdale v. Hagy, 9 Gratt. 409.

Banks and Banking, appended to Bank v. Marshall, 25 Gratt. 378.

Bonds, appended to Ward v. Churn, 18 Gratt. 801.

Interest, appended to Fred v. Dixon, 27 Gratt. 541.

Usury, appended to Coffman v. Bruffy, 26 Gratt. 698.

I. DEFINITIONS.

Bill of Exchange.—A bill of exchange may be defined as an open letter of request, addressed by one person to another, desiring him to pay a certain sum of money to a third person mentioned therein, or to his order, or it may be made payable to bearer. Fitzhugh v. Love, 6 Call 5; Dunlop v. Harris, 5 Call 28.

Promissory Note.—Promissory notes are instruments purporting an absolute promise, by the maker, to pay to a person therein named, or his order, a sum of money therein named. Dunlop v. Harris, 5 Call 28.

Check.—A check is an inland bill of exchange drawn on a bank or other house of deposit. Purcell v. Allemong, 22 Gratt. 739.

II. REQUISITES AND VALIDITY.

1. FORM.

Must Be Absolute and Certain.—A bill of exchange or promissory note, must be for money certain in amount, and payable absolutely and at all events. But it is not essential either to the character of a bill of exchange or of a promissory note that it should be negotiable. Averett v. Booker, 15 Gratt. 163.

So an order drawn on a particular fund or debt, and for the whole thereof, is not a bill of exchange because not payable absolutely, its payment being subject to the contingency that the fund shall remain in existence. Such an order only operates as equitable assignment of the fund on which it is drawn. First Nat. Bank v. Kimberlands, 16 W. Va. 555; Jolliffe v. Higgins, 6 Munf. 3; Riffe v. Gerow, 29 W. Va. 462, 2 S. E. Rep. 104; Shinn v. Board of Education, 39 W. Va. 497, 20 S. E. Rep. 604.

And an order drawn by a legatee under a will upon the executors, for value received, directing them to pay to the order of the drawee a specific sum, the amount of the legacy, out of the funds in their hands, destined by the testator for the payment thereof, is an equitable assignment of the legacy and not a bill of exchange. Anderson v. De Soer, 6 Gratt. 363.

Order to Pay Out of a Certain Fund.—An order to pay out of a specified fund, or an order to pay the payee a certain amount on account of work and labor done by the drawer for the drawee, is not a bill of exchange. Pitman v. Breckenridge, 3 Gratt. 127; Bank of Wellsburg v. Kimberlands, 16 W. Va. 555; Averett v. Booker, 15 Gratt. 163.

And an order to "pay four hundred dollars out of funds that may be due me as per our contract" is not absolute, but conditional; and the acceptor's liability thereon is dependent on the contingency that the amount shall be due to drawer according to the terms of the contract between the drawer and drawee. Riffe v. Gerow, 29 W. Va. 462, 2 S. E. Rep. 104.

And the following instrument does not constitute a bill of exchange, nor import a valuable consideration, and no promise is raised thereby, in favor of the payee against the drawer, from the failure of the drawer to accept or to pay: "Lynchburg, Dec. 8, 1852, $1,080.59. The trustee of Norvell and Averett will pay to William T. Booker the sum of one thousand and eighty dollars and fifty-nine cents, with interest from the first of March, 1850, out of any moneys in his hands belonging to me. William B. Averett." Averett v. Booker, 15 Gratt. 163.

Agreements for Attorney's Fees.—But an agreement in a note to pay attorney's fees for collection does not destroy its negotiability but such stipulation is a penalty, and not enforcible. Rixey v. Pearre, 89 Va. 113, 12 S. E. Rep. 498. But where no objection is made to such penalty in the trial court, an objection in the appellate court comes too late. Ronald v. Bk. of Princeton, 90 Va. 813, 20 S. E. Rep. 780.

Must Not Be under Seal.—A single bill under seal is not a note, but a specialty; and, therefore, the drawers and indorsers of such single bill, though it be made payable and negotiable at a bank in the state, cannot be sued jointly in debt or in assumpsit. Mann v. Sutton, 4 Rand. 258; Laidley v. Bright, 17 W. Va. 779. But where an instrument has scrolls attached opposite the signatures which are intended as substitutes for seals, this is not sufficient to make them sealed instruments, unless the seals are recognized in the body of the instrument, and they still retain their original character and may be declared on as simple bills or notes. Peasley v. Boatwright, 2 Leigh 195; Jenkins v. Hurt, 2 Rand. 446; Cromwell v. Tate, 7 Leigh 301; Clegg v. Lemesurier, 15 Gratt. 108.

2. NEGOTIABILITY.

Negotiability of Paper Payable at a Particular Bank—Statute.—By the Code of 1860, ch. 144, § 7, it was provided, that, "every promissory note, or check for money, payable in this state at a particular bank, or at a particular office thereof for discount and deposit, or at the place of business of a savings institution or a savings bank shall be deemed negotiable." Under this statute a note made by residents of Alexandria and indorsed by the president of the Bank of the Old Dominion where it was discounted, was held negotiable although it did not appear upon its face that it was payable in the state of Virginia, as it was competent to show this by extrinsic evidence. McVeigh v. The Bank of the Old Dominion, 26 Gratt. 785.

Payable at Either of Two Banks.—So in Freeman's Bank v. Ruckman, 16 Gratt. 126, a note which was payable at either of two banks in this state was held not negotiable under this statute because it did not appear from its face to be payable at a "particular bank in this state."

Name of Bank Written in after Negotiation.—But under this statute a note which on its face was not negotiable because not payable at a particular bank, but which had a blank space left for the insertion of the bank, was held to be negotiable, where it was shown that the parties intended it to be negotiable and thought that they were executing negotiable paper, and there was a usage shown to leave notes

blank as to the bank at which they were payable, and for the holder to fill such blank. Woodward v. Gunn, Va. Law J., 1878, p. 243, 1 Va. Dec. 293.

Later Statute—Bank Must Appear from Paper.—But the revisors of the Code of 1887, with full knowledge of the construction placed upon this statute by the court, altered the language so as to read, "Every promissory note which *on its face* is payable in this state at a particular bank," etc. Under this statute a note dated "Harrisonburg, Va.," and payable at the "First National Bank of Harrisonburg," was held not to be negotiable, because it did not show on its face that the bank at which it was payable was in this state. Long v. Pence, 98 Va. 584, 25 S. E. Rep. 593.

Bank Out of Existence.—Under this statute an indorsement of an overdue note payable at a bank which had ceased to exist more than five years before the indorsement was made, was held to be merely an assignment of common-law paper and such indorsement was not to be governed by the rules of the law merchant. In this case it was held that the assignee of the paper was bound to exercise due diligence in suing the maker and obtaining judgment and execution against him, as a condition precedent to his recourse against the indorser, unless the maker was notoriously insolvent. Broun v. Hull, 33 Gratt. 23.

Bank Must Be an Incorporated Institution.—And under this statute, which is the law of West Virginia as well as of Virginia, it has been held that the bank at which the paper is payable must be an incorporated institution in order for the paper to be negotiable. Bank v. Hysell, 22 W. Va. 142.

Negotiable Instruments Law.—Under the negotiable instruments law which is now in force in Virginia, any paper which contains words of negotiability is negotiable if it possesses the other requisites of negotiable paper, such as certainty, etc. § 1, Negotiable Instruments Law.

Paper Payable at a Bank Out of Virginia—Statute.—Under act of March 22, 1837, a note for a sum certain, payable to order, and negotiable and payable at a bank out of the state of Virginia, is a note negotiable at a bank in Virginia, and therefore is placed on the same footing as foreign bills of exchange, with the like remedy for recovery thereof against the maker and indorsers jointly, and with the like effect, except as to damages. Hays v. Northwestern Bank of Virginia, 9 Gratt. 127.

3. CAPACITY AND AUTHORITY OF PARTIES.

a. AGENTS.

The General Rules of Agency Are Applicable.—The principles which ordinarily govern the authority of agents are applicable to agents to draw or indorse bills of exchange, promissory notes and checks. The principal is bound by the acts of the agents within the authority which he has actually given them, which not only includes the precise act which he expressly authorized them to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond this, he is bound by the acts of the agent within the apparent authority which the principal himself knowingly permits the agent to assume or which he holds the agent out to the public as possessing. Hooe v. Oxley, 1 Wash. 19; Mann v. King, 6 Munf. 428; Hopkins v. Blane, 1 Call 361; Smith v. Lawson, 18 W. Va. 212; Richmond, etc., R. Co. v. Snead, 19 Gratt. 354.

Acts within the Apparent Scope of Authority.—Thus a power of attorney in due form, authorized the party "to draw checks, indorse notes, and generally to do all and every act and deed, towards the execution of the donor's business at a certain bank." This power was deposited in the bank to be inspected, when called for, by any person interested in matters relating thereto. The donor was held bound to make good to a *bona fide* purchaser for a valuable consideration, an indorsement of a note negotiable at the said bank, which the party made in his name as attorney; notwithstanding the real object of the power, verbally declared at the time of its execution, was to authorize the attorney to renew certain accommodation papers then in the bank, and not to endorse any other paper. Mann v. King, 6 Munf. 428.

Excess of Authority.—But where an agent is authorized to draw bills of exchange only for certain specified purposes, this is a special agency, and if the agent exceeds his authority and gives bills of exchange for purposes not specified in his authority, they do not bind the principal. Hopkins v. Blane, 1 Call 361.

And a party who deals with an agent, with knowledge or means of knowledge that he is exceeding his authority by indorsing the name of his principal for his own benefit, is not entitled to recover from the principal. Stainback v. Bank, 11 Gratt. 269.

Effect of a General Power of Attorney.—A general power of attorney to draw, indorse, and accept bills, and to make and indorse notes does not authorize the attorney to draw a bill in the joint names of himself and principal. And such a power does not authorize the attorney to draw a bill in the name of his principal upon a person having no funds of the principal in his hands, and if such bill is accepted and paid by the drawee for the accommodation of the drawee, there is no implied obligation of the principal to repay him. Stainback v. Read, 11 Gratt. 281.

And in the absence of anything to show a different intention, a power of attorney to draw, indorse or accept bills, and to make and indorse notes, negotiable at a particular bank in the name of the principal, must be construed as giving authority to act only in the separate individual business of the principal; and an indorsement of a bill by the agent for his own benefit in the name of his principal does not bind the principal. Stainback v. Bank, 11 Gratt. 269.

Authority to Execute a Joint Note No Authority to Execute an Individual Note.—Where several persons united in a power to authorize another to indorse their names upon a bill drawn in favor of one of them, it was held that the power given did not warrant several and successive indorsements, but only a joint indorsement of and for them all, so that they should be jointly bound as indorsers to the holder, and equally and jointly bound among themselves. Bank of U. S. v. Beirne, 1 Gratt. 234, 42 Am. Dec. 551.

How the Agent Should Sign.—Where a negotiable instrument is made by an agent for his principal, the agent, in order to exempt himself from liability must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hands of the agent. A mere description of the general relation which the person signing the paper owes to another, without indicating that the particular signature was made in the execution of the agency, is not sufficient to charge the principal or to exempt the agent from personal liability. Exchange Bank

v. Lewis County, 28 W. Va. 278. Thus, the mere addition of the word "president" to the signature of the president of the corporation on negotiable paper does not bind the corporation. Scott v. Baker, 3 W. Va. 285: Rand v. Hale, 3 W. Va. 495.

And a note signed "J. B., Agent for Lewis county" is not the note of Lewis county, but the individual note of the agent. Exchange Bank v. Lewis County, 28 W. Va. 278.

President of a Bank.—A president of a bank has no inherent authority to indorse or transfer negotiable paper belonging to the bank, but such authority may be implied by his habit, known to the directors, of doing acts of the same general character. Smith v. Lawson, 18 W. Va. 212.

Implied Authority of a Bank Cashier.—The cashier of a bank has *prima facie* authority by virtue of his office to transfer negotiable promissory notes belonging to the bank in the transaction of the usual business of the bank, and his transfer of such a note to a party, who receives it in good faith, confers a valid title to the note on the transferee. Smith v. Lawson, 18 W. Va. 212.

Transfer by Cashier for Improper Purpose.—But the cashier's *prima facie* authority to transfer the negotiable notes of a bank will not make such transfer valid, if it be proven that the transferee knew that the transfer was made by the cashier not in the usual course of business and for an improper purpose. Smith v. Lawson, 18 W. Va. 212.

Authority of Cashier Restricted by Charter.—And so where the management of the affairs of a banking corporation is entrusted by its charter to a board of directors, unless specially authorized by the charter, the cashier of such banking corporation has no power to assign the discounted bills and notes to a depositor in payment of his deposits without authority from the board of directors. Lamb v. Cecil, 25 W. Va. 288.

Implied Authority of Treasurer of a Corporation.—The treasurer of a corporation has as an incident of his office the authority to draw checks unless such authority is taken away or restrained. But the power to bind the corporation by indorsing negotiable notes is not inherent in the treasurer, and he that takes such notes by indorsement from an officer of the corporation does so at his peril. Davis v. Rockingham, etc., Co., 89 Va. 290, 15 S. E. Rep. 547.

President of Railroad Company.—The authority of a president of a railroad company to make contracts for necessary labor for the company is incident to his office, and he may furnish evidence of the amount payable under the contract, either before or after the performance of the service, and put that evidence in the form of a due bill or promissory note, in his discretion, unless his authority is restricted by special legislation, or by regulations of the company known to the other contracting party. Richmond, etc., R. Co. v. Snead, 19 Gratt. 354.

Bills by Railroad President in Unusual Form.— And the fact that the president of a railroad company usually gave notes of the company on printed forms, and signed them as president, was held not sufficient to prevent a recovery against the company upon a due bill, not upon a printed form, and not signed as president, but was a mere circumstance to be weighed by the jury in determining whether or not the consideration passed to the company so as to make them liable. Richmond, etc., R. Co v. Snead, 19 Gratt. 354.

Parol Evidence to Show Benefits Received by Principal.—Where the president of a railroad company signed in his own name a bill for "labor performed on cottage lot of railroad company," parol evidence was held admissible to ascertain whether the work was performed for the president or for the company. Richmond, etc., R. Co. v. Snead, 19 Gratt. 354.

Note by Agent of Confederate States.—A note given by an agent of the late confederate government, and binding himself for the price of cattle purchased for the support of the armies of such government and for the purpose of aiding and carrying on the war against the United States is a valid contract, and may be enforced against the obligor, after the end of the war. Ruckman v. Lightner, 24 Gratt. 19.

Agent for Negotiation—Scope of Authority.—The delivery of an incomplete negotiable note by the maker to a third person to be negotiated does not constitute the latter the agent of the former to make alterations, in parts of the note already complete, which are necessary to give effect to the note for the purpose for which it was intended. Hoffman v. Planters' Nat. Bk. (Va. 1901), 7 Va. Law Reg. 570.

Parol Testimony Inadmissible to Show Agency.—Where there was nothing on the face of a note to indicate that it was made by a party acting as agent, parol evidence was held inadmissible to show that the maker made the note in payment for cattle for the confederate government for which he was agent. Ruckman v. Lightner, 24 Gratt. 19.

Express Ratification.—If one promises to pay a note, to which his name has been signed by one assuming, without authority, to act as his agent, it is an adoption of the act of the agent, and in law, is equivalent to an antecedent authority to execute the note. Devendorf v. W. Va., etc., Co., 17 W. Va. 185.

But an express ratification of an insolated act beyond the authority of agent, is not sufficient to charge the principal for like acts in the future. Thus a letter authorized the addressee and another to use the name of the sender as indorser. With this letter in his possession the addressee indorsed the name of the sender upon his bills in such manner that it did not appear by the paper to have been done by an agent. Some of these bills were protested, and afterwards the donor of the power by an indorsement on the letter, said: "The above is my signature and letter, the legal liabilities of which I hereby acknowledge." The addressee again indorsed the name of the donor of the power of other bills in the same manner. The donor of the power was held not liable upon these indorsements. Union Bank of Maryland v. Beirne, 1 Gratt. 226.

Implied Ratification of Power.—And where in consequence of a notorious agency, the agent is in the habit of drawing bills, which the principal has regularly paid, this is such an affirmation of his power to draw, that the principal will be bound to pay other bills drawn by the agent, though the agent makes a misapplication of the money raised by such bills. Hooe v. Oxley, 1 Wash. 19, 1 Am. Dec. 425.

While the courts should generally refuse to allow a recovery against one person on a negotiable instrument made by another, on proof that the latter was acting as his agent, yet a person may make the signature of another his own by using or allowing it to be used as such in the course of his business, and he will and should, under such circumstances when clearly proved, be as much bound as if his own name was affixed to the bill or other negotiable instrument in question. But the court in applying this principle should be careful to limit its application to the class of cases to which it properly belongs, and not so apply it as to ignore other

well-established principles applicable to negotiable instruments. Devendorf v. W. Va., etc., Co., 17 W. Va. 135.

b. PARTNERS.

Firm Paper Given for Partner's Private Transaction.—Where a third party takes from a partner his signature of his firm upon his own private individual transaction he cannot hold the firm without proof of authority, adoption, or ratification of the act. And the taker of the note under such circumstances must prove the assent of the other partners, for *prima facie* such a transaction is a fraud, both on the part of the debtor and the creditor. Tompkins v. Wood yard, 5 W. Va. 216.

Power of Partners to Make an Indorsement for Accommodation.—The power of partners to bind one another by commercial paper does not extend to indorsements or other contracts for the accommodation of a third person. Hence, the rule is well settled that when one member of a partnership becomes an accommodation maker or indorser, for the benefit of a third person, in the name of the firm, without the assent, express or implied, or the subsequent ratification of his copartners, such paper cannot be enforced against them or the firm by the holder who takes with knowledge of its accommodation character. Tompkins v. Woodyard, 5 W. Va. 216.

Renewal of Note after Retirement of Some Members of Firm.—Where a partnership note is given, and renewed after the dissolution of the partnership by the remaining partner in the old firm name, such renewal does not bind the retiring partner, neither does its acceptance discharge the pre-existing debt; not being valid as to the retiring partner, the consideration fails, and the old debt remains. The renewal of the note in the firm name is strong evidence that the promisee did not intend to release the other partner and hold the partner who executed it liable alone. Parker v. Cousins, 2 Gratt. 372; Miller v. Miller, 8 W. Va. 542.

Thus, in Miller v. Miller, 8 W. Va. 542, a note was made by a firm and indorsed at a bank for the firm's accommodation by a party who did not know all of the members composing the firm. After the execution of this note one of the members of the firm withdrew, the indorser not being notified of his withdrawal. The note was renewed at the request of the firm and the indorser again went on the note. Upon the maturity of the note and the failure of the firm to pay it, it was retired by the indorser. In an action by this indorser against the firm, the members of the firm, including the party who had withdrawn prior to the renewal of the note, were held liable to the indorser for the money paid by him upon his indorsement.

Sealed Obligation by One Partner Held a Note in Equity.—A partner, instead of executing a promissory note for a sum of money lent the firm, executed by mistake a penal obligation, in the name of the firm, under seal. Upon a suit in equity upon the instrument, it was held that although at law there was no remedy on the sealed obligation, except against the partner who executed it, yet equity had jurisdiction to correct the mistake, and hold all the partners as much bound as if there was no seal and it was an ordinary promissory note. Galt v. Calland, 7 Leigh 594.

Notes between Partners in Settlement of Partnership Matters.—The execution of a negotiable note by one member of the partnership to the other, for the balance found due to him upon a settlement of the partnership accounts, is conclusive upon such partner as to the correctness of such settlement in the absence of accident, mistake or fraud in making such settlement. Mahnke v. Neale, 23 W. Va. 58. See *post*, "Evidence."

c. ALIEN ENEMIES.—War operates as an interdiction of all commercial and other pacific intercourse and communication with the public enemy; and every species of private contract made with subjects of the enemy during the war is unlawful. The late rebellion was war, and citizens on opposite sides were alien enemies, and their relations under the constitution were suspended and superseded for the time by new relations under the laws of war. A check drawn by a citizen of one belligerent upon a citizen of the other during this war was unlawful and void. Billgerry v. Branch, 19 Gratt. 393; McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

And a note made in June 1861, by a person resident within the confederate lines, and discounted by a bank located within the Union lines, was illegal and void; unless it was given in renewal of a note made before the war, and by an agent acting under authority conferred before the war. McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

4. THE CONSIDERATION.

a. PRESUMPTION OF CONSIDERATION.

Possession Prima Facie Imports Consideration.—In an action upon a bill of exchange or a promissory note, the party may recover without averring or proving that any valuable consideration has been received for it. Such a bill is presumed to stand on valuable consideration, and *prima facie* imports it. Averett v. Booker, 15 Gratt. 163.

The possession of a bill or a note is *prima facie* evidence of ownership, and also that the holder received it upon a valuable consideration paid therefor in the usual course of trade. As a general rule, therefore, even where there is a failure of consideration or other equitable defence as between the defendant and the drawee or the payee of the bill or note or his immediate indorser, he cannot call upon the plaintiff to prove when or upon what consideration the bill or note upon which the suit is brought was transferred to him, or how it came into his hands. Bank of Spencer v. Simmons, 43 W. Va. 79, 27 S. E. Rep. 299; Ford v. McClung, 5 W. Va. 156; Averett v. Booker, 15 Gratt. 163; Peasley v. Boatwright, 2 Leigh 195; Snead v. Coleman, 7 Gratt. 300; Crawford v. Daigh, 2 Va. Cas. 521.

Checks—Presumption of Consideration.—The drawing and delivery of a check imply the indebtedness of the drawer to the payee to the amount of the check, and in an action upon a check it is not necessary to aver in the declaration any further consideration. McClain v. Lowther, 35 W. Va. 297, 13 S. E. Rep. 1003.

When Proof of Consideration Is Required.—It is never necessary to aver consideration for any engagement on a bill or note, or to prove the existence of such consideration, unless a presumption against it be raised by the evidence of the adverse party, or unless it appear that injustice will be done to the defendant, or that the law will be violated if the plaintiff recover. Bank of Spencer v. Simmons, 43 W. Va. 79, 27 S. E. Rep. 299.

"For Value Received."—The words, "for value received," in a note, *prima facie* establishes a valuable consideration, where it becomes necessary to prove such consideration. Williamson v. Cline, 40 W. Va. 194, 20 S. E. Rep. 917.

b. LEGALITY AND SUFFICIENCY.

Note Given in Compromise of Bastardy Proceedings.—A note given to a woman in compromise of a bastardy proceeding is binding and valid, and on sufficient consideration, and the payment thereof cannot be avoided on the ground that the compromise of such proceeding is contrary to public policy, or against public morals. Nor can the innocence of the putative father be set up as a defence against the recovery of such note, in the absence of fraud on the part of the obligee in procurement thereof. Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. Rep. 812.

Notes Payable in Confederate Money.—A note made payable in confederate money was illegal and void and no payment of it could be enforced. Nor does it matter that it was made within the military lines of the late so called Confederacy, as a question of illegality is to be tested not by the pretended authority of the late insurrectionists, but by the laws of the lawful government of the country. Where the parties to a contract to be paid in confederate money, are *in pari delicto*, a court of equity will equally withhold its aid from the guilty party who would invoke it to get rid of such illegal contract executed. Brown v. Wylie, 2 W. Va. 502; Calfee v. Burgess, 3 W. Va. 274. But notes given in renewal of notes which were given for confederate money, were held valid in McLaughlin v. Beard, 5 W. Va. 588.

Notes Given for Hire of Slaves.—During the year 1861, slavery was recognized as existing both by the United States and Missouri, and slaves owed no allegiance to either. There could be no demand for their services by the United States or the state, which could occasion a failure of the consideration of notes, made in the state of Missouri, and given for the hire of slaves. Booker v. Kirkpatrick, 26 Gratt. 145.

Usurious Considerations.—Every subsequent security given for a loan originally usurious, however remote or often removed, is void. Coffman v. Miller, 26 Gratt. 701; Drake v. Chandler, 18 Gratt. 909. But a new note made by a different person is purged of usury, unless the transaction was merely intended as an evasion of the usury statute. Coffman v. Miller, 26 Gratt. 701; Keckley v. The Union Bank, 79 Va. 464.

Usurious Notes Sold through a Broker to Innocent Purchasers.—But where the maker of a negotiable note payable to his own order, indorsed it and sold it through a third person at a greater rate of interest than that allowed by law, the transaction was held not usurious, where the purchaser did not know the character of the note or that it was sold for the benefit of the maker. Bailey v. Hill, 77 Va. 492; Taylor v. Bruce, Gilmer 42; Whitworth v. Adams, 5 Rand. 333; Brummel v. Enders, 18 Gratt. 873.

Forbearance—Recovery of Usurious Consideration.—A sale at a greater discount than the legal interest, of negotiable notes made and indorsed in blank for the purpose of raising money, by a broker for the maker to a purchaser ignorant of that purpose is not usurious. But payment of illegal interest after maturity of notes for forbearance is usury, and the usurious premium may be recovered back. Moseley v. Brown, 76 Va. 419.

Double Charges of Interest in Renewals.—Where it is agreed to renew a note every sixty days for the same amount upon paying the discount, and upon the renewals interest for every sixty-fourth day is charged twice, the notes are not usurious. Parker v. Cousins, 2 Gratt. 372.

Fraudulent and Voluntary Transfers Void as to Creditors.—Negotiable paper, like any other property, may be the subject of fraudulent transfer, as the law merchant cannot protect a transaction *mala fides* from the operation of statutory law. Hence, the transfer of an overdue negotiable note with the fraudulent intent to delay, hinder, or defraud the maker of such note out of a just set-off, is void as to such set-off, unless made to a *bona fide* purchaser of value, without notice of such intent. Davis v. Noll, 38 W. Va. 66, 17 S. E. Rep. 791.

And every gift, assignment, or transfer of a negotiable instrument, on consideration not deemed valuable in law, is void as to existing creditors in the hands of such donee, assignee, or transferee, but not in the hands of a *bona fide* holder for value. Davis v. Noll, 38 W. Va. 66, 17 S. E. Rep. 791. See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

Inadequacy of Consideration Must Be Gross to Invalidate the Instrument.—Where the parties are competent to contract, relief will not be decreed on the ground of inadequacy of consideration, unless the inequality be so gross as to shock the conscience, and of itself to amount to proof of fraud. Jones v. Degge, 84 Va. 686, 5 S. E. Rep. 799; Matthews v. Crockett, 82 Va. 394.

So in a suit to enjoin the defendant from disposing of certain notes executed to him by the plaintiff, and to set aside a sale evidenced by the notes, a contention by the plaintiff that the contract of sale was unconscionable is of no force when it appears that the property will yield from 12 to 22 per cent. on the investment. Loftus v. Maloney, 89 Va. 576, 16 S. E. Rep. 749.

Payment of Interest is Sufficient for an Extension.—Payment of interest in advance, though at a usurious rate, is sufficient consideration for an agreement to extend the time of payment. Glenn v. Morgan, 23 W. Va. 467.

Want of Consideration in Original Note No Objection to One Given in Renewal.—A party who gives a renewal note after discovering that the representations which led him to sign the first were false, cannot plead want of consideration of the first as a defence to the second. Keckley v. Bank, 79 Va. 458.

Forbearance to Sue.—Forbearance to sue is valuable consideration, and if a creditor take from his debtor and surety a note giving further time for payment, this is a valid consideration to bind the surety. Williamson v. Cline, 40 W. Va. 194, 20 S. E. Rep. 917.

c. FAILURE OF CONSIDERATION.—Failure in the consideration does not affect the validity of a negotiable note in the hands of a *bona fide* holder for value. But the maker, upon paying the holder the amount of the instrument may recover it from the payee if the consideration between them has failed. Wilson v. Lazier, 11 Gratt. 477. For a full discussion of consideration, see monographic *note* on "Consideration."

5. WHAT LAW GOVERNS THE VALIDITY.

General Rule.—The general rule is that all instruments made and executed in a country, take effect and are to be construed, as to their nature, operation and extent, according to the laws of the country where they are made and executed. But where the contract is either expressly or tacitly to be performed in any other place than where the same was made and executed, the general rule is in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation and

interpretation is to be governed by the law of the place of performance. Heffebower v. Detrick, 27 W. Va. 16.

Thus, a paper signed in blank was sent to Maryland to be there filled up. It was filled up there, and at the same time and place was indorsed by the payee to the holders, for value; the note being in fact for the accommodation of the payee. This was held a Maryland contract and to be governed by the Maryland law, though the note was headed from a town in Virginia. Fant v. Miller, 17 Gratt. 47.

Place of Performance.—A note made in Massachusetts and payable at either of the banking houses in Wheeling, Va., is to be governed by the law of Virginia. Freeman's Bank v. Ruckman, 16 Gratt. 126.

No Place of Performance Named.—Where no place of performance is named in an instrument it is presumed that it is payable where made, and that law will govern. Wilson v. Lazier, 11 Gratt. 477; Heffebower v. Detrick, 27 W. Va. 16.

Law Existing at the Time of Making Contract Governed.—The rights and obligations of the parties to negotiable paper are governed by the law as it was when the contract was made, and not by the law as it was when the contract becomes payable. The ordinance of the Virginia convention on the 24th of June 1861, dispensed with demand, protest and notice upon all checks, bills and notes payable at a bank located in any city or town if at the time of maturity of such instruments, the town or city was occupied or invested by the public enemies. By an act of the legislature passed on the 10th of May 1862, this ordinance was amended so as to require notice of the dishonor of the bill or note to be given within ten days after the removal of the obstruction created by the presence of the enemies. A note was made and indorsed on the 11th of December 1861, payable at a bank in Fredericksburg in six months. When it fell due the town of Fredericksburg was in possession of the United States forces, but they left in a few months; but no notice of nonpayment was given at any time to the indorsers. The rights and obligations of the parties, were held to be governed by the ordinance which was in operation when the note was made and indorsed; and notice of nonpayment was not necessary to bind the indorsers. Duerson v. Alsop, 27 Gratt. 229.

Making and Indorsing Each Governed by Lex Loci Contractus.—Making a note and indorsing or assigning it are distinct contracts, each governed by the law of the place of the contract. Nichols v. Porter, 2 W. Va. 13.

Presumption as to Law of Foreign State.—In an action by an indorsee against the drawer of a bill of exchange, it was found by special verdict, that the bill was drawn in Maryland on a person in Virginia, and no law of Maryland was found, declaring such a bill an inland bill. It was held that the court could not take judicial notice of any law of Maryland to that effect, unless it be expressly found; and such bill being a foreign bill of exchange, according to the general law merchant, it would be so regarded. Brown v. Ferguson, 4 Leigh 37.

Lex Fori Governs Questions of Evidence.—The law of the state where an action is brought determines what is evidence of presentment and dishonor of promissory notes and inland bills of exchange. Corbin v. Planters' Bank, 87 Va. 661, 13 S. E. Rep. 98.

So where the law of a state where a note is made, declares that it shall be void unless it is stamped, it is void everywhere and an action cannot be maintained upon it in another state. But if in such case the law only declares that the note shall not be available as evidence, an action may be maintained upon it in another state. Fant v. Miller, 17 Gratt. 47.

Presumption as to Place of Performance.—In Heffebower v. Detrick, 27 W. Va. 16, it was held, that a promissory note purporting on its face to be made at a place within that state and not specifying any place of payment, would in the absence of proof be presumed to have been made and to be payable within that state.

III. ACCEPTANCE OF BILL OF EXCHANGE.

Definition.—Acceptance is the act by which the drawee of a bill of exchange signifies his undertaking to pay the bill. Bigelow on Bills, Notes, and Checks 36; Christian v. Keen, 80 Va. 369.

Nature and Effect.—An acceptance is an engagement to pay the bill according to the terms of the acceptance. The effect of the acceptance is to give credit to the bill, and to render the acceptor liable as the maker of a note; it implies an acknowledgment that he has effects of the drawer in his hands, and the circumstance that there were no effects in the hands of the acceptor is of no consequence, for by making himself a party to the instrument he has contributed to its currency and that perhaps was one reason, on which the holder parted with his money. Bennett v. Maule, Gilmer 305.

Acceptance Is Conclusive as to Signature of Drawer.—It is a well-established rule of commercial law, that the drawee of a bill of exchange is presumed to know the handwriting of the drawer, and if he accepts or pays the bill, although the drawer's name has been forged, he is bound by the act and cannot recover back the money so paid. Johnston v. Com. Bank, 27 W. Va. 343.

Right of Acceptor to Charge Bill to Drawer before Payment.—Acceptance of a bill does not entitle the acceptor to charge it in account against the drawer from the date of the acceptance, unless he pays the whole money at the time, or discharges the drawer from all responsibility. Braxton v. Willing, 4 Call 288.

When Acceptor May Sue Drawer on His Acceptance.—And the acceptor of a bill of exchange does not become entitled to sue the drawer of the bill upon acceptance. When he has paid the bill, and not before, he may recover back the amount from the drawer in an action for money had and received. Christian v. Keen, 80 Va. 369; Braxton v. Willing, 4 Call 288.

Acceptance on Faith of Funds.—Where a bill of exchange is drawn on one, who accepts it on the faith of funds of the drawer in his hands, he acquires an equitable interest in those funds, and is entitled to set-off his liability on the acceptances, against his obligation to pay those funds, and to retain them *pro tanto* for his indemnity. Lambert v. Jones, 2 P. & H. 144.

Where the Consideration for Acceptance Fails.—The general acceptance of an order binds the acceptor, in favor of a payee who took the note *bona fide* and for a valuable consideration, notwithstanding the consideration, which induced the acceptance, afterwards fails, without any fault on the part of the payee. Corbin v. Southgate, 3 H. & M. 319.

Effect of a Promise to Accept.—Where the drawee of a bill of exchange promises to accept a bill of exchange drawn on him, this promise to accept is not binding unless supported by a valuable considera-

tion, or unless some party has taken the bill on the faith of his promise to accept. Brown v. Ferguson, 4 Leigh 37.

Action against Acceptor.—Formerly an action of debt would not lie against the acceptor of a bill of exchange. Wilson v. Crowdhill, 2 Munf. 302; Smith v. Segar, 3 H. & M. 394. But under the Virginia statute (1 Rev. Code, ch. 125, § 4), an action of debts lies by the payee against the acceptor. Hollingsworth v. Milton, 8 Leigh 50.

IV. TRANSFER.

1. BY INDORSEMENT.

Definition of Indorsement.—Indorsement is a term known in law, which by the custom of merchants, transfers the property to the indorsee. Fitzhugh v. Love, 6 Call 5.

Necessity of Indorsement.—Bills payable to bearer may be transferred by the delivery, but to transfer those payable to order it is necessary, in addition to delivery, that there should be something by which the payee may appear to express his order. This additional circumstance is an indorsement. Fitzhugh v. Love, 6 Call 5.

Effect of Indorsement.—The effect of indorsing the payee's name upon a negotiable instrument is perfectly understood in the commercial world. It is in the nature of a warranty that the maker will pay the note upon presentment at maturity, and if not so paid, he, the indorser, will upon due and reasonable notice of the dishonor of the note, pay the same to the holder. The term "indorsed," when applied to bills of exchange and other negotiable instruments, imports a transfer for the legal value. But with respect to bonds and other securities not negotiable, the equitable title passes by assignment only. Welsh v. Ebersole, 75 Va. 651.

Indorsement in Full.—An indorsement in full is one which mentions the name of the person in whose favor it is made, and to whom or to whose order the sum is to be paid. For instance, "Pay to B or order," signed "A," is an indorsement in full by A, the payee or holder of the paper, to B. An indorsement in full prevents the bill or note from being indorsed by any one but the indorsee, and none but the special indorsee or his representative can sue upon it. Spence v. Robinson, 35 W. Va. 318, 13 S. E. Rep. 1004.

Effect of a Blank Indorsement.—A blank indorsement is in legal effect a direction to the maker or drawee to pay the amount of the instrument to bearer, and therefore renders the paper transferable by delivery, without further indorsement. It also carries the right to any holder to insert his own name above the blank indorsement, and thus make the paper payable to himself. This will, however, release all subsequent indorsers. 1 Daniel, Neg. Instr. 694, 694a; Rees v. Conococheague Bank, 5 Rand. 329; Orrick v. Colston, 7 Gratt. 189; Frank v. Lilienfeld, 33 Gratt. 377, 385; Ritchie v. Moore, 5 Munf. 388; Jordan v. Neilson, 2 Wash. 164.

But a blank indorsement upon a note, does not *per se* transfer a title, but is an authority for the holder, either to hold it as the agent of the indorser, or to claim it as his own by assignment, at his election, without any further act to be done by the assignor. The blank indorsement is conclusive proof of the assent of the indorser to transfer the note to the holder, if he elects to take it as a transfer. The assent and election of the holder to treat the indorsement as a transfer, was held to be as well proved by suing upon it in his own name, as if he had written over it an assignment to himself, as it is the assent of both parties to the transfer, which perfects it, and not the form in which the assent is evidenced. Rees v. Conococheague Bank, 5 Rand. 326.

Modes of Filling Blank Indorsements.—A paper signed in blank, and indorsed in blank, may be filled up either as a common promissory note or a negotiable note; and the person who indorsed it in blank will be liable on his indorsement to a holder for value. If the paper is filled up as a common promissory note to a third person, who advances the money to the maker, he may treat the indorser as an original security of the note. If after the note is filled up and delivered to the payee, the holder fills up the indorsement without a guaranty, he may afterwards erase it, and proceed against the indorser as original security. Orrick v. Colston, 7 Gratt. 189.

Blank Indorsement May Be Filled during Trial.—And the plaintiff's attorney may fill up a blank indorsement and make it payable to the plaintiff during the trial of a cause. Hooe v. Wilson, 5 Call 61.

What is Equivalent to Blank Indorsement.—An indorsement by one of two payees of a negotiable note to the other by which the indorser "assigns and transfers all right, title and interest" in the note to such other is equivalent to a blank indorsement of the note, and carries with it the consequences of an indorsement without restriction or limitation, and cannot be varied or contradicted by evidence of any contemporaneous parol agreement between the parties. Citizens' National Bank v. Walton, 96 Va. 435, 31 S. E. Rep. 890.

Right to Strike Out Indorsements.—The holder of a bill of exchange, with indorsement in blank, may strike out the indorsement subsequent to the first, and may write over the first indorsement an assignment to himself, or the bill, without such assignment, will be considered the property of the holder, he having the power to make it. Ritchie v. Moore, 5 Munf. 388, 7 Am. Dec. 688.

But where there were two indorsers to a promissory note, the last indorsee struck out the second indorsement, and filled up the first to himself. It was held, that he could not charge the first indorser upon an execution against the maker returned "no effects" because there was no privity between them. Hooe v. Wilson, 5 Call 61.

Indorsement "Without Recourse."—In Ober v. Goodridge, 27 Gratt. 878, a number of negotiable notes were transferred "without recourse." It was held, looking to all the circumstances of the case, that the words were to be construed in their literal sense; and that the transferrer was not liable for the failure to recover from the indorser. If the transferee intended that the words should be used in this instance in their restricted and limited sense, he should have been careful to express his meaning, or have it expressed in plain and unmistakable terms.

Restrictive Indorsement.—Where the payee of a bill of exchange indorses it "Pay to A or his order only" such indorsement restricts the negotiability of the instrument, and the drawer may prove that no consideration was paid for the instrument when sued upon it. Power v. Finnie, 4 Call 411.

Indorsement Enlarging Liability of Indorsers.—In Nat. Bank v. McElfresh, etc., Co. (W. Va. 1900), 37 S. E. Rep. 541, the payees in a negotiable note made the following indorsement on the back of it: "For value received we hereby guaranty the payment of the

within note at maturity, waiving demand, notice of nonpayment, and protest," which was followed by their signatures. It was held, that this operated as a transfer of the note, and as an indorsement thereof with enlarged liability.

Indorsement after Maturity.—The indorsement of negotiable notes, though made after maturity, passes the legal title without notice to the maker. But in case of transfers of choses in action not negotiable, only the equitable title passes, and the maker may make payments to the payee or obligee until he has notice of the transfer. Davis v. Miller, 14 Gratt. 1; Smith v. Lawson, 18 W. Va. 212.

Effect of Indorsement after Maturity.—When a note is indorsed after it becomes due it is considered as a note newly drawn by the person so indorsing it. Broun v. Hull, 33 Gratt. 29.

Indorsement of Overdue Paper Does Not Relate Back.—The indorsement of an overdue note does not relate back to the date of a note; but is a new and independent contract only taking effect from the time it is made, and must be determined by the laws and circumstances then existing. Broun v. Hull, 33 Gratt. 23.

Necessity of Delivery to Complete the Transfers.—It is an elementary principle that delivery is essential to perfect the transfer of a promissory note. Until delivered to the payee it has no vitality; and not only must there be a delivery, but there must be an acceptance by the payee. Wright v. Smith, 81 Va. 777; Howe v. Ould, 28 Gratt. 1; Rowan v. Chenoweth (W. Va. 1900), 38 S. E. Rep. 544; Grasswitt v. Connally, 27 Gratt. 19.

Constructive Delivery Is Sufficient.—Delivery of a promissory note is essential to its efficacy, and if not delivered in the lifetime of the maker, it cannot be delivered after his death. But delivery may be constructive as well as actual, and where it is clear that the maker of a note intended it to be a finished note and binding on him, without further act on his part, it will so operate, though not actually delivered in his lifetime. Rowan v. Chenoweth (W. Va. 1900), 38 S. E. Rep. 544; Howe v. Ould, 28 Gratt. 1.

What Amounts to Constructive Delivery.—Thus, the payee of a note indorsed it in blank and deposited it with a bank as collateral security for a loan, and afterwards sold the same for value and gave an order on the bank therefor to the purchaser, who presented the order to the bank and was informed that the president was absent from town. Some days later the purchaser had an interview with the president at the bank, and was told by him that the loan for which the note was pledged was nearly paid, and that he would deliver the note to the purchaser but for the service of attachment upon the bank. The loan was afterwards paid in full. Before the sale of the note an attachment had been served upon the maker at the suit of a creditor of the payee, but the purchaser had no notice thereof at the time of the purchase. After the sale and notice to the bank by him, an attachment was served on the bank by another creditor of the payee. It was held, that these circumstances amounted to indorsement and constructive delivery to the purchaser, and that he was entitled to the note as against the attaching creditor. Howe v. Ould, 28 Gratt. 1.

Evidence to Show Want of Delivery.—And to establish the fact that there was no delivery of a note sued on, or delivery thereof for a special purpose only, parol evidence is admissible. When such evidence in connection with written evidence shows for the purpose for which the note was delivered has failed, there is no liability on the maker. Solenberger v. Gilbert, 86 Va. 778, 11 S. E. Rep. 789; Ronald v. Bank of Princeton, 90 Va. 813, 20 S. E. Rep. 780.

2. BY ASSIGNMENT.

Assignment Defined.—Assignment, as to bonds or notes, implies more than indorsement. It means indorsement by one party, with intent to assign, and an acceptance of that assignment by the other party. Bank v. Pindall, 2 Rand. 465.

No Form of Words Necessary to Constitute an Assignment.—No particular form is necessary to constitute an equitable assignment of a debt or chose in action. An order for value appropriating the fund is sufficient. No action can be maintained against the drawee without his acceptance. Notice to the debtor is essential to perfect the title. Until such notice, the assignee is liable to all equities between the debtor and assignor. Switzer v. Noffsinger, 82 Va. 518.

Assignment of Note Carries Security.—Where a note is secured by a deed of trust or mortgage, the assignment of the note carries with it the benefit of the security, unless excluded expressly or by fair and reasonable implication. Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 878; Briggs v. Enslow, 44 W. Va. 499, 29 S. E. Rep. 1008.

What Is Sufficient Averment of Assignment.—The declaration in an action upon a note averred that the payee of the note indorsed and delivered it to the plaintiff; the note not being negotiable but assignable. This was held as sufficient averment of its assignment. Freeman's Bank v. Ruckman, 16 Gratt. 126.

Law Governing the Assignment.—The declaration averred that the note sued on was made in Boston, and on the same day and year was indorsed and delivered to the plaintiff, a bank corporation under the laws of Massachusetts. Upon a demurrer the court considered the assignment made in Massachusetts, where it might legally have been made. Freeman's Bank v. Ruckman, 16 Gratt. 126.

Assignment Written on Back of Attorney's Receipt.—In Clarke v. Hogeman, 13 W. Va. 718, a note was placed in the hands of an attorney for collection. The party entitled to the note wrote the assignment of "the within claim" on the back of the attorney's receipt. This was held a valid assignment of the note.

Note Secured by Deed of Trust—What Amounts to Assignment.—The payee of a note which was secured by a deed of trust, directed the trustee to sell the property, and pay the proceeds to a third party. This was held to be a good equitable assignment of the note to such third party. Lambert v. Jones, 2 P. & H. 144.

Injunction to Assignment.—The grantee of land who had been defrauded by his grantor charged in a bill in equity that his grantor had transferred his negotiable notes given for the purchase price of the land to a third person without consideration, and prayed the court to enjoin such third party from transferring the notes to a *bona fide* holder. The court enjoined such third person for assigning the notes and ordered the same cancelled to protect the grantee. Dickenson v. Bankers' Loan, etc., Co., 93 Va. 498, 25 S. E. Rep. 548.

Bill of Exchange May Be Transferred after Protest.—A bill of exchange does not lose its negotiable character by being protested; but after protest such bill may be assigned or transferred without assignment. Richie v. Moore, 5 Munf. 388.

Principles Which Govern Assignments of Bills and Notes.—The principles which govern the transfer by assignment of bills and notes which are not negotiable, are the same which govern the assignment of ordinary choses in action. The assignment is controlled in all cases by the rules of the common law, and the assignee acquires no better title to the instrument than that possessed by his assignor. Davis v. Miller, 14 Gratt. 1; Clarke v. Hogeman, 13 W. Va. 718. For a full discussion of this subject, see monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

2. BY DELIVERY.—An instrument which is payable to bearer, or which has been indorsed in blank, may be transferred without any formal indorsement or assignment. The title to such instrument passes by the delivery of the instrument and no other act is necessary to give the holder title to the instrument. Howe v. Ould, 28 Gratt. 1; Myers v. Friend, 1 Rand. 12; Branch v. Commissioners, 80 Va. 427.

V. RIGHTS OF HOLDER.

1. WHAT CONSTITUTES HOLDER IN DUE COURSE.

a. VALUE.

Necessity for a Valuable Consideration.—In order to constitute one a holder for value in the due course of trade, he must have taken the instrument upon a valuable consideration. Smith v. Lawson, 18 W. Va. 212; Davis v. Miller, 14 Gratt. 1.

Transferred as Collateral or in Payment of Pre-Existing Debt.—The best-considered as well as the most numerous authorities regard the creditor, who received the bill or note of a third party from his debtor either in payment of, or as collateral security for his debt, as entitled to the full protection of a *bona fide* holder for value, free from all equities which might have been pleaded between the original parties. Devendorf v. W. Va., etc., Co., 17 W. Va. 135; Hotchkiss v. Fitzgerald, etc., Co., 41 W. Va. 357, 23 S. E. Rep. 576; Shepherd v. Anderson, 2 P. & H. 203.

Collateral for a Valid Pre-Existing Debt.—Where a negotiable instrument is transferred as collateral to secure a valid pre-existing debt, by being properly indorsed and delivered, or by delivery only when indorsed in blank or made payable to bearer, so that the transferee becomes a party to the instrument, and he takes the same before maturity, in good faith and without notice of equities, he thereby becomes, without more, a holder for value in the usual course of business. Hotchkiss v. Fitzgerald, etc., Co., 41 W. Va. 357, 23 S. E. Rep. 576.

But the holder of a negotiable note, which has been transferred to him, as collateral security for a debt, by a person who could not have recovered against the maker in an action on the note, cannot recover in an action of debt on the note against the maker, more than the amount of the debt for which the note was taken as security. Shepherd v. Anderson, 2 P. & H. 203.

Pre-Existing Debt Prima Facie a Valuable Consideration.—A valid pre-existing debt is *prima facie* a valuable consideration for the transfer before maturity of a negotiable note in the hands of a *bona fide* holder for value, without notice of latent equities between the maker and first indorser, although such note be held merely as collateral security for the payment of such debt. Mercantile Bank v. Boggs (W. Va. 1900), 37 S. E. Rep. 587.

Same—Under Negotiable Instruments Law.—A pre-existing debt constitutes value for a transfer of negotiable paper. If the transfer be made merely as collateral, the transferee is a holder for value to the extent of the amount due him. §§ 25 and 27 of the Negotiable Instruments Law; Payne v. Zell, 98 Va. 294, 36 S. E. Rep. 379.

Conflict of Laws—Cases Distinguished.—These cases may appear to be in conflict with Prentice v. Zane, 2 Gratt. 262, and Union Trust Co. v. McClellan, 40 W. Va. 405, 21 S. E. Rep. 1025, but upon examination of these cases it will be found that in each case the instrument in question was subject to the laws of the state of Pennsylvania, and the court applied the Pennsylvania law regardless of the fact that the law of the forum was otherwise. See Hotchkiss v. Fitzgerald, etc., Co., 41 W. Va. 359, 23 S. E. Rep. 576.

Transfer in Consideration of Paying Debts of the Indorser.—Negotiable notes made for the accommodation of the payee were indorsed by him to the holders in consideration of money previously advanced by them to him, of money advanced to him at the time of the transfer, and of notes of the payee falling due at a future day, which they undertook to pay, and did pay as they became due; all of which amounted to the full amount of the notes so indorsed to them. The holders were held to be holders for value. Fant v. Miller, 17 Gratt. 47.

Instrument Pledged as Collateral—Right to Sue Pledgor.—Where notes of third parties are given as collateral security for the payment of the maker's note, the holder has the right to proceed to recover upon the collateral securities notwithstanding the note of the maker. Nothing short of its satisfaction would prevent a recovery by the creditors. Lazier v. Nevin, 3 W. Va. 622.

Instruments Pledged as Collateral—Right of Pledgee to Sell.—Where a note or accepted order of a third person, is transferred and delivered to a creditor as collateral security for a debt, the debtor may sue upon the chose in action at law, and if necessary sue in the name of the legal owner. Unless a power to sell is superadded to the agreement, whereby such chose in action is pledged as a collateral security, the creditor has no right to sell such chose in action and he cannot come into a court of equity to ask a sale thereof. Whitteker v. Charleston, etc., Co., 16 W. Va. 717.

b. BONA FIDES.

Meaning of "Bona Fide Holder."—The term "*bona fide* holder" means a holder who has acquired the instrument without notice of equities. Absence of knowledge or notice of equities is the essential thing in the matter of *bona fides*, and where a party is not chargeable with either knowledge or notice of equities affecting an instrument of which he is the holder, he is a "*bona fide* holder." Smith v. Lawson, 18 W. Va. 212; Roberts v. Tavenner (W. Va. 1900), 37 S. E. Rep. 576; Frank v. Lilienfeld, 33 Gratt. 377; Cussen v. Brandt, 97 Va. 1, 32 S. E. Rep. 791.

Nothing Short of Mala Fides Will Invalidate the Holder's Title.—The law is well settled, that to invalidate the title of the holder of a negotiable instrument (not absolutely void by statute law), indorsed in blank, and acquired for value, in due course of trade and before maturity, it is not sufficient to show circumstances in the acquisition of the note affecting such holder with suspicion merely, or that he was guilty of ordinary negligence, or even gross negligence, but it is necessary to show that he was guilty of *mala fides*. Frank v. Lilienfeld, 33 Gratt. 377; Smith v. Lawson, 18 W. Va. 212.

Evidence to Show Mala Fides.—Gross negligence in the receipt of a note may be evidence of *mala fides*,

and as such may be received in evidence, but it does not of itself show *mala fides*, and the holder cannot be deprived of his right to recover, unless he acquire the note *mala fide*. Smith v. Lawson, 18 W. Va. 212.

"Notice" Used in This Connection Means Knowledge.—In order to stand upon a better footing than his transferrer, the holder must acquire the instrument without notice of fraud, defect of title, illegality of consideration, or other fact which impeaches its validity in his transferrer's hands; and the word "notice" in this connection signifies the same as knowledge. Roberts v. Tavenner (W. Va. 1900), 37 S. E. Rep. 576.

Facts Sufficient to Charge a Purchaser with Notice.—A party who acquires a note with full knowledge of facts, which in law show that the party from whom he took the note had no authority to transfer it, cannot be regarded as acquiring it *bona fide*, though under a misconception of law he may have supposed that the party from whom he acquired it had a right to make the transfer. Smith v. Lawson, 18 W. Va. 212.

So in Cussen v. Brandt, 97 Va. 1, 32 S. E. Rep. 791, a party who purchased from an agent to collect, one of a series of negotiable notes secured by a deed of trust on real estate and payable in the order of their maturity, was postponed to the holder of the note thereafter maturing, where the note sold bore the indorsement "for collection" which was still legible, though erased, this being sufficient to put him upon inquiry.

Purchaser from an Unauthorized Bank President Not a Bona Fide Holder.—And the holder of a note to whom it has been transferred for valuable consideration by the president of a bank, who had no authority to transfer it, is not a *bona fide* holder of the note, and the maker of the note may dispute his title to it in an action brought on the note. Smith v. Lawson, 18 W. Va. 212.

Actual Notice of Equities.—And so where an agent indorsed a note for the benefit of his principal, and was assured by the principal that he should not be held responsible upon such indorsement, he was held not liable to pay the money at the suit of the person, to whom the note was indorsed with notice of such equity. Chalmers v. McMurdo, 5 Munf. 252.

Purchaser from an Agent for Collection.—The purchaser of overdue negotiable paper, from an agent for collection, acquires only such title as the agent had. Cussen v. Brandt, 97 Va. 1, 32 S. E. Rep. 791.

Personal Representative of an Accommodation Indorser.—The personal representative of an accommodation indorser of a negotiable note protested for nonpayment, can only acquire the note, whether by purchase or payment, in his fiduciary character. And he cannot in any event, either by purchase or payment, acquire larger rights than his testator or intestate would have had, had he paid the note in his lifetime and after protest. Burton v. Slaughter, 26 Gratt. 914.

2. RIGHTS OF HOLDER IN DUE COURSE.

Title Acquired by a Bona Fide Holder for Value.—Where negotiable paper is transferred before maturity to a *bona fide* holder for value, he takes it free from all equities existing between the antecedent parties of which he had no notice; such holder often acquires a better right than that of the indorser under whom he claims. Cottrell v. Watkins, 89 Va. 801, 17 S. E. Rep. 328, 19 L. R. A. 754, and *note*, 37 Am. St. Rep. 897; Davis v. Miller, 14 Gratt. 1; Smith v. Lawson, 18 W. Va. 212; Leonard v. Dougherty, 22 W. Va. 536.

And a *bona fide* holder of negotiable paper who purchased it for value in the ordinary course of business before maturity and without notice of equities which impeach its validity between antecedent parties, has title thereto unaffected by such equities and may recover on the note, although it was without legal validity between the antecedent parties. Bank v. Johns, 22 W. Va. 520; Leonard v. Dougherty, 22 W. Va. 536; Lomax v. Picot, 2 Rand. 247; Norton v. Rose, 2 Wash. 233; McNiel v. Baird, 6 Munf. 316.

Reason for Rule That Equities Do Not Affect a Bona Fide Holder.—The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equities to which the original party was subject. If this rule was applied to bills aud promissory notes, it would stop their currency. Norton v. Rose, 2 Wash. 233.

Holder of Lost Paper.—When a note payable to bearer, which has once become operative by delivery has been lost or stolen from the owner and has subsequently come to the hands of a *bona fide* holder for value, the latter may recover against the maker and all indorsers on the paper when in the hands of the loser, and the loser must sustain the loss. Branch v. Commissioners, 80 Va. 427.

Right of Holder of a Note Cut in Two.—Where a bank note was cut in two, and one-half sent by mail and lost, it was held that the holder of the remaining half had a right to demand payment at the bank, upon presentation of the half in his possession, proving ownership, and giving bond and adequate security for the indemnification of the bank. But where these prerequisites were not complied with, and the bank was sued in consequence of refusing payment, the holder was not allowed to recover interest or costs, even though he performed the conditions after the suit was brought. Farmers' Bank v. Reynolds, 4 Rand. 186. See also, Bank of Va. v. Ward, 6 Munf. 166.

Right to Tack a Note to a Mortgage.—A creditor by a mortgage or deed of trust, has not a right, without a written agreement, to tack to such mortgage a deed of trust and note of the debtor, in exclusion of another mortgage or deed of trust, bearing date either before or after such note. Colquhoun v. Atkinsons, 6 Munf. 550.

3. PAPER TRANSFERRED OVERDUE.

Valid Transfer May Be Made after Maturity.—A negotiable note may be transferred any time while it remains a good, subsisting, unpaid note, whether before or after maturity: and, in the latter case, even though it be protested for nonpayment, and bears upon its face the stamp of dishonor. Cottrell v. Watkins, 89 Va. 801, 17 S. E. Rep. 328, 19 L. R. A. 754, and *note*, 37 Am. St. Rep. 897.

Title of Indorsee of Overdue Paper.—But in case of a transfer of overdue paper the holder takes it as a dishonored instrument, subject to all the defences and equities to which it was subject in the hands of his immediate indorser, whether he has any notice thereof or not; such holder takes nothing except the title and right of his immediate indorser. Cottrell v. Watkins, 89 Va. 801, 17 S. E. Rep. 328, 19 L. R. A. 754, and *note*, 37 Am. St. Rep. 897; Davis v. Miller, 14 Gratt. 1; Smith v. Lawson, 18 W. Va. 212.

Overdue Note Secured by Trust Deed.—In Karn v. Blackford (Va. 1894), 20 S. E. Rep. 149, after the acceptance of a note, the payee, in a composition of creditors of the maker, agreed that the note should be paid according to the terms of a trust deed. A

party who acquired the note after maturity was held to hold the same subject to the provisions of the trust deed, though the deed was unrecorded when the note was acquired.

Indorsee of Overdue Paper Not a Bona Fide Holder.—And one who purchases a note after maturity is not a *bona fide* holder, and takes it subject to the defence of payment in whole or in part. Cottrell v. Watkins, 89 Va. 801, 17 S. E. Rep. 328; Davis v. Miller, 14 Gratt. 1; Arents v. Com., 18 Gratt. 750.

Indorsee Does Not Take Subject to Set-Off.—But a *bona fide* purchaser for value of an overdue negotiable instrument holds it subject to only such equities as attaches to the note itself at the time of the transfer. He takes it in the same manner that he would take any other personal property. The right of set-off was unknown to the common law, but is of modern statutory creation, and is neither an equity nor a lien recognized by the law merchant as attaching to a negotiable instrument. Hence, a *bona fide* purchaser of an overdue negotiable note is not required to take notice of existing set-offs in the absence of legislative enactment; and this, though the indorsee gave no consideration for the paper, and had notice of, and took the paper on purpose to defeat the set-off. Davis v. Noll, 38 W. Va. 66, 17 S. E. Rep. 791; Davis v. Miller, 14 Gratt. 1; Ritchie v. Moore, 5 Munf. 388, 7 Am. Dec. 688.

Title of Indorsee of Overdue Accommodation Paper.—While it is a general rule that if the paper be overdue at the time of transfer, that circumstance of itself is notice, and the indorsee can acquire no better title than that possessed by his indorser, yet, if the indorser's title was unimpeachable, the fact that the paper was executed for accommodation, without consideration, and that the indorsee knew it, is no defence, even where the paper was overdue at the time of the indorsement, it being considered that parties to accommodation paper hold themselves out to the public, by their signatures, to be bound to every person who shall take the same for value, to the same extent as if paid to him personally. If the holder receive the paper after maturity from an indorser, who took it *bona fide* before maturity, there is no question as to his right to recover. Cottrell v. Watkins, 89 Va. 801, 17 S. E. Rep. 328, 19 L. R. A. 754, and *note*, 37 Am. St. Rep. 897.

Same—He Stands in His Endorser's Shoes—An indorsee of an accommodation note, taken after maturity, with or without knowledge of its consideration, may enforce it against prior parties to the same extent as if it had been executed for value, if his immediate indorser was entitled to so enforce it. Cottrell v. Watkins, 89 Va. 801, 17 S. E. Rep. 328, 19 L. R. A. 754, and *note*, 37 Am. St. Rep. 897.

And if a person for whose benefit accommodation notes were made, pays them off as they fall due, but, instead of cancelling them passes them to a third person, they cannot be enforced by him, and if they are enforced by means of the sale of property under a trust deed given to secure their payment, such sale is fraudulent and will be vacated in equity. Cottrell v. Watkins, 89 Va. 801, 17 S. E. Rep. 328.

Overdue Paper Is Negotiable.—In Virginia it is provided by statute (see Va. Code, § 2860), that, "the assignee of any bond, note or writing not negotiable, may maintain thereupon any action in his own name which the original obligee or payee might have brought, but shall allow all just discounts, not only against himself, but against the assignor, before the defendant had notice of the assignment." In Davis v. Miller, 14 Gratt. 1, it was argued that this statute was applicable to negotiable paper which had been transferred after maturity; but the court held that the statute did not include such paper.

4. PRESUMPTIONS IN HOLDER'S FAVOR.

General Rule.—The general rule is that the holder of a negotiable instrument, regular upon its face, is presumed to have acquired it before maturity for value and without notice of any infirmity in the paper. Piedmont Bank v. Hatcher, 94 Va. 229, 26 S. E. Rep. 505; Duerson v. Alsop, 27 Gratt. 229; Wilson v. Lazier, 11 Gratt. 477; Dashiell v. Bank (Va. 1895), 22 S. E. Rep. 169; Vathir v. Zane, 6 Gratt. 246.

Possession Prima Facie Evidence That the Holder Gave Value—And the mere possession of a negotiable instrument is *prima facie* evidence that the holder took it for value, and that he came by it honestly. A total failure of the consideration of a negotiable instrument does not impose on the innocent holder the burden of proving that he gave value for it. But where the evidence raised a suspicion of fraud in the procurement of the note, then the holder is bound to show that he gave value for it. Wilson v. Lazier, 11 Gratt. 477; Dashiell v. Bank (Va. 1895), 22 S. E. Rep. 169; Vathir v. Zane, 6 Gratt. 246.

Burden of Proof, Not Shifted by Failure of Consideration.—A total failure of consideration of a negotiable note does not impose on the innocent holder the burden of proving that he gave value for it. Wilson v. Lazier, 11 Gratt. 477.

Fraud Is Never Presumed but Must Be Proved.—And the general rule, that fraud is never presumed, but must always be proved by clear and satisfactory evidence, is applicable to negotiable instruments. In a suit to set aside a note on the ground of fraud, the possession of instruments being *prima facie* proof of ownership, the burden of proof is on the plaintiff to show that the note has been fraudulently obtained. Dashiell v. Bank (Va. 1895), 22 S. E. Rep. 169.

Presumption That Holder Is Holder for Value Fails in Certain Cases.—But under certain circumstances the presumption that the holder of a negotiable note is a holder for value, fails, and the burden of proof shifts upon him to show that he is such. Thus, in Duerson v. Alsop, 27 Gratt. 229, a holder of a note indorsed for the accommodation of the maker, gave no notice to the indorser or his personal representative that he held the note, for eight years after maturity of the note. The holder made no effort to collect from the maker, though for the greater part of the time he was able to pay it. Under these circumstances the presumption that the holder of the note was a holder for value failed, and the burden of proof was held to be upon him to show that he gave value for the note.

So if the maker or party primarily liable for its payment, or any party bound by the original consideration, proves that it was obtained by fraud or illegality in its inception, or if the circumstances raise a strong suspicion of fraud or illegality, the burden of proof is shifted, and the holder of the note must show that he acquired it *bona fide* for value in the usual course of business while current, and under circumstances which create no presumption that he knew of the facts which impeach its validity. Piedmont Bank v. Hatcher, 94 Va. 229, 26 S. E. Rep. 505; Vathir v. Zane, 6 Gratt. 246.

Fraud in Procurement Shifts Burden of Proof.—And where a note is shown to have been procured by fraud in the procurement on the part of the payee, the holder in order to entitle himself to recover,

must prove that he is a *bona fide* holder for value. Vathir v. Zane, 6 Gratt. 246.

Misappropriation of the Instrument by Payee—Burden of Proof.—And where it is shown in evidence that a negotiable note was made and delivered to the payee at his instance, and for his accommodation for a specific purpose, and that such payee, without the knowledge or consent of the maker, used such note for a different purpose, the burden is on the holder to show that he received it in the ordinary course of business, before maturity, for value, and without notice of its wrongful misuse by the payee, before he can recover from the maker. Union Trust Co. v. McClellan, 40 W. Va. 405, 21 S. E. Rep. 1025.

5. EFFECT OF FRAUD OR DURESS.

Fraud in Esse Contractus—West Virginia Rule.—A *bona fide* holder of negotiable paper has a valid title and can recover against the maker thereof, unless at the time he purchased the note it was absolutely void, although the maker was induced to sign such note by fraud, not intending to sign such a note but a paper of entirely different character. In such case the question of negligence in the maker forms no legitimate subject of inquiry. Bank v. Johns, 22 W. Va. 520; Leonard v. Dougherty, 22 W. Va. 536, overruling Morehead v. Bank, 5 W. Va. 74.

Note in Renewal of a Note Obtained by Fraud.—Where a plea avers that the defendant had been induced by the plaintiff to make a note, for which the note in suit is a renewal, and which was given for another's debt, by representing to defendant that that debt was amply secured by a deed of trust on real estate, while the plea on its face shows that the note was renewed several times after the defendant knew that the deed of trust would not satisfy the debt, and that the defendant had changed the debt by dropping the original debtor, and giving the note in suit; such facts constitute no defence to the note in the suit. Keckley v. The Union Bank, 79 Va. 458.

Fraudulent Concealment of Facts.—In the sale of a lease of a house and tenement, the vendor failed to show the lease to the vendee, and did not inform him of a covenant therein, that in case of destruction of the house by fire, the lease should terminate and become void. This was held such a concealment as to vitiate the contract, and the house being destroyed by fire, a court of equity relieved the vendee by injoining the vendor from collecting the purchase money, and by directing his notes for the same to be given up and cancelled. Snelson v. Franklin, 6 Munf. 210; McNiel v. Baird, 6 Munf. 316.

Threat of Prosecution of Maker's Son unless He Executed Note, Is Not Duress.—The maker of a note forged the name of two parties as indorsers on the note, one of whom was his son-in-law. The holder of the note discovering the forgery informed the son-in-law that unless he procured the maker to make a new note with the parties whose names had been forged as indorsers, that he would prosecute the maker. The new note was accordingly given and the prosecution did not take place. The note was repeatedly renewed and a note was given by the indorser (the maker having dropped off) for the balance, after sundry payments. These facts were held not to constitute such duress as would avoid the note. Keckley v. The Union Bank, 79 Va. 458.

6. EFFECT OF USURY.

Usury in Transfer Does Not Affect Bona Fide Holders.—A note which was valid in its inception, was afterwards indorsed by a party to whom it had regularly come, to a third person, at a greater discount than legal interest. This transaction was held not to be usurious, as an intermediate indorsement of a note, for a usurious consideration as between indorser and indorsee, does not vitiate the note in the hands of a subsequent *bona fide* holder without notice of the usury. Whitworth v. Adams, 5 Rand. 333; Taylor v. Bruce, Gilmer 42; Bailey v. Hill, 77 Va. 492.

Usury No Defence to Note in Hands of Bona Fide Holder.—Since the passage of the act now embodied in § 2818 of the Code, which declares that usurious contracts shall be deemed to be for an illegal consideration, as to the excess beyond the principal sum loaned or foreborne, the plea of usury cannot be sustained in an action on negotiable paper brought by a *bona fide* holder for value, who acquired the same before maturity in due course of trade. The only effect of such plea is to cast the burden of proof on the plaintiff to show that he is a *bona fide* holder for value. When he has shown this he is entitled to recover. Lynchburg Nat. Bk. v. Scott, 91 Va. 653, 22 S. E. Rep. 487.

Purging a Transaction Affected with Usury by Taking a New Note.—In an action of assumpsit upon a negotiable note it was set up by a special plea that the note was made for a balance of a note given by one party to the suit, for the aggregate of sundry notes, one of which was undue, and that there was no allowance made for that fact in ascertaining such aggregate, and that interest having been twice exacted for the sum of the undue note, the note for the aggregate was usurious, and tainted the note sued upon. It was held, that the failure to include the present worth only, instead of the face value of the undue note, did not constitute usury in the note for the aggregate; but if it did, the taking of the note in suit was such change of parties as purged the transaction of usury, and the new note was valid. Keckley v. The Union Bank, 79 Va. 458.

7. EFFECT OF ALTERATION.

Alteration Renders Instrument Invalid unless Consented to.—Where a person puts his name to paper, which is full in form, for a certain sum, payable at a certain time and place, for the accommodation of another who is to become a party to the same when it shall be negotiated, his liability is limited by the precise terms of that paper. An alteration afterwards, which is material, without his consent will make it a contract which he never executed and which it is manifest he never intended to execute; and it is a new contract to which he can in no sense be treated as a party; and he cannot be bound by it. But a party to the instrument, or one of several parties to the instrument, may consent to the alteration and the party so consenting will be bound. Bank v. Lockwood, 13 W. Va. 392; Batchelder v. White, 80 Va. 108; Dobyns v. Rawley, 76 Va. 544; Morehead v. Parkersburg Nat. Bank, 5 W. Va. 74.

But the objection that a material alteration has been made in a note in suit cannot be made for the first time in the appellate court. Tate v. Bank, 96 Va. 765, 32 S. E. Rep. 476.

Changing Name of Payee.—And an unauthorized change of the name of the payee of a negotiable note is such a material alteration as renders the note void as to the maker. The fact that the note was incomplete when altered, does not affect the result. §§ 124 and 125 of the Negotiable Instruments Law as to the alteration of such instruments, is simply declaratory of the former law on the sub-

ject. Hoffman v. Planters' Nat. Bank (Va. 1901), 7 Va. Law Reg. 570.

Changing an Ordinary Promissory Note into a Negotiable Note.—And changing an ordinary promissory note into a negotiable note without the knowledge or consent, either expressed or implied, of the promisor is such a material alteration as vitiates the note. Morehead v. Parkersburg Nat. Bank, 5 W. Va. 74.

Instruments Delivered in Blank and Completed Fraudulently—Rule of the Law Merchant.—The authority implied by a signature to a blank note, and the credit given, are so extensive, that the party so signing will be bound, although the holder was only authorized to use it for one purpose and has perverted it to another. But the holder cannot alter the material terms of the instrument by erasing what is written or printed as part of the same; or pervert its scope and meaning by filling blanks and stipulations repugnant to what is clearly expressed in the note before it is delivered by the indorser in blank. Frank v. Lilienfeld, 33 Gratt. 377; Guerrant v. Guerrant (Corporation Court of Danville), 7 Va. Law Reg. 639. See also, Brummel v. Enders, 18 Gratt. 877.

Thus, a negotiable note signed in blank and indorsed in blank by several persons, was delivered to another to raise money on for his own accommodation. The party to whom it was delivered filled it up so as to make it payable sixty days after date, and having put his own name on it as last indorser, delivered it to the plaintiffs to deposit in bank to take up a note which they had indorsed for him. The plaintiffs after offering it to the bank for discount, altered the word "sixty" to "thirty," so as to make the time of payment thirty days earlier. This alteration was made with the assent of the last indorser, but in the absence and without the knowledge of the drawer and other indorsers. The plaintiffs were allowed to recover on the note against the drawer and all of the indorsers, notwithstanding the alteration. Douglass v. Scott, 8 Leigh 43.

Same—Rule by Negotiable Instruments Law.—While it is a rule of the law merchant that where a negotiable instrument is intrusted to another with an unfilled blank, the person in possession has authority, so far as concerns a holder in due course, to complete it, consistently with the written or printed terms of the instrument, although he may thereby violate his actual authority, this rule has been altered by the Negotiable Instruments Law, in the case where the holder takes the instrument before the blank is filled. In such case, he is put on notice, and must ascertain the real authority of the person intrusted with the incomplete instrument, and takes it at his peril. Guerrant v. Guerrant (Corporation Court of Danville), 7 Va. Law Reg. 639; Hoffman v. Planters' Nat. Bank (Va. 1901), 7 Va. Law Reg. 570.

Alteration of Check by Holder—Bank is Still Liable if Drawer is Not Negligent.—A bank is responsible to a depositor for the payment of a check which has been altered in a material particular after signature, unless the negligence or laches of the drawer has laid the foundation for the error of the bank. The depositor, however, is only chargeable with the duty of ordinary care and diligence. Merely giving a stranger a check in exchange for money is not such negligence on the part of the drawer as will excuse the bank on which it is drawn for paying the check after it has been raised to a larger amount by the drawee without authority. National Bank v. Nolting, 94 Va. 263, 26 S. E. Rep. 826.

Change by Agreement of Parties Is Not an Alteration.—Where the parties to a bill or note agree to a change of any of its terms, they cannot complain of such change as an alteration. They have as much right to change as to make the contract. Schmelz v. Rix, 95 Va. 509, 28 S. E. Rep. 890; Bank v. Lockwood, 13 W. Va. 392.

VI. DILIGENCE REQUIRED OF HOLDER.

1. OF NEGOTIABLE PAPER.

a. PRESENTMENT FOR ACCEPTANCE.

Must Be Presented for Acceptance within Reasonable Time.—In order to hold the drawer of a bill of exchange liable the holder must present the bill to the drawee for acceptance within a reasonable time. In case of bills payable at sight, in states where such paper is entitled to grace, or of paper payable at a given time after sight, the courts have declined to lay down any rule prescribing what is a reasonable time in which they must be presented for acceptance, leaving the question in every case as it arises, to be determined by its peculiar circumstances, and if the bill is not presented within a reasonable time the drawer is discharged, although the party continue solvent and no damage is caused by the delay. One of the circumstances affecting the question of what is a reasonable time, in such case, is whether the bill has been put in, and kept in circulation, for if it has been kept in circulation the delay of a year or even more, would not necessarily amount to negligence. But if the holder retains possession of the bill for an unreasonable time and thus locks it up from circulation, he makes it his own, and has no remedy against antecedent parties from or through whom he derived title. Thornburg v. Emmons, 23 W. Va. 825.

Should Be Presented within Business Hours.—In cases where it is necessary to present a bill of exchange to the drawee for acceptance, the presentment should be made during the usual hours of business. Nelson v. Fotterall, 7 Leigh 179.

To Whom Presentment Should Be Made.—The presentment of a bill of exchange for acceptance should in all cases be made to the drawee himself or his duly authorized agent. Nelson v. Fotterall, 7 Leigh 179.

Presentment to Clerk.—It seems that it is not necessary to prove that the clerk at the drawee's counting house is the clerk of the drawee authorized to accept or refuse acceptance of bills drawn on the drawee. Nelson v. Fotterall, 7 Leigh 179. But parol evidence has been held admissible to show that the clerk was authorized to refuse acceptance. Stainback v. Bank, 11 Gratt. 260; Nelson v. Fotterall, 7 Leigh 179.

b. PRESENTMENT FOR PAYMENT.

(1) Necessity of Presentment.

To Fix Liability of Drawer and Indorsers.—In order to charge an indorser of a bill or note or the drawer of a check, it is necessary that the instrument should be presented for payment or some good excuse shown for the failure to make such presentment. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888; Waring v. Betts, 90 Va. 46, 17 S. E. Rep. 739.

To Fix Liability of Maker and Acceptor.—But in order to sustain an action against the acceptor of a bill of exchange or the maker of a promissory note payable at a time and place specified in the acceptance of note, it is not necessary to aver or prove a presentment and demand at the time and

place so specified. Armistead v. Armisteads, 10 Leigh 512.

To Fix Liability of the Drawer of a Check.—Presentment of a check to a bank for payment is not absolutely necessary in order to hold the drawer. But the fact that a check is presumed to be drawn on funds makes it extremely important to the drawer that the check should be promptly presented for payment and the drawer notified if there is a refusal to pay, so that he may inquire into the cause of the refusal. Therefore, it is a general and well-established rule that where the holder of a check fails to present it for payment within a reasonable time, during which time the bank fails, the drawer is discharged to the extent of the prejudice he may suffer through such failure. But where a check is presented for payment, and payment refused, and notice is given to the holder at any time before the bank fails the drawer is not discharged, if it be shown that he is not prejudiced by the delay; and if prejudiced he is only discharged *pro tanto*. Purcell v. Allemong, 22 Gratt. 739; Bell v. Alexander, 21 Gratt. 1; Cox v. Boone, 8 W. Va. 500; Compton v. Gilman, 19 W. Va. 312; McClain v. Lowther, 35 W. Va. 297, 13 S. E. Rep. 1008.

Former West Virginia Doctrine Overruled.—It has been held, that unless a check is promptly presented at the bank for payment, the drawer is discharged from liability whether any injury has been sustained by him by reason of the failure to present or not. Ford v. McClung, 5 W. Va. 156. But this case is overruled in Compton v. Gilman, 19 W. Va. 312.

Presumption of Injury to Drawer of a Check.—Where a check is not presented in time, and notice of nonpayment is not given, injury to the drawer will be presumed; but a check is always presumed to be drawn on actual funds; and while if the holder has been guilty of laches in not presenting it in due time, or in failing to give notice of nonpayment, it becomes incumbent upon him to show that the drawer has not been injured by the dereliction, yet, on the other hand, if he shows that the drawer had no funds in the bank against which he drew, the burden of proving actual damage is shifted upon the drawer, and in the absence of such proof the plaintiff is entitled to recover. McClain v. Lowther, 55 W. Va. 297, 13 S. E. Rep. 1008.

Where Presentment Is Impossible Holder Must Notify Drawer.—Where the holder of the check is not able to present the check by reason of the removal of the bank and the condition of the country, he should give notice of the fact to the drawer, and offer to return it. If he fails to do this the drawer is not liable. Purcell v. Allemong, 22 Gratt. 739.

(2) *Mode of Presentment.*

Instrument Must Be at Hand.—Presentment of the bill or note and demand of payment should be made by an actual exhibition of the instrument itself; or at least the demand of payment should be accompanied by some clear indication that the instrument is at hand ready to be delivered, and such must really be the case. This is requisite in order that the maker or acceptor may be able to judge of the genuineness of the instrument and of the right of the holder to receive payment, and that he may immediately reclaim possession of it upon paying the amount. Waring v. Betts, 90 Va. 46, 17 S. E. Rep. 739.

Formal Exhibition of Instrument Not Necessary unless Required.—But where, on demand for payment of a note, exhibition of the instrument is not asked for, and the party on whom the demand is made declines to pay on other grounds, a formal, actual presentment of the instrument is waived. Waring v. Betts, 90 Va. 46, 17 S. E. Rep. 739.

Paper Payable at Bank and Held by That Bank for Collection.—So where paper is payable at a bank and is held by that bank for collection, presentment in the ordinary way—by exhibiting the paper—is not required; the maker or acceptor must have provided funds there with which to pay, and if he has not done so, it only remains to say that the note has not been paid, to show or to indicate the dishonor. All that can be done, or ought to be required, is that the books of the bank should be examined to ascertain whether the maker had any funds in their hands; and, if not, there is a default which gives the holder a right to look to the indorser for payment. Peabody Insurance Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

Where Personal Presentment Is Impossible.—Though the holder of a check is disabled, so that he cannot go in person to present the payment, yet, if he could have sent it by mail, he will not be excused for not presenting it. Purcell v. Allemong, 22 Gratt. 739.

(3) *Time of Presentment.*

Paper Payable at a Particular Time Must Be Presented at That Time.—When a note is made payable at a particular time due diligence requires that it shall be presented at that time and it is incumbent on the holder of the note to show a compliance with this on his part by suitable averments in his declaration, and by proper proofs at the trial. To charge the indorser it is indispensable that the notes should be presented for payment, and payment thereof demanded at the time designated in the note, and that due notice be given him that the demand is ineffectual; and it is necessary to prove that the presentment for payment was then made, otherwise the indorser will be absolutely discharged. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

Paper Payable on Demand Must Be Presented within Reasonable Time.—A note payable on demand or on call is payable at once, and interest and the statute of limitations commence to run from its date. But in order to charge the indorser of a negotiable note so payable, it must be presented for payment within a reasonable time. No fixed rule can be laid down as to what will constitute a reasonable time, but this must be determined by the facts of the particular case. Bacon v. Bacon, 94 Va. 686, 27 S. E. Rep. 576.

What Amounts to Presentment within a Reasonable Time.—A creditor received on account of his debt, at his own dwelling on Wednesday evening, his debtor's check on a bank in a town fifteen miles away. The mail for that town closed at the post-office nearest to and three or four miles from the creditor's residence at 7:30 o'clock the next morning, and the next following mail closed on the same hour on Saturday, arriving at the town in which the bank was located between eleven A. M. and noon. The check was not sent by either mail. The bank stopped payment at noon on Saturday. It was held, that there was no laches in not sending the check on Thursday, nor on Saturday, because if the creditor had then sent it to his agent, the latter would have had at least all that day in which to present it, and that, therefore, the debtor was not discharged. Cox v. Boone, 8 W. Va. 500.

Time of Payment Limited—Must Be Presented before the Expiration of That Time.—Under the authority of an ordinance a city issued notes for the purpose of raising money. The time within which these

notes were redeemable was limited in the ordinance. Some of these notes not having been presented for payment within the prescribed time, it was held, that the holders of them were not entitled to set them off against taxes due the city, after the fund which had been provided for their payment by the city had perished, and after the expiration of the time limited for their redemption. Miller v. Lynchburg, 20 Gratt. 330.

Presentment on Fourth Day of Grace Insufficient in Absence of Usage—Where a bill is payable at a place or bank, at which there is a special established usage, that bills there payable shall be presented on the fourth and not on the third day of grace, such special usage must be alleged in the declaration upon such bill, otherwise proof of presentment on the fourth day of grace is not admissible. Jackson v. Henderson, 3 Leigh 196.

Presentment during War Illegal.—Presentment and demand of payment of a check made by a resident of Vicksburg upon a bank in New Orleans while commercial intercourse between Vicksburg and New Orleans was prohibited by the proclamation of the president, was illegal. Billgerry v. Branch, 19 Gratt. 393.

Presentment Must Be Made during Business Hours.—Where presentment is made at the place of business of the maker it must be during such hours when such places are customarily open, or at least, while some one is there competent to give an answer. Waring v. Betts, 90 Va. 46, 17 S. E. Rep. 739; Nelson v. Fotterall, 7 Leigh 179.

Paper Payable at Bank Must Be Presented during Banking Hours.—When an instrument is payable at bank it must be presented during banking hours; and the payer is allowed until the expiration of banking hours for payment. Waring v. Betts, 90 Va. 46, 17 S. E. Rep. 739.

Paper Not Payable at Bank or Place of Business.—But when the note is not made payable at bank, but to an individual, presentment may be made at any reasonable time during the day during what are termed business hours, which, it is held, range through the whole day to the hours of rest in the evening. Waring v. Betts, 90 Va. 46, 17 S. E. Rep. 739.

(4) *Place of Presentment.*

Paper Payable at a Particular Place Must Be Presented There.—Where paper is payable at a particular place due diligence requires that it shall be presented at that place, and it is incumbent upon the plaintiff to show compliance with this rule at the trial by suitable evidence. To charge the indorser it is indispensable that the instrument in question should be presented at the place therein designated, and unless this is shown by satisfactory evidence the indorser will be absolutely discharged. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

Same—West Virginia Statutory Rule.—But under Code of 1868 of West Virginia, ch. 99, sec. 1, a declaration against the maker of a promissory note payable at a particular place, need not aver presentment for payment at the time or place specified. Merchants', etc., Bank v. Evans, 9 W. Va. 373.

Presentment at Bank Excused Where Bank Has Ceased to Exist.—Although the note is made payable at a bank, presentment and demand for presentment at the bank within banking hours is excused if the bank has ceased to exist, and in such case presentment to and demand on the indorser of such note and manager of the bank made at his residence at 5:20 P. M. is sufficient to charge him. Waring v. Betts, 90 Va. 46, 17 S. E. Rep. 739.

Presentment to Cashier Must Be Made at His Bank.—In an action on a negotiable note payable at a bank, it is not sufficient to show that such note was presented for payment to the cashier of the bank at which it was payable, unless it further appears that such presentment was made to the cashier *at the bank*. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

Paper Payable at One Bank and Negotiated at Another.—A note negotiable and payable at the Farmers' Bank of Virginia, was in fact negotiated at the bank of the United States, with the knowledge and assent of the maker and indorser. Presentment of the note at the latter bank was held not sufficient to charge the indorser, though he assented to the negotiation of the note there; nor could any usage of the bank of the United States dispense with due presentment at the Farmers' Bank where it was payable. Watkins v. Crouch, 5 Leigh 522.

Presentment at Bank Not Necessary to Charge the Maker.—In an action against the maker and indorser of a note negotiable and payable at the Farmers' Bank of Virginia, it was held not necessary to aver and prove due presentment of the note and demand of payment at the bank, in order to entitle the plaintiffs to recover of the maker, but it was necessary, in order to entitle them to recover against the indorser. Watkins v. Crouch, 5 Leigh 522.

Presentment at the Office of an Authorized Agent.—A bank upon the cessation of its banking operations in a city, to wind up its affairs in that place put its notes, etc., falling due at that place in the hands of a private banker in that city, for collection, and made his office its office of discount and deposit, and of this the maker and indorsers of the note had notice. The presentment and demand of payment at the office of this private banker was held a sufficient presentment and demand. Crews v. Farmers' Bank, 31 Gratt. 348.

Note Negotiable at a Bank Not Necessarily Payable There.—In an action of debt on a promissory note, by the indorsee against the maker, the declaration stated that the note was only made negotiable at the bank of Virginia, and averred that the note at maturity was duly presented at the bank, and protested for nonpayment. The note offered in evidence, was made negotiable at the bank, and there was no proof that it was presented at the bank for payment. It was held, that a note made negotiable at a bank is not necessarily payable there also, and so the averment of presentation at the bank was wholly immaterial, and need not be proved. Barrett v. Wills, 4 Leigh 114.

c. PROTEST.

(1) *Necessity of Protest.*

To Fix Liability of Parties to Foreign Bills of Exchange.—By the law merchant, which is a part of the common law, protest of a dishonored foreign bill of exchange is ordinarily indispensable, and the attorney's certificate of protest proves itself; that is, it is *prima facie* evidence of presentment and nonacceptance or nonpayment. But the rule does not extend to promissory notes and inland bills. As to those, the protest is not regarded as an official act, and accordingly, in the absence of statute, is not receivable as evidence of dishonor. Corbin v. Planters' Bank, 87 Va. 661, 13 S. E. Rep. 98; Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

To Fix Liability of Indorsers of a Note—West Virginia Rule.—But in Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888, the court said: "As in the case

of foreign bills of exchange, so now, by virtue of our statute, due diligence requires that, if a negotiable note be dishonored for nonpayment, the holder is required to protest the same in order to charge the indorser. * * * In order to charge the indorser, it is not only necessary to aver and prove that the note at its maturity was presented for payment, and payment thereof demanded, at the place of payment designated in the note, but it must also be averred and proved that the note was protested for nonpayment and that notice of the dishonor of the note was duly given to the indorsers."

To Enable the Holder to Bring a Joint Action.—And in order to hold an indorser of a negotiable note liable in an action of debt, with the maker, it must appear that the note was duly and formally protested for nonpayment, and that the indorser was duly notified of such nonpayment and protest. Shields v. Farmers' Bank, 5 W. Va. 254.

Where Instrument Is Not Protestable by Virginia Law.—In the absence of proof that a bill or note sued on in Virginia was protestable by the law of the state where it was made payable, the presumption prevails that it was not. Corbin v. Planters' Bank, 87 Va. 661, 13 S. E. Rep. 98.

(2). *Time of Making Protest.*—Protest cannot be made until after the instrument becomes payable, and where a bill of exchange is protested for nonpayment and notice thereof given to the drawer before the bill according to its tenor and effect becomes payable, such protest and notice are premature, and fix no liability on such drawer to pay the bill, and the drawer's liability upon the bill is the same as if no protest had ever been made. Thornburg v. Emmons, 23 W. Va. 326.

But in a doubtful case it is proper for the jury to determine whether the protest was made after dishonor or not. Thus in an action of assumpsit by an indorsee against the drawers of a foreign bill of exchange drawn by merchants in Virginia on Liverpool, it appeared that the bill was presented to the drawee at Liverpool, and acceptance refused, on the 27th of March, and that the bill was put into the hands of a notary for the purpose of protest on the 28th. It was held a proper question for the jury to decide, upon the evidence, whether the refusal of the drawee to accept was within or after business hours of the 27th, so that the bill could be put into the notary's hands on that day, or not until the next day. Nelson v. Fotterall, 7 Leigh 179.

(3) *Protest as Evidence.*

To Prove Dishonor.—A protest of a foreign bill of exchange, in a foreign county is proved by the notarial seal. The protest is not conclusive, but only *prima facie* evidence of the dishonor of the bill. Nelson v. Fotterall, 7 Leigh 179.

But where a promissory note or inland bill is payable in another state, the notarial certificate of protest thereof made in that state is not evidence of dishonor, in an action brought thereon in the state of Virginia. Corbin v. Planters' Bank, 87 Va. 661, 13 S. E. Rep. 98.

As Evidence of Dishonor by Failure to Accept.—Where the protest of a foreign bill of exchange, stated that the notary took the bill to the counting house of the drawee and there exhibited it to a clerk of the drawee and demanded acceptance thereof; and that the said clerk replied that the same could not be accepted, it was held, that the protest was sufficient to bind the indorser, and parol evidence was admissible in an action by the holder against the indorser to prove that the clerk was authorized to refuse acceptance. Stainback v. Bank of Virginia, 11 Gratt. 260.

Of Facts Stated Therein.—Under W. Va. Code, sec. 7, ch. 51, sec. 8, ch. 99, the protest of a negotiable instrument is *prima facie* evidence of the facts "stated therein, or at the foot, or on the back thereof, in relation to presentment and dishonor, and notice thereof." Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888; Walker v. Turner, 2 Gratt. 534.

To Prove Presentment, Dishonor, and Notice.—But when the protest is the only evidence relied on to establish due presentment, dishonor, and notice, such protest must contain averments sufficient to show that everything requisite has been done on the part of the holder or his agent to authorize the demand upon the indorser. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

To Prove Notice.—And where a protest simply states that notice of dishonor was sent by mail to the indorser, directed to their "several addresses," such certificate, in the absence of all other evidence is insufficient to prove due notice. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

But in Slaughters v. Farland, 31 Gratt. 134, a certificate of a notary that he gave notice of a protest of a note for nonpayment sent by mail to the place of residence of the indorser while there was a mail communication between the place of starting and the residence, though not by the direct route, was held to be sufficient evidence of notice.

Copy of Protest.—A copy of a bill of exchange and notarial protest, with an affidavit of the payee that the original was lost or mislaid, was held not to be legal evidence to charge the drawer. Wright v. Hencock, 3 Munf. 521.

Aiding Protest by Extrinsic Evidence.—Where the protest itself did not state that notice of the dishonor of the note was given to the indorser, the affidavit of the notary stating that notice had been given, was held not competent evidence. Walker v. Turner, 2 Gratt. 534.

In an action of debt upon a negotiable note the plaintiff offered in evidence the protest of the notary, which stated the due presentment and demand of the note, the failure to pay, the protest for nonpayment, and the fact that notice of the protest had been forwarded to the makers of the note. It omitted to state that the notice had been forwarded to the indorser, who was the defendant. He then offered in evidence the *ex parte* affidavit of the notary, that he had forwarded it by mail, informing him of the protest and dishonor of the note. It was held, that such affidavit was not admissible to prove notice, in a case where the protest did not state that notice of the dishonor had been sent to the indorser. Walker v. Turner, 2 Gratt. 534.

Effect as Evidence Determined by the Court.—A notarial certificate of protest is in the nature of documentary evidence, and the proper construction as well as the legal effect thereof, as an instrument of evidence of the facts stated therein, are questions of law, to be determined exclusively by the court. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

Inferences on Demurrer to Evidence—Virginia Rule.—In an action of debt against the indorsers of a protested note discounted at the bank, the protest of the notary stated that "he placed in the postoffice of this place four written notices, one directed to the payer, and one directed to the two indorsers, at Blacksburg, Virginia, informing them," etc. On de-

murrer to the evidence it was held, that as the jury would have been warranted to infer from this evidence that the residence of the defendants was in Blacksburg the court must make the same inference upon a demurrer to evidence. Linkous v. Hale, 27 Gratt. 668. This case overrules the law as laid down in a headnote to Raine v. Rice, 2 P. & H. 529.

Same—West Virginia Rule.—But this case is disapproved by the West Virginia court, and it is held, that where the only evidence introduced to prove presentment, dishonor, and notice is contained in the notarial certificate of protest, the court, upon a demurrer to evidence, will not infer that any step was regularly taken, or that any fact existed, which is not certified to in the protest. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

And so where a certificate of protest simply states that notice was addressed to the indorser at a certain place, without adding that such place was the postoffice or residence of the indorser, the court, upon a demurrer to evidence, will not infer that such was the fact, and such certificate is, therefore, insufficient to prove due notice. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

Protest without Notarial Seal Admissible in Evidence.—And the want of a notarial seal is not sufficient to prevent the receipt of a certificate of protest signed by a notary of this state in evidence. Second Nat. Bank v. Chancellor, 9 W. Va. 69.

d. NOTICE OF DISHONOR.

(1) *Necessity of Notice.*

Knowledge without Notice Not Sufficient.—Notice of dishonor means notification of dishonor; and knowledge of nonpayment of the instrument by the party to be charged is not sufficient. Bank of Old Dominion v. McVeigh, 29 Gratt. 546; Brown v. Ferguson, 4 Leigh 37.

To Fix Liability of Drawers and Indorsers of Bills of Exchange.—The drawer of a bill of exchange, or order, is not directly liable to the payee or indorser, but his implied obligation or contract is to pay, in the event the amount is not paid by the drawee. The general rule is well established, that drawers and endorsers are entitled to prompt notice of the nonacceptance or nonpayment, in order that the former may look after his funds, and withdraw and secure the same, and that the latter may take the necessary steps to secure himself; and that upon the failure to receive such notice, they are discharged from liability; and the bill or order, as between the drawer and payee or indorsee, will be considered paid. Ford v. McClung, 5 W. Va. 156; Brown v. Ferguson, 4 Leigh 37; Thompson v. Cumming, 2 Leigh 321; Willock v. Riddle, 5 Call 358; Davis v. Poland, 92 Va. 225, 23 S. E. Rep. 292; Early v. Preston, 1 P. & H. 228; Wood v. Luttrel, 1 Call 232.

To Fix Liability of Indorsers of Notes.—So the indorser of a note is entitled to notice of dishonor of the instrument and a failure to use due diligence in giving him notice will discharge him. May v. Boisseau, 8 Leigh 181; Bank of Old Dominion v. McVeigh, 29 Gratt. 546; Brown v. Ferguson, 4 Leigh 37; Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888; Davis v. Poland, 92 Va. 225, 23 S. E. Rep. 292.

To Fix Liability of Drawer of Check.—The contract of the drawer of a check differs materially from the contract of the drawer of a bill of exchange. In order to hold the drawer of a check liable, the holder is not absolutely bound to present the check for the payment promptly, and the drawer is not absolutely entitled to notice of its dishonor. But the fact that a check is presumed to be drawn against deposited funds makes it of great importance that a check should be presented, and that the drawer should be notified of its nonpayment, in order that he may speedily inquire into the cause of refusal and be placed in a position to secure his funds which are deposited in bank. Therefore, where the holder of a check fails to present the check at the bank for payment within a reasonable time, or fails to give notice to the drawer of its dishonor, the drawer is discharged to the extent that he is prejudiced by such failure. Bell v. Alexander, 21 Gratt. 1; Purcell v. Allemong, 23 Gratt. 739; Cox v. Boone, 8 W. Va. 510; Devendorf v. W. Va. Oil, etc., Co., 17 W. Va. 174; Compton v. Gilman, 19 W. Va. 312.

To Fix Liability of Maker and Acceptor.—The contract of the maker of a negotiable note is an absolute one and it is of course never necessary to prove notice of dishonor to him, as he necessarily knows of the dishonor of the instruments through his own failure to pay; and the same is true of the acceptor of a bill of exchange. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888; Hays v. Northwestern Bank, 9 Gratt. 127; Hansbrough v. Gray, 3 Gratt. 356; Watkins v. Crouch, 5 Leigh 522.

To Fix Liability of Irregular Indorsers.—Where a negotiable promissory note is first indorsed by a stranger and then delivered to the payee, such irregular indorser, according to the West Virginia rule, is *prima facie* an original promisor or guarantor as the holder may elect. His liability is not governed by the strict rules of the law merchant, but is determined by the manner in which the holder elects to treat him. If the holder elects to treat him as a joint maker or guarantor, instead of an ordinary indorser, protest and notice of nonpayment are not necessary in order to bind him. Miller v. Clendenin, 42 W. Va. 416, 26 S. E. Rep. 512.

It has not been decided in Virginia whether an irregular indorser is entitled to notice of dishonor or not; but it is certainly necessary now under the provisions of sec. 63 of the Negotiable Instruments Law. See Call v. Scott, 4 Call 402; Fitzhugh v. Love, 6 Call 5; Frank v. Lilienfeld, 33 Gratt. 377. See *infra*, "Liabilities of Parties—Irregular Indorsers."

To Fix Liability of Accommodation Maker.—The maker of a note made for the accommodation of the payee, is not released by the failure to protest the note and give him notice of dishonor, though it is known to the holder that he is an accommodation maker of the note. Hansbrough v. Gray, 3 Gratt. 356.

To Fix Liability of the Endorser of Notes Made for His Accommodation.—Where notes are made for the accommodation of the payee, the payee is liable upon his indorsement without having been served with notice of protest and dishonor. McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

To Fix Liability of Accommodation Indorser.—An indorser is chargeable without notice if he indorsed for the drawer for accommodation only, and had no expectation that the drawee would pay. Farmers' Bank v. Vanmeter, 4 Rand. 553.

To Fix Liability of Endorser of a Nonnegotiable Instrument.—And it is a well-settled rule that a party whose name appears on the back of a nonnegotiable instrument, as assignor or indorser, is not entitled to notice of the dishonor of the instrument. Pitman v. Breckenridge, 3 Gratt. 127.

Notice of Failure to Accept Necessary.—In case of the dishonor of a bill of exchange by a failure

of the drawee to accept, it is just as essential that the holder have notice of the dishonor by such failure to accept, as it is for him to have notice of the failure to pay when presented for payment. Thompson v. Cumming, 2 Leigh 321.

Not Necessary to Notify All in Order to Hold One.—Where there are several indorsers to a negotiable instrument, the holder does not have to give notice of protest to all of them in order to bind one. Those who have received notice of protest are bound notwithstanding the fact that there are others who have not been notified. Cardwell v. Allan, 33 Gratt. 160.

Condition Precedent to Recovery.—The burden of proof that due presentment of a note for payment has been made, and due notice of protest thereof given to the indorser, or that due diligence has been used to give such notice, rests upon the plaintiff; and clear proof on his part of such presentment, dishonor, and notice is a condition precedent to his right to recover against the indorser. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888; Early v. Preston, 1 P. & H. 228.

Injury Implied from Failure to Give Notice.—In case of failure to give notice to the drawer of a bill upon its dishonor, the law implies injury to the drawer. Ford v. McClung, 5 W. Va. 156.

Penalty for Failure to Give Notice of Protest of Inland Bill.—The penalty for not giving notice of the protest of an inland bill of exchange, is the loss of interest and damages; but the principal is nevertheless recoverable. Willock v. Riddle, 5 Call 358.

(2) *Mode of Giving Notice.*

(a) **Where Parties Reside in Same Town.**

Personal Service Necessary.—The best evidence of notice is proof of personal service on the party to be affected by it, or by leaving a copy at his dwelling house. Depositing a notice in the postoffice affords but presumptive evidence of its reception, and is permitted to be substituted for the former only where the latter would be too inconvenient or expensive. Hence, when the convenience of the public post is not needed for the purposes of the transmission, as where the parties reside in the same city or town, there is no reason for its use, or for waiving the more stringent and certain evidence of notice. Therefore, where the parties reside in the same city or town the general rule is that notice must be delivered in person to the party to be charged, or left at his residence or place of business. Brown v. Bank of Abingdon, 85 Va. 95, 7 S. E. Rep. 357; Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888; McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

And this rule holds good even though the party to be charged resides outside of the town, but in the vicinity, if he receives his mail at this town. And in the absence of proof of a usage known to him at the time of entering into the contract notice must be left at his residence or dwelling; and notice deposited in the postoffice is not sufficient to charge him in the absence of proof of its actual receipt. Brown v. Bank of Abingdon, 85 Va. 95, 7 S. E. Rep. 357; Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

Distinction between Different Modes.—The distinction between the different modes of giving notice is this: That where the holder and indorser reside in different places, if the holder deposit the notice in the postoffice in due season, he has no further burden on him as to the actual receipt of it by the latter; but when the parties both live in the same town, the sender of the notice is bound to show that it was actually received by the indorser in due season, or left at his dwelling house, which in that case, is deemed equivalent to personal service. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

(b) **Where Parties Reside in Different Towns.**—Where the parties live at a distance from each other and in different cities or towns, so that personal service would be inconvenient and expensive, notice sent by mail to the nearest postoffice is sufficient to bind the party. Brown v. Bank of Abingdon, 85 Va. 95, 7 S. E. Rep. 357; McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

(3) *What Amounts to Sufficient Service by Mail.*

Deposit in Postoffice Sufficient.—The deposit of the notice in the postoffice, properly addressed and in proper time, is all that is required to charge the party so notified, and the sender has no further duty on him as to the actual receipt. Friend v. Wilkinson, 9 Gratt. 31; Farmers' Bank v. Gunnell, 26 Gratt. 137; McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

Party Equal Distance from Two Postoffices.—Where an indorser resided in a country district passing under a particular name, and having a postoffice within it; and being the same distance from that office and another out of the bounds of the district, a notice of protest sent to the first-mentioned office, was held sufficient, though in fact he was accustomed to receive his letters and papers from the other office. Rand v. Reynolds, 2 Gratt. 171.

Letter Deposited in Mail during War.—Where the holder and indorser resided in different localities at the time of the dishonor, and for months before and afterwards, the usual and ordinary intercourse by mail being intercepted by a state of war, it was held that the holder did not prove due diligence by simply proving that he deposited in this postoffice at the day of dishonor of the note, a notice of dishonor addressed to the indorser at his place of residence. Farmers' Bank v. Gunnell, 26 Gratt. 131.

And so notice of dishonor of a check deposited in the postoffice at New Orleans while that city was under permanent federal occupancy and control, and addressed to Petersburg, Va., during the pendency of the Civil War was of no avail, unless it was shown that the law or a general usage required the letter containing the notice to be preserved by the postmaster until the restoration of mail communication, and then forwarded to its destination. Billgerry v. Branch, 19 Gratt. 393.

Notice Sent by One of Two Equally Good Routes.—A bill drawn in Petersburg, Va., on a house in London, was protested for nonacceptance on the 5th of April 1843. The next Cunard steamer sailed from Liverpool for the United States on the 19th of that month, and notice of the dishonor of the bill was sent by that steamer. At that time these steamers carried the mail between the two countries under a contract with the British government, and it was the usual mode of transmitting letters. There were, however, regular lines of sailing packets between London and Liverpool and the United States, for which letter bags were made up at the London postoffice, and such packets sailed from London or Liverpool on the 7th, 10th and 17th of April 1843. But it was probable that the steamer of the 19th would arrive before any of them. The notice was held sufficient. Stainback v. The Bank of Virginia, 11 Gratt. 260.

Notice Addressed to "Legal Representative" of Party.—An indorser on a negotiable note died intes-

tate before the note became due. When the note became due it was regularly protested for nonpayment, and no person having then qualified as administrator on the estate of the indorser, the notary on the same day deposited in the postoffice of the town in which the note had been made payable, and discounted, the notice of protest directed to "the legal representative," of the indorser. This was held sufficient notice. Boyd v. City Sav. Bank, 15 Gratt. 501. The reason upon which this case is based is, that as no person had qualified as administrator on the estate, there was no one on whom personal service could be made, and it was, therefore, excused.

(4) *Time of Giving Notice.*

Where Parties Reside in Different Places.—If the party to be charged reside at a different place from the holder, the notice must be sent to him by the first mail which leaves after the day of the dishonor is passed, and does not close before early and convenient hours of the day succeeding the day of dishonor, directed to him at the place of his residence, or to his nearest postoffice, or to the postoffice where he usually receives his mail matter, advising him of the protest. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888; Corbin v. Planters' Nat. Bank, 87 Va. 661, 13 S. E. Rep. 98; Brown v. Ferguson, 4 Leigh 37

But where a note was due on the 14th of the month in New York, and on the 17th the holder received notice of its dishonor in Richmond, Virginia, which on the same day he forwarded to the indorser, there is no proof of due notice of dishonor, as it does not appear when the notice was mailed in New York. Corbin v. Planters' Nat. Bank, 87 Va. 661, 13 S. E. Rep. 98.

Any party to a bill of exchange, or a notary who protests it may give notice of its dishonor; and such notice will be sufficient, if it be sent by the notary on the day after or the next mail day after protest; or by any party thereto, on the day thereafter, or the next mail day after such notice is received by mail—excluding Sundays in both cases. Early v. Preston, 1 P. & H. 228.

Where Parties Live in Same Place.—Where the indorser lives in the same place where the note is payable, notice of protest given him on either the same day the demand is made or the next day is sufficient. Brown v. Ferguson, 4 Leigh 37.

Notice by Successive Indorsers.—If due notice is given by the holder to his immediate indorser, who, on receiving notice, transmits notice reasonably to his immediate indorser, the holder may recover against the latter, although he has never given him any notice, as notice by an indorser whose liability has been fixed inures to the benefit of all subsequent parties to the instrument; and this, regardless of the fact that the prior indorser did not receive notice as soon as he would have received it, had it been sent him by the holder, for the holder has a reasonable time to give notice to his immediate indorser, and this indorser has the same time in which to give notice to his predecessor, and so on. Big Sandy Nat. Bk. v. Chilton, 40 W. Va. 491, 21 S. E. Rep. 774; Brown v. Ferguson, 4 Leigh 37.

Successive Indorsers—Agent for Collection.—Every party to a bill of exchange is entitled to one full day, to give notice to the party next before him, of the dishonor of the instrument. This rule is applicable even to a party who is a mere agent for collection, and who indorses the bill only for the purpose of collection. Brown v. Ferguson, 4 Leigh 37.

Each Party Must Exercise Due Diligence.—Over diligence of one party to a bill does not supply the under diligence of others; and though the drawer or indorser sought to be charged, in fact receives notice as early as he would regularly be entitled to it, yet the holder, in order to charge him, is bound to show due diligence in each and every party through whose hands the bill has passed. The *onus probandi*, in such case, lies on the plaintiff, to prove due diligence, and not on the defendant to prove negligence. Brown v. Ferguson, 4 Leigh 37.

Burden Proving That Notice Was Mailed in Proper Time.—In an action upon a bill of exchange by an indorsee against an indorser, it appeared to be a proper case in which to send notice of protest by the mail, and it also appeared that such protest had not arrived at as early a date as in the regular course of the mail it might have come if started at the proper time. The burden of proof was held to be upon the plaintiff to prove that it was put into the mail at the proper time. Friend v. Wilkinson, 9 Gratt. 81.

Unreasonable Delay.—Wherever there is an unreasonable delay in giving notice to the indorser he will be discharged. A delay of two months is unreasonable, and a notice if sent there is of no effect to charge the indorser. Bank of Old Dom. v. McVeigh, 29 Gratt. 546.

Nonsecular Days Must Be Proved.—The courts will not take judicial notice of the fact that the next day after the protest, or receipt of notice thereof, is not a mail day; or the time it requires for a letter to go by mail between two given points. Such matters if material, must be proved. Early v. Preston, 1 P. & H. 228.

Notice of Protest of Foreign Bill under Act of 1848.—If notice of the protest of a foreign bill of exchange be given within eighteen months from the date of the bill, it will be sufficient under the act of 1848 (see Hen. Sts. 85), unless there be particular circumstances to warrant a departure from the general rule. Stott v. Alexander, 1 Wash. 331.

"Due Diligence" a Question of Law.—The question of due diligence in serving notice of dishonor of negotiable paper is a question of law, and if there be doubt or difficulty, in making proper deductions from the evidence, it must be solved by the court, as if the jury had not passed on the evidence. Early v. Preston, 1 P. & H. 228; Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

Excuses for Delay in Giving Notice.—Where the holder and indorser reside in different states or countries at the time of the indorsement and maturity of the note, and war arises between such states or countries between those periods, and continues to exist at the time of such maturity, the impossibility which thus arises of their giving such notice is a legal excuse for not doing so. The excuse, however, is not permanent, but is only for a delay until the impossibility ceases when due notice must be given. McVeigh v. Bank of Old Dom., 26 Gratt. 785; Farmers' Bk. v. Gunnell, 26 Gratt. 131; Tardy v. Boyd, 26 Gratt. 631.

(5) *Place of Giving Notice.*

Must Be Left at Place of Business or Residence, or Deposited in Postoffice.—Notice served by delivering a copy at the residence or place of business of the indorser is always sufficient to bind him whether he actually received it or not; and where the parties reside in different towns notice sent by mail addressed to the postoffice which is nearest to the indorser's residence or place of business, is sufficient.

Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888; McVeigh v. Bank of Old Dom., 26 Gratt. 785.

But notice of dishonor of a note left with a servant at the residence of an indorser, who was at the time a refugee in the confederate lines, was not sufficient, as the statute directing how notices may be given does not apply to notice of dishonor of negotiable paper. McVeigh v. Bk. of Old Dom., 26 Gratt. 785.

Temporary Residence.—Where a party has an actual domicil and a temporary residence it is a general rule that notice sent to such temporary residence will bind him. But where the party to be charged has ceased to reside at his temporary place of residence, notice there will be insufficient. Thus, where notice was left at the dwelling house of a member of congress in Washington after the adjournment of congress and after he had left the city, notice there was held to be insufficient. Bayly v. Chubb, 16 Gratt. 284.

Notice Sent to Wrong Place after Due Inquiry.—Where the holder using due diligence to ascertain the place of residence of the indorser is wrongly informed, and transmits notice by mail according to such information, the liability of the indorser becomes thereby fixed and absolute, and the holder is not bound to give any other notice, even though he may afterwards be informed correctly as to the residence of the indorser. McVeigh v. Bank of Old Dom., 26 Gratt. 785.

e. EXCUSES FOR WANT OF PRESENTMENT, PROTEST, AND NOTICE.

Notice May Be Expressly Waived.—The consequences of neglect to give notice may be waived by the person entitled to take advantage of the failure, but the act which is to operate as a waiver must be the act of the indorser himself. May v. Boisseau, 8 Leigh 181; Dey v. Martin, 78 Va. 1.

Waiver is Intentional Relinquishment of a Known Right.—Where an indorser of a negotiable note executed a trust deed to the holder in ignorance of the fact that the holder had extended time to the maker, by which extension the indorser is released, the trust deed was enjoined. Giving the trust deed did not amount to a waiver, as a waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it. Dey v. Martin, 78 Va. 1.

Unequivocal Promise to Pay is a Waiver.—Although a promise to pay by an indorser, with full knowledge of all the facts, and of the laches of the holder, may be held in point of law to amount to waiver of the right to notice, yet this rule must be taken with this qualification: the promise to be obligatory must be deliberately made in clear, explicit language, and must amount to an admission of the right of the holder, or of a duty and willingness of the indorser to pay. If, therefore, the conduct or acts of the indorser be equivocal, or the language used be of a qualified or uncertain nature, the indorser will not be held responsible. A conditional promise to pay, or an offer to pay in a certain manner, is not binding, as a waiver of the rights acquired by the laches of the holder, if the terms be not accepted. Tardy v. Boyd, 26 Gratt. 631; Pate v. McClure, 4 Rand. 164.

Offer to Pay in Depreciated Currency.—But an offer by an indorser to pay the debt in depreciated currency, which offer is refused, is not sufficient to excuse notice, for as soon as the offer to pay in such currency is refused the parties stand upon their former footing, the offer not constituting a waiver. Tardy v. Boyd, 26 Gratt. 631.

Acknowledgment of Debt by the Indorser.—If the drawer of a protested bill of exchange, being applied to in behalf of the holder for payment, acknowledges the debt to be just and promises to pay it, saying nothing about his having received notice, the holder in an action of debt upon the bill, against such drawer, is not bound to prove that notice was given him of the protest. Walker v. Laverty, 6 Munf. 487; Pate v. McClure, 4 Rand. 164.

Thus, in an action on a bill of exchange, the defendant required proof of notice of protest for nonpayment of the bill. The plaintiff introduced a witness, who proved, that he applied to the defendant for payment of the said bill, who acknowledged that the debt was a just one, and said he would pay it; nothing was said as to his receiving notice. The defendant moved the court to instruct the jury that unless the acknowledgment was made, with the knowledge of all the facts in the case, as to the laches of the holder of the bill, the evidence of acknowledgment was not to be received. The court refused to give such instruction, and instructed the jury that such acknowledgment was a waiver of notice. This instruction was held proper on appeal. Pate v. McClure, 4 Rand. 164.

Where Residence of Indorser Cannot Be Found by Due Diligence.—Where the holder uses due diligence to ascertain the place of residence of the indorser at the time of the maturity of the note without being able to do so, he is altogether excused for giving such notice, and the liability of the indorser then becomes fixed and absolute, and the holder is under no obligation to give such notice even though he may afterwards discover the place of the residence of the indorser. McVeigh v. Bank of Old Dom., 26 Gratt 785.

Where Indorser Receives Assets of Maker.—The assignment of property by the maker of a note to the indorser to relieve him against his contract of indorsement is not a sufficient excuse for failure to make presentment, and give the indorser notice of dishonor, unless the property so assigned is adequate to indemnify the indorser against all possible loss by his contract of indorsement. Watkins v. Crouch, 5 Leigh 522.

Conveyance in Trust by Indorser to Secure His Contract of Indorsement.—Where an indorser of a negotiable instrument executes a deed of trust to a trustee as collateral security for his contract of indorsement, the property conveyed by the deed of trust may be subjected and sold, and it is not incumbent upon the holder of the instrument to give the indorser notice of protest of the instrument in order to subject this property. Cardwell v. Allan, 33 Gratt. 160.

Knowledge of Insolvency by Drawee Not Sufficient Excuse.—Knowledge of the insolvency of a drawee of a bill, or of the fact that the bill will be dishonored, does not excuse the holder from notifying the drawer of protest for nonpayment. Until the drawer or indorser receives such notice, he has no reason to conclude that resort will be had to him. Brown v. Ferguson, 4 Leigh 37.

Promise to Accept Counter Draft No Excuse.—A promise of a drawer of a bill of exchange to accept a bill to be drawn on him by the drawees, to enable him to take up his bill, has not the effect of a waiver of notice to such drawer. Brown v. Ferguson, 4 Leigh 37.

Where Drawer Has No Reasonable Grounds to Draw.—Where the drawer of a bill of exchange has no reasonable grounds to draw he is not entitled to notice of the dishonor of the instrument. But it is not necessary that the bill should be drawn on funds in order to entitle the drawer to notice. Thus, where the drawer had no funds with the drawee, he was held entitled to notice of dishonor where the previous course of dealing between the parties furnished reasonable ground to draw. Thornburg v. Emmons, 23 W. Va. 325.

Fraudulent Indorser Is Not Entitled to Notice.—An indorser, who unites with the drawer to deceive the holder, by representing a bill as one that will probably be accepted, with a knowledge that it will not, is guilty of a fraud, which deprives him of the right to insist upon notice. Therefore, an indorser who indorsed a bill of exchange for the accommodation of the drawer, for the purpose of procuring a discount at the bank, and who had no expectation that the bill would be paid by the drawee, was held not entitled to notice. Farmers' Bank v. Vanmeter, 4 Rand. 553.

War a Temporary Excuse.—A state of war which intercepts intercourse by the ordinary and usual course of mail between the holder and the indorser of a note, excuses the holder from giving notice of dishonor so long as such interruption continues; but due diligence on the part of the holder requires that he should forward notice to the indorser as soon as interruption ceases. Farmers' Bank v. Gunnell, 26 Gratt. 131; McVeigh v. Bank of Old Dom., 26 Gratt. 785; Tardy v. Boyd, 26 Gratt. 631.

Law Dispensing with Notice Unconstitutional as to Existing Instruments.—The ordinance of Virginia convention passed June 24, 1861, which provided that in cases specified the parties to negotiable instruments in such cities and towns (as before specified), shall remain bound after the maturity of such instruments, without demand, protest or notice as if the requirements of the law in that respect had been complied with, was as to instruments made and discounted before its passage, in violation of the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of the contract." Farmers' Bank v. Gunnell, 26 Gratt. 131.

Verdict of Jury Should Find Excuses.—Upon the question whether or not the drawer has received or is entitled to notice of the dishonor of the instrument, a special verdict of the jury in such case ought to find the causes which would excuse the delay in giving notice, if any such existed. Brown v. Ferguson, 4 Leigh 37.

2. OF NONNEGOTIABLE PAPER.

Must Bring Suit against Maker Generally.—The general rule is that due diligence must be used by the assignee, in bringing suit against the maker, before the assignor can be sued. But there are many cases in which no suit need be brought against the maker, as where the note was a forgery, and the assignor has received the money from the assignee, or where the assignor practiced a fraud upon the assignee, or where exchange notes were given between the maker and the assignor, as a consideration for each other, and the note given by the assignor has never been paid by him nor sued upon. There is no obligation on the assignee to pursue the bail of the maker before suing his assignor. Caton v. Lenox, 5 Rand. 31; Lee v. Love, 1 Call 497.

Holder Cannot Set Off a Claim against Maker.—So in Mandeville v. Patton, 3 Call 9, it was held that the assignee of a promissory note negotiable at the bank of Alexandria, could not offer it as set-off, to a suit brought against him by the assignor, upon a note in writing to deliver to the plaintiff goods and groceries to a certain amount, because in such case the assignee must first proceed against the maker.

Must Sue the Maker within a Reasonable Time.—And in Thompson v. Govan, 9 Gratt. 695, an assignee of a note who had delayed suing the maker for two years, was not allowed to recover the amount of the note in an action against the assignor, in the absence of proof of the maker's insolvency at the time, or shortly after the note fell due.

Must Bring a Valid Suit against Maker.—And it is not sufficient exercise of due diligence on the part of the assignee of a promissory note to bring a suit against the maker, which fails because of informality in the proceedings; but he must bring a sufficient suit, before he can charge the assignor. Bronaugh v. Scott, 5 Call 78.

Record of Suit against the Maker Must Be Certain.—In order for the holder of a promissory note to sue the assignor he must show that he has used due diligence to collect the note from the maker. Where the evidence of the holder's due diligence consists of the record of a suit brought against the maker, this record must be certain to every intent. Hooe v. Wilson, 5 Call 61. In this case an assignee in blank of the payee of the promissory note indorsed it in blank to a firm under a special agreement. One of the partners filled up the blank indorsement to himself, brought suit against the maker, obtained judgment, and issued a *fi. fa.* which was returned, "no effects." This partner then brought suit against the assignor. It was held, that the record of the suit against the maker was not proof of a suit upon the note assigned by the defendant, because that record stated an assignment to that partner individually, while in fact the assignment was made to the firm, and the partner individually had no title to the note.

Exceptions to Necessity of Suing Maker.—As a general rule it is necessary for the holder of a promissory note to sue the maker before he can proceed against the indorser; but to this rule there are exceptions. One of the instances in which it is not necessary to proceed against the maker is where he has been discharged in bankruptcy under the bankrupt laws of the United States, or the insolvent laws of a state, or that the drawer was actually insolvent, so that a suit against him would have been wholly unavailing. Brown v. Ross, 6 Munf. 391.

The object of the suit by the assignee against the maker of a note, is to ascertain his ability to pay the money. If his inability can be ascertained, to every reasonable certainty, by any other means, there is no necessity of a suit against him, and recourse may be had, in the first instance, under such circumstances, to the assignor. Therefore, where the maker of a note was notoriously insolvent, the assignee was allowed to proceed against the assignor in the first instance. Saunders v. Marshall, 4 H. & M. 455. See Caton v. Lenox, 5 Rand. 31.

And where exchange notes have been given between the maker and assignor of a note as a consideration for each other, and the note given by the assignor has never been paid by him, nor sued upon, the assignee need not bring suit against the maker in order to charge the assignor. Caton v. Lenox, 5 Rand. 31.

Assignee Must Proceed against Acceptor.—A party

having a claim for a debt in suit, assigned that claim for a valuable consideration, and wrote a letter to his attorney entrusted to prosecute and collect the claim, informing him of the assignment, and requiring him to pay the money when collected, to the assignee. The attorney accepted the order, payable when collected. He afterwards collected the money, and became insolvent before paying it over to the assignee. It was held, that the assignor and drawer were not liable to the assignee, unless he had used due diligence to recover the money from the acceptor of the order, and given the assignor and drawer notice of the acceptor's failure to pay. Wood v. Duval, 9 Leigh 6.

Burden of Proving Due Diligence.—In an action by an assignee against the assignor of a promissory note, the plaintiff, in order to maintain his action, must show that the maker was insolvent at the time the note was made, or fell due, or that he has used due diligence to recover from the maker, and failed. Drane v. Scholfield, 6 Leigh 386. In this case the maker of the note had removed to an adjoining state. Whether or not the assignee was bound to pursue the maker in the adjoining state in order to entitle him to proceed against the assignor, was left undecided. But it was held, that whether he was bound to pursue the maker or not, he might elect to do so; and as he had made his election to do so, and failed to commence or prosecute his suit against the maker, he had no recourse against the assignor. See monographic *note* on "Assignments" for a full discussion of this subject.

Statute of Limitations.—Action upon a note is barred by the statute of limitations by the lapse of five years after date of the note, before the bringing of the action. Watson v. Hurt, 6 Gratt. 633.

VII. LIABILITIES OF PARTIES.

1. THE MAKER.

Maker's Contract is Absolute.—The contract of a maker of a negotiable note is an absolute one. His contract is to pay at all events and he is liable for the amount of the note without presentment, demand, protest, or notice thereof. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888; Hansbrough v. Gray, 3 Gratt. 356; Hays v. Northwestern Bank, 9 Gratt. 127; Watkins v. Crouch, 5 Leigh 522.

Note in Singular Number Signed by Two is Joint and Several.—A promissory note in the singular number, but signed and sealed by two persons, is joint and several. Holman v. Gilliam, 6 Rand. 38.

Maker Conclusively Presumed to Know His Own Signature.—If one pays a forged note purporting to be made by him he cannot recover back the amount. Johnston v. Com. Bank, 27 W. Va. 343.

Surety in a Note Treated as Principal.—Where one of two or more makers of a joint and several promissory note is surety, he is liable to the payee as principal; and except in special cases provided by statute, the holder of such note has the same legal rights against such surety as he has against the principal debtor. Merchants' Nat. Bank v. Good, 21 W. Va. 455.

Where Maker Leaves the State Statute of Limitations Stops Running.—And where a party makes a negotiable note payable in one state and then leaves that state and goes to another state and continues to reside there, he will be considered as a person who has obstructed the payee in the prosecution of his right of action on such note during his absence from the state, and, under the statute, the time which he has been absent from the state is to be excepted from the operation of the statute of limitations. Heflebower v. Detrick, 27 W. Va. 16.

Survivor of Joint Makers Alone Liable under Statute.—The surviving obligor in a joint note, made before the act of 1786 (Rev. Code, p. 31), is alone liable to an action at law; nor can the note be set up in equity against the representatives of the deceased obligor, but on the ground of a moral obligation antecedently existing on his part to pay the money. Chandler v. Hill, 2 H. & M. 124.

Liability of Maker for Interest.—In an action in Virginia upon a note made in Maryland, on which more than six per cent. interest was charged, the plaintiff may recover the principal and six per cent. interest, and where a separate note was given for the excess of interest, which is still in the hands of the plaintiff unpaid, he will be permitted to recover the principal of the note sued on and six per cent. interest thereon. Fant v. Miller, 17 Gratt. 47.

2. THE DRAWER OF A CHECK.—The liability of the drawer of a check is different from that of the maker of a note, in that it is not an absolute liability, and it is different from that of the drawer of a bill of exchange in that it is more binding. The drawer of a check is absolutely liable to pay the check unless he is prejudiced by the laches of the holder, and this is the only peculiarity of the liability of the drawer of the check. Bell v. Alexander, 21 Gratt. 1; Purcell v. Allemong, 22 Gratt. 739; Cox v. Boone, 8 W. Va. 510; Devendorf v. W. Va. Oil, etc., Co., 17 W. Va. 174; Compton v. Gilman, 19 W. Va. 312. See *ante*, "Notice—Necessity of Notice."

3. INDORSERS.

Indorser's Contract is Conditional.—The contract of an indorser of a negotiable note is conditional. His undertaking is that if, upon due diligence having been used against the maker, the money is not paid, he will become liable for it. The due diligence is a condition precedent to a right of recovery against him. Being only collaterally and conditionally responsible, the indorser must be dealt with with the utmost strictness. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. Rep. 888.

Indorsement Both a Transfer and a Contract.—An indorsement on a note, bill, or draft is not merely a transfer, but is a fresh and substantive contract, embodying all the terms of the instrument indorsed, and binding the indorser, though the instrument be void. Nichols v. Porter, 2 W. Va. 13.

Indorser Considered as Drawing a New Bill.—The indorser of the note is not only considered as warranting the note, but as drawing a new bill; and thereby rendering himself immediately liable to every indorsee to whom it may, for a valuable consideration, be assigned. Every subsequent indorser is considered in the same light: and the *bona fide* owner of the note, if he does not receive payment of the maker, may, at his election, bring suit against him, or against any indorser, however remote. If he recovers against a remote indorser, such indorser has the same remedy against the maker of the note, or any prior indorser, as the owner of the note had against him. The currency and credit of such notes is aided by such a construction; for then, the more indorsers, the more security. Dunlop v. Harris, 5 Call 16.

Liability as between Immediate Parties Prima Facie Merely.—But as between the immediate parties, or as to any party having notice, the liability of one whose name is indorsed on negotiable paper is *prima facie* merely, and he may show any facts and circumstances, as against his immediate indorsee,

which would constitute a good defence to any other written contract. Hence, he may prove that the party whose name is indorsed below him, really indorsed before him, in point of time. Quarrier v. Quarrier, 36 W. Va. 310, 15 S. E. Rep. 154; Faulkner v. Thomas (W. Va.), 35 S. E. Rep. 915.

Order of Liability is Successive Not Joint.—When several persons indorse a bill or note in succession, the legal effect is to subject them, as to each other, in the order they indorse. The indorsement imports a several and successive, not a joint, obligation, whether the indorsement be made for accommodation, or for value received, unless there be an agreement *aliunde* different from that evidenced by the indorsements. When the successive indorsements are for accommodation of other parties, the indorsers for accommodation may make an agreement to be jointly and equally bound, but whoever asserts such agreement must prove it. In cases, therefore, in which no such agreement is proved, the indorsers are not bound to contribution amongst themselves, but each and all are liable to those who succeed them. 1 Daniel, Neg. Inst. § 703; Willis v. Willis, 42 W. Va. 522, 26 S. E. Rep. 515; Bank of U. S. v. Beirne, 1 Gratt. 234; Nat. Bank v. Bates, 20 W. Va. 210; Stovall v. Border Grange Bank, 78 Va. 188.

Joint Indorsement Does Not Always Import Joint Liability.—But the name of the payee of a bill cannot be endorsed thereon jointly with that of other persons, so as to make them all jointly liable as indorsers; and, therefore, a power authorizing an attorney to indorse the names of the principals jointly on a bill is not complied with by making the bill payable to one of the principals and indorsing upon the same the names of all the principals. Bank of U. S. v. Beirne, 1 Gratt. 539.

Positions of Indorsers' Names Changed without Consent.—The third indorser indorsed a note on the faith of the solvency of a prior indorser. On the renewal of the note, the order of the endorsements were changed, without the consent of this third indorser, who for the convenience of renewing the note, had left his blank indorsement with the makers. It was held, that a court of equity would grant him relief as against the indorser who should have preceded him. Slagle v. Rust, 4 Gratt. 274.

Time of Indorsement as Affecting Indorsers' Liability.—The first indorser of a note in point of time, is not, of course, first responsible. If the payee of a note writes his name over that of a person who indorsed the same in blank before delivery, but did so only on the ground of the payee's responsibility as first indorser, the payee will be liable as such in point of contract, though second in point of time. Chalmers v. McMurdo, 5 Munf. 252, 7 Am. Dec. 684.

Agreements between Indorsers as to Their Ultimate Liability.—It is not a fraud in the holder of a bill of exchange, to make an arrangement with one of the indorsers, by which it is agreed that the whole burden shall be thrown upon the other indorsers, and that the indorser first mentioned is to be liable only in case they should be unable to pay. Farmers' Bank v. Vanmeter, 4 Rand. 553.

Parol Evidence Inadmissible to Vary the Liability of the Indorser.—In an action by an indorsee against his immediate indorser, upon a protested bill of exchange, parol evidence of an agreement made between them, at the time of the indorsement, which would vary the legal liability of the indorser under his indorsement, is inadmissible. Woodward v. Foster, 18 Gratt. 200.

Effect of Indorsement of a Void Instrument.—Although a bill or note be declared void by statute, so that the drawer or maker is discharged from liability to any subsequent holder, yet any person who indorses such paper to a *bona fide* holder for value is liable on his indorsement, notwithstanding the invalidity of the instrument; because by indorsing he represents that the paper is genuine, and warrants that it will be paid. Moffett v. Bickle, 21 Gratt. 290; Nichols v. Porter, 2 W. Va. 13.

Transfer of Note after Protest Does Not Affect Indorser's Liability.—The liability of an indorser of negotiable paper is not affected by the fact of its transfer to a party responsible therefor after it has been protested for nonpayment. Nichols v. Porter, 2 W. Va. 13.

Law of Place of Transfer Governs Transfer.—The assignor of an instrument is not liable as an indorser, if the paper is nonnegotiable according to the laws of the state where it was transferred, although it may have been negotiable under the laws of the place where it was made. Nichols v. Porter, 2 W. Va. 13.

4. IRREGULAR INDORSERS.

Irregular Indorser Defined.—An irregular or anomalous indorser is a person, not the payee in the instrument, who places his name upon the back of it before it is delivered to the payee. He is not an indorser in the true sense, as the object of placing his name upon the paper is not to effect a transfer of it, but is generally intended to operate as additional security for the paper. Frank v. Lilienfeld, 33 Gratt. 377; Miller v. Clendenin, 42 W. Va. 416, 26 S. E. Rep. 512.

Relation to the Instrument May Be Shown by Extrinsic Evidence.—When a negotiable promissory note made payable to a particular person or order, is first indorsed by a third person, and then delivered to the payee, such indorser is *prima facie* an original promisor or guarantor, as the payee may elect, or the payee may by indorsing his name above that of such third person, and transferring the note, make him a second indorser in the commercial sense. But the true nature of the transaction, and the understanding of the parties to it at the time, may be shown by parol proof, and such proof may destroy this right of election by the payee, and the third person backing such note may be held liable only as an original promisor, or as a guarantor, or as an indorser, according to the nature of the transaction, and the original understanding of the parties to it. If it is shown by evidence that such third person signed his name on the back of such a note at the time it was made as security for the maker and for his accommodation, to give him credit with the payee, such proof does not alter the right of the payee to hold him bound as original promisor, or as guarantor, or as indorser, as he may elect, but strengthens his *prima facie* right to elect; such option may be exercised at any time by the payee, and so long as he holds the note, may be changed at his pleasure, even after the institution of a suit by him against such third person. If it be shown that the understanding between such third person and the payee at the time of the transaction, was that such third person should be bound only collaterally, such understanding will destroy the right which the payee would have otherwise had, of electing to hold him bound as original promisor. Watson v. Hurt, 6 Gratt. 633; Orrick v. Colston, 7 Gratt. 189; Kearnes v. Montgomery, 4 W. Va. 29; Burton v. Hansford, 10 W. Va. 470; Long v. Campbell, 37 W. Va. 665, 17 S. E.

Rep. 197; Roanoke, etc., Co. v. Watkins, 41 W. Va. 787, 24 S. E. Rep. 612; Miller v. Clendenin, 42 W. Va. 416, 26 S. E. Rep. 512.

And this rule applies to irregular indorsers of nonnegotiable paper, as well as to irregular indorsers of negotiable paper. Watson v. Hurt, 6 Gratt. 683; Orrick v. Colston, 7 Gratt. 189; Kearnes v. Montgomery, 4 W. Va. 29.

Extrinsic Evidence to Show Intention of Parties.—So where it appears that it was the intention of a party to be bound as an ordinary indorser when he placed his name upon the instrument, his liability is not affected because of the peculiar position of his name upon the paper, but he will be held to the liability which he intended to assume. Frank v. Lilienfeld, 33 Gratt. 377.

Indorsement Made for Additional Security.—So in Call v. Scott, 4 Call 402, a party who placed his name upon a bill of exchange as an irregular indorser was allowed to recover the amount of the bill from the drawer, upon proving that he only endorsed the note as security.

Extrinsic Evidence Inadmissible to Change the Contract.—A blank indorsement by a person who is not the payee of a note, and who is not a regular indorsee, imports a guarantee, and this guarantee cannot be altered by proof of a parol agreement, at the time of the execution of the note, that the note was not to be paid until the happening of a contingent future event. Watson v. Hurt, 6 Gratt. 683.

5. ASSIGNORS.—An assignor of nonnegotiable paper is not liable for its payment, unless it be shown that the maker was insolvent at the time the note fell due, or at the time of its assignment, if assigned after it became due, or that due diligence has been used against the maker without recovering the money, or by the use of due diligence the money could not have been made. Nichols v. Porter, 2 W. Va. 13. The liability of the assignor will be found fully treated in a monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

6. TRANSFERRER WITHOUT INDORSEMENT.—One who, for value transfers a negotiable note without an indorsement, thereby guarantees the genuineness of the instrument, but not the solvency of the parties thereto. In such case, it is immaterial whether the person making the transfer received the consideration for his own use, or for the use of another, unless he is acting as agent, and discloses not only his agency, but the name of the principal for whom he is acting. Lyons v. Miller, 6 Gratt. 427, 52 Am. Dec. 129.

7. ACCOMMODATION PARTIES.

Accommodation Paper Not Binding until Negotiation.—Although a negotiable note on its face imports a debt due from the maker to the payee, and the indorsement imports a debt from the first indorser to the second, yet an accommodation note is not available as a security for money, until it is issued or negotiated to some real holder for valuable consideration. Until such note is so negotiated, it is a mere blank piece of paper, in no manner binding on the makers or indorsers. Whitworth v. Adams, 5 Rand. 342; May v. Boisseau, 8 Leigh 193. An indorser on an accommodation note has a right to retract his indorsement at any time before the negotiation of the note to a *bona fide* holder for value. And his right to retract such indorsement is not affected by a conveyance of property to him by the maker of the note to indemnify him against his indorsement. May v. Boisseau, 8 Leigh 192; Berkeley v. Tinsley, 88 Va. 1001, 14 S. E. Rep. 842.

And although the paper has been pledged for a certain sum, an accommodation indorser, while of course remaining liable for the amount advanced, may revoke his indorsement and prevent the further discount of the instrument. Berkeley v. Tinsley, 88 Va. 1001, 14 S. E. Rep. 842.

Accommodation Indorsers Liable Successively in Absence of Contract.—It is the established rule that the parties to ordinary commercial paper negotiated for value in the regular course of business are liable to each other in succession as their names appear upon the instrument. In the absence of special agreement, the same rule applies to successive accommodation parties, and a subsequent accommodation indorser who has been compelled to meet the obligation may maintain an action upon the instrument against any prior accommodation party and recover the whole amount paid. Robertson v. Williams, 5 Munf. 381; United States Bank v. Beirne, 1 Gratt. 265; Hogue v. Davis, 8 Gratt. 4.

Where several indorsers of negotiable paper have indorsed it for the accommodation of the maker, they are responsible in the order of their indorsements, unless there has been an agreement among them to be jointly and equally bound: and the burden of proving such an agreement is upon the prior indorser who seeks the benefit of it. Hogue v. Davis, 8 Gratt. 4.

Order of Liability Changed by Agreement.—Where an accommodation indorser or security of a note, on which judgment has been obtained, purchases real estate from the principal debtor who retained the lien for the purchase price, and it is a matter of contract between them, at the time of the sale, that the indorser or surety shall assume the payment of the judgment, the relation of the parties *inter se* is changed. The indorser or surety becomes the real debtor, and the principal debtor the surety; and the latter has the right to require that the lien of the judgment shall be enforced against the real debtor for his exoneration. Rhea v. Preston, 75 Va. 757.

Indorser for Accommodation is a Surety.—An indorser of a negotiable note who indorses for the accommodation of the maker, is a surety of the maker, and if time of payment is extended by the holder to the maker by a binding agreement without the consent of such indorser, the indorser is thereby released. State Sav. Bank v. Baker, 93 Va. 510, 25 S. E. Rep. 550; Dey v. Martin, 78 Va. 1.

What Is Not an Accommodation Note—In a contract for building a house it was agreed between the contractor and the employer, that the house should be paid for in notes of the employer, to be delivered to the contractor as the work progressed, and at times when a third party should say that the contractor had completed enough work to entitle him to the notes. The first note was properly issued. Before the contractor was entitled to the second note, it was delivered to him by the employer at the request of the contractor. This note though given to the contractor to accommodate him is not an accommodation note in the legal sense, but is a note founded upon a valuable consideration and is enforceable. Ould v. Myers, 23 Gratt. 383.

Right of Accommodation Indorser Who Pays after Protest—An accommodation indorser of a negotiable note who pays the note after protest, has only the right of a surety, to be fully indemnified for his payment on account of his principal. This indemnity is fully secured by the payment to him by the

principal of the value paid by the surety. Burton v. Slaughter, 26 Gratt. 914.

VIII. DISCHARGE AND PAYMENT.

1. BY EXECUTION OF NEW NOTE.

Execution of New Note No Payment unless So Intended.—The general rule is that the debtor's own note does not operate as the payment of an antecedent note unless so intended by the parties. In the absence of such intention, express or implied, the note is treated as a conditional payment merely. Hopkins v. Detwiler, 25 W. Va. 734; Lazier v. Nevin, 3 W. Va. 622; Miller v. Miller, 8 W. Va. 550; Poole v. Rice, 9 W. Va. 73; Dunlap v. Shanklin, 10 W. Va. 662; Bantz v. Basnett, 12 W. Va. 772; Sayre v. King, 17 W. Va. 562; Bank v. Good, 21 W. Va. 455; Farmers' Bank v. Mut., etc., Soc., 4 Leigh 88; Moses v. Trice, 21 Gratt. 556; Lewis v. Davisson, 29 Gratt. 216; First Nat. Bank of Parkersburg v. Handley (W. Va. 1900), 37 S. E. Rep. 536; Morriss v. Harveys, 75 Va. 726; Hess v. Dille, 23 W. Va. 90; Taylor v. Bank of Alexandria, 5 Leigh 471.

Where the Debt is Passed into Judgment Same Rule Applies—And if the note is passed into judgment, the same rule applies; the new note is considered simply as a conditional satisfaction of the judgment, and upon the dishonor of the former, the latter revives and may be enforced at law or in equity. When the parties provide for the extinguishment of the judgment, it may be fairly presumed that they contemplate the extinguishment of the debt upon which it is founded. Where a substituted note was accepted in satisfaction of a judgment the court presumed in the absence of evidence to the contrary that it was accepted in satisfaction of the debt represented by the judgment. Morriss v. Harveys, 75 Va. 726; Feamster v. Withrow, 12 W. Va. 611.

Several Small Notes Given for a Large One—And where several small promissory notes were given for a large one, they were held to be no satisfaction for the larger one, unless paid, and suit was allowed to be maintained on the larger one. McGuire v. Gadsby, 3 Call 234.

Where the New Note is That of a Stranger.—But where the new note is that of a third party not previously bound for the debt the taking of such new note and the surrender of the old, will be treated *prima facie* as a discharge of the old note, and a release of the maker thereof from personal liability. But where the debt is a lien on land of which the maker of the new note has become the purchaser and as a part of the consideration therefor assumed to pay said debt, such new note given by such purchaser and surrender of the old note will not extinguish the lien on the land or be regarded as a payment of the debt, but will discharge the old note and operate *prima facie* as a release of the makers of the old note from responsibility of the old debt. Hess v. Dille, 23 W. Va. 90.

Part Payment and Execution of New Note for Residue.—So where a part of a debt is paid before a note becomes due, and a new note is executed by the debtor for the residue, and the express agreement made between the parties that the old note shall be surrendered, such agreement is founded upon a valuable consideration and extinguishes the old note, and no suit can be brought thereon. Bantz v. Basnett, 12 W. Va. 772.

Note Made by New Parties and Agreement to Surrender Old Note.—In Dages v. Lee, 20 W. Va. 584, the acceptance by a creditor, of a note of a partner and his wife with an express agreement to surrender the evidence of the partnership debt, was held to operate as a discharge of the partnership debt. And the neglect of the creditor to surrender the evidence of the partnership debt according to his agreement, did not constitute a failure of consideration of the note, or release the makers.

Where There is an Agreement to Accept the Note in Payment.—But, of course, where there is an express agreement between the parties to accept the new note in full satisfaction of the old this agreement will control Merchants' Nat. Bank v. Good, 21 W. Va. 455; Hopkins v. Detwiler, 25 W. Va. 734; Morriss v. Harveys, 75 Va. 726; First Nat. Bank of Parkersburg v. Handley (W. Va. 1900), 37 S. E. Rep. 536; Poole v. Rice, 9 W. Va. 73; Dunlap v. Shanklin, 10 W. Va. 662; Hess v. Dille, 23 W. Va. 90; Moses v. Trice, 21 Gratt. 556.

Agreement to Accept in Full Satisfaction Procured by Fraud.—But whether a note is that of one previously bound, or of a stranger, it will not be regarded as an absolute payment or extinguishment of the precedent debt, even when so expressly received, if the agreement to so accept it was procured by fraudulent concealments and misrepresentations. Poole v. Rice, 9 W. Va. 73; Merchants' Nat. Bank v. Good, 21 W. Va. 455.

Surrender of Old Note Creates No Presumption of Payment.—And the fact that the old note is surrendered in such case, does not of itself raise a presumption of an agreement to accept the new note in full satisfaction of the old, and especially is this true where the creditor would thereby lose some security which he held for the debt. Hess v. Dille, 23 W. Va. 90; Merchants' Nat. Bank v. Good, 21 W. Va. 455.

Note Secured by a Mortgage or Trust Deed.—The same principle is applicable in case of notes secured by a mortgage. Here no change in the form of the instrument which evidences the debt will affect the mortgage. Nothing short of payment of the debt will discharge the mortgage. Hopkins v. Detwiler, 25 W. Va. 734.

Execution of Consolidated Note for Individual Notes.—Where stockholders of a corporation borrow money for the purposes of the corporation and execute their individual notes for the amount borrowed, upon which they appear indifferently as makers and indorsers, and make a verbal agreement between themselves that should the corporation fail to pay the debt they should share the loss ratably, and subsequently take up these individual notes and execute a consolidated note for the whole amount, the execution of the consolidated note effects no merger of the parol agreement, and this agreement may still be enforced between the parties. The execution of the consolidated note operates not only as a renewal of the obligation to the creditor, but impliedly as a renewal and continuance of the verbal agreement between the makers and indorsers, modified so far only as to make it correspond with the date and terms of the new note. Kimmins v. Oldham, 27 W. Va. 258.

Renewal Notes.—Upon a sale of land it was agreed, that the vendor was to convey it to the purchaser when the first payment should be made. At the time of making the contract the purchaser made a note to a third party for the amount of the first payment. This party indorsed the note and delivered it to the vendor who had it discounted. When the note matured the third party represented to the vendor that the purchaser had gone to Cincinnati for money to pay the note, and could not

get back in time to meet the payment, and that he wanted to renew the note. A new note was accordingly made with the vendor as indorser, and by it the first note was taken up. Upon the maturity of the note the vendor was compelled to take it up. It was held, that the first note was not received by the vendor as a payment on the contract, and that the renewal by the third party did not discharge the purchaser from liability for the first payment. Stephenson v. Rice, 12 W. Va. 575.

Judgment Note as Additional Security.—Where a judgment note is given as an additional security to an original promissory note there is no merger. The party claiming the judgment note as collateral may show such fact by parol evidence. Witz v. Fite, 91 Va. 446, 22 S. E. Rep. 171. In this case a plea that a judgment note was executed in satisfaction of a prior promissory note was held defective as it did not allege that it was accepted in satisfaction of such note. In no case will a note be discharged by the execution of an instrument of a higher nature, unless the parties intended to effect a merger thereby. Bowles v. Elmore, 7 Gratt. 385.

Usurious Notes No Payment.—Where usurious notes are given for a valid pre-existing note these usurious notes do not cancel the valid note, but that remains still unsatisfied, the new notes being nugatory and void. In such case the creditor is remitted to his original title thereto and remedy therefor. Parker v. Cousins, 2 Gratt. 372.

2. TO WHOM PAYMENT MAY BE MADE.

Note Deposited in Bank for Collection May Be Paid to Bank.—If a note deposited for collection in a bank where it is made payable, is not paid at maturity, but being protested is permitted by the holder to remain in the bank, however long or for whatever motive he may permit it thus to remain there, it may, as a general rule, be safely paid to the bank by the debtor, provided he has not notice that the bank in fact has no authority to receive the money. Alley v. Rogers, 19 Gratt. 366.

Payment at Branch Bank.—The provision in the Code of Virginia, that, "though a bank had a branch * * * all its notes should be received in payment of debts to the bank, whether contracted at the parent bank, or a branch," applied only while the debts remained due to the bank. When a negotiable promissory note discounted by the Farmers' Bank of Virginia had been assigned by the bank to trustees, for the payment of antecedent debts, and the maker, having notice of the assignment, afterwards acquired notes of the bank, he could not, with these, pay his debt so assigned, or set them off against it. Farmers' Bank v. Willis, 7 W. Va. 31.

Where notes were discounted at the Bank of the Old Dominion in Alexandria, payment of these notes made to a branch of that bank, in another town, in confederate money, under an act of assembly authorizing it, the branch not having the notes at the time, was held not to constitute a payment of the notes; though after the war the bank took possession of all the assets of said branch, including the funds so paid. McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

Payment to Mother Bank.—The mother bank has a right to receive the payment of any debt due the branch, even though contracted with a branch bank, as a negotiable note discounted by a branch bank; and the mother bank may authorize one of its own officers to receive payment of such a note or confirm the receipt of payment of such a note, if it had previously been done by such officer without express authority. Smith v. Lawson, 18 W. Va. 212.

Payment to Assignor of an Instrument Transferable by Delivery Invalid.—By the indorsement, or transfer by delivery when payable to bearer, of a negotiable note, though after maturity the legal title passes without notice to the maker, and therefore a payment to the assignor or transferrer, who no longer holds the legal title, is not a good payment, though the party making the payment had no notice of the assignment or transfer. Smith v. Lawson, 18 W. Va. 212.

Payment of an Overdue Note to Party Who Held it at Maturity.—Payment of an overdue note to one who held it at maturity, but who had transferred it after maturity, and before such payment, of which transfer the one making the payment had no notice, was held not to discharge the maker; and it made no difference that a written assignment was made separate from the note, it having been previously indorsed by the payee, and being, therefore, transferable by delivery. Smith v. Lawson, 18 W. Va. 212.

Right of Bank to Set Off Deposits.—A joint note, signed by several parties, for $6,000, was presented to a bank for discount by the principal in the note. The bank discounted it for $4,000 only, and the cashier indorsed it "discounted for $4,000 only, and should be so read." This was done without the knowledge of the sureties in the note. It was held that they were notwithstanding bound, the transaction being equivalent to a discounting of the note for $6,000 and a repayment by the principal of $2,000 thereon; and that its not being paid at maturity, general deposits made by the principal, after its maturity, could not without his directions so to apply them, be regarded as payments on this note. Merchants', etc., Bk. v. Evans, 9 W. Va. 373.

Bank Not Required to Appropriate Deposits to Payment.—When a note of which the bank is the holder becomes due and payable and the bank has not sufficient funds to the credit of the maker to satisfy the note, it is not required to appropriate the deposit to the payment of the note, nor in such case is it required to appropriate subsequent deposits to its payment. Bacon v. Bacon, 94 Va. 686, 27 S. E. Rep. 576.

Deposit in Bank before Maturity Does Not Amount to Payment.—Defendant offered to pay his note to the plaintiff, but at the plaintiff's request the note was renewed, upon the understanding that it should be deposited in bank for collection. Subsequently the defendant deposited in his own name the amount of the note in the bank, which was burned, with its contents, before the note had matured or been deposited. It was held, that the defendant was liable for the amount of the note. Moses v. Trice, 21 Gratt. 556.

3. IN WHAT CURRENCY PAYMENT MAY BE MADE.

Notes Made with Reference to Confederate Money as a Standard of Value.—During the late war, a firm being indebted to a bank by note, accepted the offer of a third party to take up their note at the bank. This party took up the note paying confederate money, which was the only money having any circulation in Virginia at that time. The firm executed their note to this party without mentioning the currency in which such note was to be paid. It was held that the note was payable in confederate money, as in the absence of stipulation to the contrary, it would be presumed that the parties con-

tracted with reference to it. Ashby v. Porter, 26 Gratt. 455.

Upon a sale of land at public auction during the late war, nothing was said at the time of the sale as to the kind of money which should be paid for the land. The land was sold for its value estimated in confederate money as of that date, and the purchaser made a cash payment in that money, and gave his negotiable notes payable in one and two years, with a deed of trust to secure them. The vendor received payment of the first note when it became due, in the same money and sold the second note to a third party, who paid for it in the same currency. When this second note became due the maker tendered payment in confederate notes, which was refused. The sale was held to have been made with reference to confederate notes as a standard of value, and the purchaser of the note though a holder for value took it as it was held by the payee. Lohman v. Crouch, 19 Gratt. 331.

Promise to Pay a Sound Money Note in Depreciated Currency No Discharge.—But a perfectly valid debt evidenced by a negotiable note, and payable in sound currency, cannot be discharged by a mere promise without consideration on either side to pay in confederate currency; especially is this true, where the promise has not been performed and no attempt has been made to perform it. In such case an action may be brought on the note though it is in possession of the maker, it not having been surrendered with an intention to discharge it. Lewis v. Davisson, 20 Gratt. 216.

Acceptance of Payments in Depreciated Currency Does Not Amount to Ratification.—Upon a sale of land the purchaser paid one-fourth cash and gave his notes for the balance, payable in one, two and three years. Nothing was said at the time as to the currency in which the notes were to be paid; but the vendor accepted payment of the first two notes in confederate currency. The vendor was held not bound to take confederate currency for the last note; but was entitled to be paid in the legal money of the country. Omohundro v. Crump, 18 Gratt. 703.

Paper in Bank during War—Nonresident Owner.—As to notes deposited in bank for collection during the war, when confederate money was the only currency, they might have been properly paid in such money, at least without notice that other money was demanded. But in the case of a nonresident owner, the bank had no authority to receive payment of the note in depreciated currency, and such payment was void and the notes still remained due. Alley v. Rogers, 19 Gratt. 366.

4. EFFECT OF PAYMENT BY PARTICULAR PARTIES.

Payment by Parties Primarily Bound.—When one who is primarily bound for the payment of a note takes it up, it is a payment and extinguishment of the note, no matter what his intention may have been; but if a note be taken up by a stranger who is neither a party to the paper, nor in any way bound for its payment, it becomes a question of fact, to be determined upon the evidence in the case, whether the transaction constitutes a payment or a purchase. Cussen v. Brandt, 97 Va. 1, 32 S. E. Rep. 791.

Payment by Indorser.—Payment of a dishonored note by an indorser, does not extinguish its negotiability as to him and all parties liable thereon to him. But it discharges the liability of subsequent indorsers, whose liability will not be revived by his putting the note in circulation again. Davis v. Miller, 14 Gratt. 1; Cottrell v. Watkins, 89 Va. 801, 17 S. E. Rep. 338; Smith v. Lawson, 18 W. Va. 212.

Payment after Dishonor.—And payment by the maker and indorser of a negotiable note, after it has been protested for nonpayment, taken up by the payee and transferred by him to his creditor as collateral security for a larger debt, such payment being made without knowledge of the transfer, is not a good defence to an action brought on the note by the transferee and holder against the maker. Davis v. Miller, 14 Gratt. 1.

Payment at Bank by Stranger.—Payment of a note at a bank is either a sale or a discharge thereof. It cannot be a sale without the bank's consent. Where the note is paid by a stranger bound for its payment at maturity, the note is thereby actually discharged, and cannot be reissued by him, so as to bind the parties thereto or to keep alive a trust deed executed to secure it, except with the knowledge and consent of those parties. Citizens' Bk. v. Lay, 80 Va. 436.

5. TENDER OF PAYMENT.—Where an offer of payment of a note is made on condition that the holder will surrender collateral security and other liabilities, the offer is not a proper tender where the party making it has no right to make such a demand for the collateral, and, therefore, the tender does not stop interest on the note. Fidelity, etc., Co. v. Engleby (Va. 1901), 37 S. E. Rep. 957.

6. DISCHARGE OF PARTIES.

Accommodation Maker.—The maker of an accommodation note is not discharged by the omission of the holder to enforce the collection thereof, until the payee, for whose accommodation the note was made, becomes insolvent, though the holder had looked to the payee for payment. Hansbrough v. Gray, 3 Gratt. 356.

Extension Releases Indorser unless He Has Waived His Rights.—Where the holder of a note extends time to the principal by a binding agreement without the consent of the indorser, however immaterial the extension may be, and even if it is to the advantage of the indorser, he is nevertheless discharged from liability on his indorsement unless he has waived his rights, because by the extension, the holder impairs the remedy which the indorser would have over against the principal to save himself from loss. Dey v. Martin, 78 Va. 1; Merchants', etc., Bank v. Evans, 9 W. Va. 373. These cases overrule the case of Bennett v. Maule, Gilmer 305.

Suspension Must Be Binding and for a Definite Time.—But in order to discharge a surety by indulging the principal, it must be shown amongst other things, that there was an agreement or promise, upon valid consideration, to indulge the principal for some definite time, or at least for a time not altogether indefinite. The partial payment by the principal without an agreement to extend as to the balance is not sufficient to discharge the surety, though the principal expected that in consequence of the payment he would not be immediately pressed for the balance, and in fact, he was not so pressed. Bacon v. Bacon, 94 Va. 686, 27 S. E. Rep. 576; Merchants', etc., Bk. v. Evans, 9 W. Va. 373; Dey v. Martin, 78 Va. 1.

Extension of Time to Second Indorser Does Not Affect First.—An indorser of a note is not released from liability by an agreement of the holder with a subsequent indorser to extend the time of payment. Wright v. Independence Nat. Bk., 96 Va. 728, 32 S. E. Rep. 459.

Agreement to Extend upon Condition That the Indorser Consents.—Where the holder of a note agrees to an extension of the time of the payment on condition that the indorser consents to the extension, the indorser is not thereby released. Winfree v. Bank, 97 Va. 83, 33 S. E. Rep. 375.

Extension of Time to Maker of Notes Delivered as Collateral.—Where the negotiable note of two or more makers upon which there is an accommodation indorser, is delivered as collateral for the note of one of the makers, and both notes are given to secure the same debt, delivered at the same time, and as parts of the same transaction, all payments made on either note should go to the credit of both, and the extension of the time to the principal of the collateral note, by a binding agreement with the creditor, without the consent of the indorser, releases the indorser. State Sav. Bk. v. Baker, 93 Va. 510, 25 S. E. Rep. 550; Dey v. Martin, 78 Va. 1.

What Does Not Amount to a Discharge of Indorser.—After a holder of a note had delivered it to a bank as collateral security for a debt, he gave a plaintiff an order entitling him to the note when the debt was paid. Pending an action by the bank on the note the debt was paid, and the action was dismissed, and subsequently the note was delivered to the plaintiff pursuant to the said order. It was held, that the dismissal was not a retraxit precluding the plaintiff, who was not a party, from subsequently recovering from an indorser who was a party, and acquiesced in the dismissal; nor did the dismissal discharge the indorser because it extended time to the maker. Tate v. Bank, 96 Va. 765, 32 S. E. Rep. 476.

7. EQUITIES ARISING UPON PAYMENT BY PARTIES SECONDARILY LIABLE.

a. CONTRIBUTION.

Contribution between Several Accommodation Indorsers.—Where several indorsements are made for the accommodation of the drawer, one indorser has no right to contribution against the other indorsers unless there is a stipulation to that effect. Farmers' Bank v. Vanmeter, 4 Rand. 553.

But when successive indorsers are indorsed for the accommodation of the maker, though at different times and without mutual agreement, they are co-sureties and in equity liable to contribution. Stovall v. Border Grange Bank, 78 Va. 188.

Contribution between Cosureties.—A joint and several single bill was executed in the country by a principal and seven sureties, to enable the principal to borrow money from a bank. The principal upon coming to town and finding that the rules of the bank required a town surety, made application to a citizen to become such surety. This citizen having adopted a rule not to put his name on bank paper for any purpose, but being willing to accommodate the principal, applied to a friend to become bound on the paper, with an assurance that if the principal did not pay it off when it became due, he would pay it off for him. The friend, upon this assurance, put his name on the paper as co-obligor with the other sureties, without their knowledge. Upon the bill becoming due the principal made default in the payment, and it was paid off by the citizen. Upon a suit in equity brought by this citizen for contribution against the other sureties, it was held that this citizen was to be considered one of the eight sureties, having become such in the name of his friend, and that he was entitled to contribution from all except that friend. Stout v. Vause, 1 Rob. 169.

Nearly a month after the protest of a negotiable note on which two makers were bound, one of the makers for the purpose of paying the note, executed his two negotiable notes, dated on the day of their execution, and with one exception indorsed by new indorsers, and had the same discounted and the proceeds placed to his personal credit in bank. Out of the money thus obtained he paid the original note by his individual check, and the note was marked paid and delivered to him, and he assigned the same to an indorser on one of the new notes. This was held not a renewal of the first note, but an independent transaction, and the assignee of that note was entitled to demand of the other joint maker of it the payment of one-half thereof for the sole benefit of such assignee, and to the exclusion of the other indorsers of the new notes. Conrad v. Smith, 91 Va. 292, 21 S. E. Rep. 591.

Payment by Trustee after Claim is Barred by Statute.—Where the trustee of one of two joint makers of notes and due bills pays the indebtedness after it had become barred by the statute of limitations, he cannot enforce contribution by the estate of the other joint maker. Turner v. Thom, 89 Va. 745, 17 S. E. Rep. 323.

b. SUBROGATION.

Indorser Paying a Note Subrogated to Holder's Rights.—An accommodation indorser paying off a judgment against himself and the maker of a protested negotiable note is entitled to be subrogated to all the rights of the holder. He is under no obligation to appeal from the judgment, as he could not know that relief could be thus obtained. The law imposes no such unreasonable burden upon a surety. Bank of Old Dominion v. Allen, 76 Va. 200.

Indorser Stands in Holder's Shoes.—And when an indorser pays off the debt, evidenced by the instrument, he has a right to proceed at once against the prior parties to the instrument to collect what he has so paid, and to enforce all the equities of the holder. But if the holder has suspended his own right to proceed, the indorser, who stands in his shoes cannot proceed, because of such suspension; the rights of the indorser being thus impaired by the holder, it operates as an exoneration of the indorser. Shields v. Reynolds, 9 W. Va. 483.

Surety Subrogated to Principal's Rights.—In an action upon a promissory note, a second indorser having given an injunction bond and his surety in that bond having been compelled to pay the note, this surety was held to be subrogated to the right of the second indorser and was allowed to recover from the first indorser. Chrisman v. Harman, 29 Gratt. 494.

Surety May Enforce Principal's Liens.—And a surety whose principal is dead, may enforce for his exoneration any lien of the creditor on the estate of his principal, and may bring any suit in equity which the creditor can bring, for a settlement of the administration account on the estate of the deceased, and for the administration of the assets, whether legal or equitable; but the creditor must be a party that he may receive the money when it is recovered. Stephenson v. Taverners, 9 Gratt. 399.

And a surety, whose principal is dead, may file a bill *quia timet* against the creditor and the executor of the debtor, to compel the latter to pay the debt so as to exonerate the surety from the responsibility. Stephenson v. Taverners, 9 Gratt. 399.

Judgment against Maker Kept Alive for Indorser's Benefit.—At different terms separate judgments were had against the maker and indorser of a negotiable note. On the judgment against the indorser, a judgment was obtained in the state of Illinois,

which judgment was satisfied by the indorser. This satisfaction of the Illinois judgment did not extinguish the lien of the judgment against the maker, and as soon as the indorser paid it, he and his assignees were entitled to be subrogated to the lien of that judgment. Bank of Old Dominion v. Allen, 76 Va. 200.

Subrogation Cannot Create a Right Not Already Existing.—Where the first indorser on a note is indemnified against loss thereon by a deed of trust, but becomes discharged from his liability on the note by reason of want of notice of the dishonor of it, the holder cannot by substitution to his rights obtain the benefit of the property conveyed in trust to indemnify the indorser, inasmuch as the indorser has not been injured. Bank of Virginia v. Boisseau, 12 Leigh 387.

Where an accommodation indorser, who is indemnified by the maker of the note by a deed of trust, is discharged from his liability on the note by the laches of the holder, such holder can be subrogated only to the rights of the indorser; and the indorser having sustained no damage, and, therefore, having no claim on the trust fund, the holder can have none. Hopewell v. Cumberland Bank, 10 Leigh 206.

Breach of Covenant by Maker—Right of Indorsers against His Heirs.—The maker of a note conveyed land to trustees as security for the note, and to indemnify his accommodation indorsers thereon, and therein covenanted, for himself and his heirs, with the trustees and the holder of the note, that he was possessed of the absolute estate in the land, and that he would warrant and defend the same against all persons. The land being afterwards sold under a prior deed of trust after the grantee's death, it was held that the indorsers having paid the note were entitled to come into equity for satisfaction out of the real assets in the hands of the heirs, to the extent of the damages accruing from such breach of covenant. Haffey v. Birchetts, 11 Leigh 83.

IX. ACTIONS.

1. WHO MAY BRING ACTION.

Beneficial Owner of Instrument Transferrable by Delivery.—The beneficial owner of a negotiable instrument, which is payable to bearer or indorsed in blank, may institute a suit thereon in any court of law, in the name of any one who will allow his name to be used for that purpose; and where the defendant has no legal or equitable defence to the instrument as against the real owner thereof, he cannot be permitted to show that the nominal plaintiff, in whose name the suit is brought, is not the real party in interest. Bank of Spencer v. Simmons, 43 W. Va. 79, 27 S. E. Rep. 299.

Holder under a Special Indorsement Only One Who Can Sue.—But if a negotiable instrument, not payable to bearer, be endorsed specially to a particular person, while such person remains the holder and legal owner, the right of action is in him alone, and none but him or his personal representative can sue. Spence v. Robinson, 35 W. Va. 313, 13 S. E. Rep. 1004.

Holder of Instrument Indorsed in Blank.—And an action on a negotiable note indorsed in blank may be maintained in the name of the holder, who is not the owner, by the owner's consent. Smith v. Lawson, 18 W. Va. 212.

Administrator of an Accommodation Indorser.—And the administrator of an accommodation indorser of a negotiable note protested for nonpayment, who takes up the note after the death of his intestate, may maintain either assumpsit on debt in his own name against the maker of the note, for the amount in value which he has paid for the note. Burton v. Slaughter, 26 Gratt. 914.

Action by Assignee of a Nonnegotiable Instrument.—The assignee of a note or draft does not acquire the legal title to the debt, but an equitable right only, which by virtue of the statute he may assert at law in his own name, or in that of the original payee, for his benefit; and it is not necessary, that the record should show, that the suit is for the benefit of the assignee. Clarke v. Hogeman, 13 W. Va. 718. See monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

Indorsee against Remote Indorser.—And in Virginia, an indorsee of a promissory note cannot maintain an action against a remote indorser for want of privity. Mandeville v. Riddle, 1 Cranch (U. S.) 290 (1803); Dunlop v. Harris, 5 Call 16.

Holders of Promissory Note against Indorsers.—Though, in general, *indebitatus assumpsit* for money lent, or money paid and expended, or money had and received, lies for the holders of a promissory note against an indorser, and the indorsement is *prima facie* evidence to support those money counts; yet if it be found by special verdict, that the defendant indorsed the note, and the holders discounted it, for accommodation of the maker, and that the defendant received no part of the proceeds of the note so discounted, in such case the holders cannot recover against the defendant on the money counts. Bank of the U. S. v. Jackson, 9 Leigh 221.

Action by Owner of Note Which Has Been Destroyed.—An action at law can be maintained upon a note that has been destroyed. The evidence should, however, satisfy the jury beyond any reasonable doubt, that the note has been destroyed. Moses v. Trice, 21 Gratt. 556.

Action by Owner of Lost Instrument Transferrable by Delivery.—But an action at law cannot be maintained upon a lost negotiable note transferrable by delivery, whether due, or not at the time of the loss. The sole remedy of the owner is in a court of chancery, which can adjust the equities of the parties, and which can require suitable indemnity as a condition of relief. Moses v. Trice, 21 Gratt. 556.

But if at the time of the trial a recovery upon the lost note would be barred by the statute of limitations, the action may be maintained. Moses v. Trice, 21 Gratt. 556.

Attachment.—Upon a settlement of an account, the creditor took a negotiable note from the debtor, for the amount found due. The note was discounted at the bank for the creditor. While the note was in the bank and before it became due, the debtor absconded. It was held, that the creditor could not sue out an attachment against the debtor for the debt due upon the account. McCluny v. Jackson, 6 Gratt. 98.

But an attachment in chancery lies to secure a debt payable at a subsequent day, or to relieve the indorser of a note which has not become payable at the date of such attachment, which binds the property in the hands of the garnishee from the time of its service, so as to inhibit the absent defendant from making a transfer thereof, even for the benefit of a creditor whose claim is already due and payable. Williamson v. Bowie, 6 Munf. 176.

Payee of an Order Drawn on a Fund.—An order drawn on a particular fund or debt, and for the whole thereof, though not accepted by the drawer,

is a good equitable assignment of the fund or debt, and it will be recognized by a court of law to the extent of permitting the payee of such an order to institute a suit at law in the name of the drawer against the drawee. First Nat. Bank of Wellsburg v. Kimberlands, 16 W. Va. 555. On this subject, see generally, monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

Action by Holder of Accommodation Paper.—A promissory note negotiable at a bank was made and indorsed for the sole purpose of obtaining accommodation for the maker. This note was left with a second indorser to be lodged in bank for discount. This second indorser fraudulently put the note into circulation to raise money thereon for his own use. It was held, that the third indorser, knowing nothing of such fraud might cause the note to be protested as to the maker and prior indorser, pay it himself, and thereupon maintain his action against the maker and first indorser; notwithstanding the fact that no valuable consideration passed or was contracted for, between him and the second indorser, but he made the indorsement merely for the motive of enabling such second indorser to get the note discounted at the bank. Robertson v. Williams, 5 Munf. 381.

Payee in Representative Capacity—Authority to Sue.—The payee of a note, made for the benefit of a company for which he was treasurer, transferred it to another. An action was brought in the name of the former for the benefit of the latter, and on the trial the payee testified that he did not authorize the suit to be brought in his name. This was not sufficient to prevent a recovery by the assignee in his action. Kimmins v. Wilson, 8 W. Va. 584.

2. AGAINST WHOM ACTION MAY BE BROUGHT.

Action against Acceptor by the Indorsee.—At common law an action of debt will not lie for the indorsee against the acceptor of a bill of exchange. Smith v. Segar, 3 H. & M. 394; Wilson v. Crowdhill, 2 Munf. 302. But under the statute (Code 1860, ch. 144, sec. 10), which provides, that an action of debt may be maintained on a note or writing by which there is a promise to pay money, if the same be signed by the party who is charged thereby, or his agent, an action of debt will lie in the name of the indorsee on a bill of exchange against the acceptor. Hollingsworth v. Milton, 8 Leigh 50; Regnault v. Hunter, 4 W. Va. 257.

Action against Acceptor by the Drawer.—An action of debt will lie for the drawer of a bill of exchange, who is also the payee, against the acceptor at common law. Regnault v. Hunter, 4 W. Va. 257.

Joint Action against Makers and Indorsers of a Foreign Note.—The makers and indorsers of a promissory note executed in another state, under the law of which it is negotiable, are not jointly liable to a holder who discounts it in Virginia, and such holder cannot, therefore, sue the maker and indorsers jointly. Corbin v. Planters' Nat. Bank, 87 Va. 661, 13 S. E. Rep. 98, 24 Am. St. Rep. 673.

Against a Remote Party.—Where a note not negotiable, was indorsed by several persons in succession, the last assignee could only sue the maker and his immediate assignor, and not a remote assignor, prior to the Act of the Assembly of 1807. Caton v. Lenox, 5 Rand. 31; Dunlop v. Harris, 5 Call 16.

But under the provisions of § 2861 of the Va. Code, an action may be maintained by an assignee by a nonnegotiable note against a remote assignor thereof to recover money upon the contract implied by the assignment that he will repay the consideration received by him for the note, if by the use of due diligence it cannot be made out of the maker. Hence, an assignee may proceed by motion against the remote assignor for a like recovery under the very terms of § 3211 of the Code. Long v. Pence, 93 Va. 584, 25 S. E. Rep. 593; Drane v. Scholfield, 6 Leigh 386.

Against One of Two Partners.—A promissory note was executed by one of two partners in the firm name. One of the partners was an infant at the time of the execution of the note. An action brought against the adult partner only was held badly brought, as the act of the infant was voidable only, and was valid until disaffirmed. Wamsley v. Lindenberger, 2 Rand. 478.

Action of Detinue against Bona Fide Holder of Treasury Notes.—A treasury note is, by the act of congress transferrable by delivery and assignment only. Myers v. Friend, 1 Rand. 12. In this case a treasury note indorsed in blank, was stolen from the mail, and subsequently passed into the hands of a *bona fide* purchaser for value. It was held, that the note could be recovered in an action of detinue, brought by the real owner against such *bona fide* purchaser.

Joint Instrument Sealed as to One Party—Joint Action Proper.—An action of debt was brought by the administrator of the payee upon an instrument in these words: "On demand I promise to pay to David Keller, the just and full sum of $200, for value received, as witness my hand and seal.

"THOMAS MCHUFFMAN. [Seal.]

"Security:—DAVID M. RIFFE."

This instrument was held to be a joint and several promise as to both defendants, and *prima facie* the instrument was on its face as to the defendant McHuffman a single bill obligatory, and as to the defendant Riffe his promissory note, and a joint action was proper in such case. Keller v. McHuffman, 15 W. Va. 64.

Joint Action against Drawer and Indorsers of a Specialty.—A single bill, under seal, is not a note, but a specialty; and therefore the drawer and indorsers of such a bill, made "negotiable and payable" at a certain place, cannot be sued jointly thereon. Mann v. Sutton, 4 Rand. 253.

3. THE DECLARATION.

Necessary Averments—Generally.—In an action on a negotiable note against the indorser, the declaration must allege, that the note was duly presented for payment at the place where it was payable, at the time when it became due and payable, and that it was not paid, and that thereupon the said note was duly protested for nonpayment, of all of which the indorser had prompt notice. Bank v. Hysell, 22 W. Va. 142. In this case a declaration which simply stated, "that the note was presented at the close of banking hours to the cashier of the bank where it was payable, for payment which was refused, and thereupon it was duly protested for nonpayment, and notice thereof was given said indorser," was held fatally defective, as it did not state when the note was presented for payment or where it was presented.

Must Aver the Place of Payment.—A negotiable note payable at a particular office or bank, is a very different instrument from a mere promissory note payable generally, even when between the same parties and for the same amount. The place of payment regulates the rate of interest and sometimes determines the character of the instrument

as to its negotiability. These are matters of importance and make the place of payment a material part of the description of the note. It is therefore essential that the place of payment fixed by the note should be set out in the declaration on the note; and if this be not done, and the admission of the note in evidence is objected to, the court should exclude it on account of the variance between such note and the one described in the declaration. Damarin v. Young, 27 W. Va. 436; Bank v. Showacre, 26 W. Va. 48.

And where a note on its face is dated at a specified place, and is drawn in such form as to make it a negotiable instrument at such place, the maker, when sued on such note by an innocent holder for value, will not be allowed to aver or prove that such note was not in fact made at the place at which it purports to have been made. Bank v. Showacre, 26 W. Va. 48.

Plaintiff Must Allege That He Is the Payee or Holder.—And in an action of debt on a negotiable note the plaintiff must allege in his declaration, that he is the payee or indorsee or holder of the note. If he fails to make such allegation, though he alleges the drawing of the note and its indorsement by the payee in blank, the declaration is fatally defective on general demurrer. Bank v. Hysell, 22 W. Va. 142.

Necessity for Averment of Presentment.—A count in the declaration on a protested bill of exchange which did not aver presentment and demand of payment, was held bad on demurrer, and the overruling of such demurrer was held error. But in this case it was held that the appellate court would not reverse the judgment for such error, as the presentation and demand of payment was sufficiently alleged in other counts, and no injury could have resulted to the defendant therefrom. Early v. Preston, 1 P. & H. 228.

Averment of Time of Presentment Stated under Videlicet.—A declaration in an action of assumpsit on a bill of exchange, by the holder against an indorser, alleged that "when the bill became due and payable according to the tenor and effect thereof, to wit, on the 27th of December 1816, on the bank of Marietta in Ohio" it was presented for payment, and dishonored. The 27th of December was not the third, but the fourth day after the time appointed for the payment of the bill. As it was averred that the bill was presented when it became due according to its tenor and effect, and the date of the presentment was stated under a *videlicet*, the date so stated was held not material, and the plaintiff might prove presentment on the third day of grace. Jackson v. Henderson, 8 Leigh 196.

Averment of Nonpayment—And in an action of debt or assumpsit upon a promissory note it is indispensable to aver nonpayment, and that to every party connected with the note entitled to receive payment, whether payee, assignee, decedent, or representative, or survivors of decedent, and each one of the parties jointly entitled to receive payment. Smoot v. McGraw (W. Va. 1900), 35 S. E. Rep. 914.

Averments of Demand and Notice in Case of Accommodation Paper.—But where a declaration upon a note is special, and avers demand and notice to the indorser, the plaintiff may prove at the trial that the note was made and discounted for the accommodation of the indorser, and that he received the proceeds. The plaintiff may recover in the action, though no notice, or an insufficient notice, was given to the indorser. McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

Averment of Time of Placing a Note for Collection.—In an action against a bank for negligence in failing to protest a note placed with for its collection, it is sufficient if the declaration avers that it was so placed with the bank before its maturity, though the date of placing is not specified. Roanoke Bank v. Hambrick, 82 Va. 135.

Amount of Cost of Protest.—A declaration in debt, under the law of Virginia, upon a protested bill of exchange for the principal, interest, damages and costs of protest, must aver the amount of those costs of protest. Wilson v. Lenox, 1 Cranch (U. S.) 194 (1803).

Declaration Must Demand Currency for Which Instrument Is Given.—In an action of debt upon a protested bill of exchange, drawn for sterling money, the declaration was for the current money value of the sum for which the bill was drawn. The declaration should have been for the sterling money, and judgment being for the sum so demanded, was reversed on a writ of error. Scott v. Call, 1 Wash. 115.

And thus, where a declaration stated that a bill was drawn for current money, without naming the sum of current money, it was held that the plaintiff could only recover current money. Proudfit v. Murray, 1 Call 394.

Interest Should Be Demanded in Declaration.—If a declaration upon a promissory note does not demand interest, and the defendant waives his plea, the court cannot give judgment for interest. Brooke v. Gordon, 2 Call 213; Hubbard v. Blow, 4 Call 224.

Where a bill of exchange had fallen due and been protested before the act allowing 3 per cent. damages, and interest upon the costs of protest, went into operation, such damages and interest are not recovered in action upon a bill. Friend v. Wilkinson, 9 Gratt. 31.

Omission to State That the Bill Is Payable with Interest.—In Harper v. Smith, 6 Munf. 389, it was held that a judgment entered upon *nil dicit* in action of debt on a penal bill, ought not to be reversed on the ground that the declaration though describing the bill correctly as to the principal, penalty, and date, omitted to mention that the debt was payable "with interest from a day prior to the date"; and that the judgment, in conformity with the penal bill, was entered for the penalty, to be discharged by the principal, *with such interest*, and costs.

Not Necessary to Aver Consideration—Under the Virginia statute, an action of debt may be brought upon a note in writing; and in such action it need not be averred or proved that there was any consideration for the note. The note itself imports consideration, as does a bond; the only difference being that in case of a bond the consideration cannot be inquired into, but in the case of a note it may. Peasley v. Boatwright, 2 Leigh 195; Snead v. Coleman, 7 Gratt. 300; Crawford v. Daigh, 2 Va. Cas. 521; Cheuvront v. Bee, 44 W. Va. 103, 28 S. E. Rep. 751; Jackson v. Jackson, 10 Leigh 452.

Declaration Must Negative Payment to Maker as Well as to Indorsee.—In an action by an indorsee of a note against the maker, the declaration, failing to negative payment to the maker, as well as to the indorsee, is insufficient. Norvell v. Hudgins, 4 Munf. 496.

Declaration Must Lay an Express Promise.—In an action on the case upon a note of hand, there must be an express assumpsit laid in the declaration;

merely reciting the note of hand in *haec verba* is not sufficient. Cooke v. Simms, 2 Call 39.

Effect of Averment That a Nonnegotiable Note Was "Indorsed."—In a declaration upon a nonnegotiable note, an averment that a person "indorsed" it, instead of the word "assigned" it, is equivalent to the word "assigned" on demurrer. Smoot v. McGraw (W. Va.), 35 S. E. Rep. 914.

Variance between Declaration and Proof.—A declaration on a negotiable note, stated the indorsement and delivery as at the time of the making; and the proof was that the delivery was after the note fell due. This was held no variance; and if it was, could only be taken advantage of at the trial by a motion to exclude the evidence, or to instruct the jury to disregard it. Davis v. Miller, 14 Gratt. 1.

And so where an action of assumpsit was brought for goods sold and delivered, the declaration filed contained only the common counts. The only count in the declaration to which the evidence applied, was that for goods sold and delivered. It was shown that the goods were absolutely paid for by a check. The demand upon the account being thereby extinguished there was no count in the declaration upon which the plaintiff could recover. Blair v. Wilson, 28 Gratt. 165.

Variance in Descriptions.—A count in a declaration on a promissory note which alleged that the maker, by his promissory note, promised to pay the plaintiff $6,000 (meaning, and intending thereby $4,000), by reason whereof he became liable to pay $4,000, was held bad on general demurrer. Merchants', etc., Bank v. Evans, 9 W. Va. 373.

Description of Paper Signed with Scroll as Unsealed, Is Correct.—An action of debt was brought upon an instrument, which was in form a promissory note for money, and which concluded "witness the hands" of the parties, but no actual seal was attached to the instrument, scrolls being placed opposite to the signatures and used by way of seals. This instrument was held rightly described in the declaration as a promissory note. Peasley v. Boatwright, 2 Leigh 195.

Error in Declaration Cured by Statute.—But if a declaration describe a note of several parties as several, while the note is joint and several, and no objection is made on account of the variance before judgment, though it be rendered on demurrer to evidence, it is unavailing to reverse the judgment, by reason of sec. 3, ch. 131 of the Code of W. Va. Long v. Campbell, 37 W. Va. 665, 17 S. E. Rep. 197 (1893).

And if the demand in the declaration in an action of debt be for less than the right of recovery shown by the note described in it, it would be disregarded on demurrer by reason of sec. 29, ch. 125 of the Code, and as the variance does not aggrieve the defendant, but is to his benefit; and also, in the absence of a demurrer, it is cured after judgment by sec. 3, ch. 134 of the Code of W. Va. Long v. Campbell, 37 W. Va. 665, 17 S. E. Rep. 197 (1893).

Declaration for a Sterling Debt.—A sterling debt may be sued for without laying the value in current money; if it is laid, it is merely surplusage, and will not vitiate; but in such case, the damages should be laid in sterling money, the verdict and judgment should be in sterling money, and the court is to fix the rate of exchange. Skipwith v. Baird, 2 Wash. 165.

Omission of Sum for Which Note Was Given.—In an action against the makers and indorsers of a protested negotiable note, the accidental omission of the sum for which the note was given, in describing it in the declaration, was held no ground of demurrer, where the sum sufficiently appeared from other parts of the declaration. Archer v. Ward, 9 Gratt. 622.

Conformity of Declaration with the Writ.—In an action of a negotiable note it was held no error to demand interest in the declaration which was not claimed in the writ; but it was held error to claim in the declaration, costs of protest, when those costs were not demanded in the writ. Hatcher v. Lewis, 4 Rand. 152.

Conclusion of Counts.—Where an action of debt is based upon a single bill and simple contract for money lent, money received, or money paid, and the aggregate of all the counts is demanded, the usual conclusion need not be adopted to each count, and if the general conclusion of the declaration is in proper form it will be considered as applying to each count, as well as to all collectively. Somerville v. Grim, 17 W. Va. 803. Upon this subject, see generally monographic *note* on "Action of Debt" appended to Davis v. Mead, 13 Gratt. 118.

Profert Not Necessary.—In an action of debt on a bill of exchange, it is not necessary for the plaintiff to make profert of the bill in the declaration. Terrell v. Atkinson, 2 Wash. 143.

Demurrer to Declaration in Covenant on a Note.—Demurrer lies to a declaration in covenant on a trust deed executed merely as a collateral security for the payment of a promissory note. Such trust deed does not raise such note to the dignity of a specialty, and the note is barred by a lapse of five years before suit brought. Wolf v. Violett, 78 Va. 57.

Counts Not Included in Bills of Exception Presumed to Be Proved.—In an action of assumpsit there were two money counts, and one upon an inland bill of exchange. The court gave an improper instruction with regard to the bill of exchange, but the bill of exceptions did not state that there was any other evidence. It was held, that it would be presumed after verdict, that the money counts were proved. Willock v. Riddle, 5 Call 358.

4. THE PLEAS.

Proof of Execution Not Necessary unless Put in Issue by a Sworn Plea.—In an action of debt at common law upon negotiable paper the plea *nil debet* put in issue the execution of the instrument and all the transfers thereof. But in Virginia, by statute (Va. Code, § 3279), where the declaration avers the execution and transfer of the paper no proof thereof is required unless such plea is supported by an affidavit. Clason v. Parrish, 93 Va. 24, 24 S. E. Rep. 471.

Object of Statute Requiring Sworn Plea.—The object of this statute is to dispense with the proof of handwriting in certain cases, and it does not apply to a transfer of paper by mere delivery. Upon an averment of such transfer by a wife, proof of transfer by the husband without proof of his agency is insufficient, even on demurrer to evidence to maintain the issue on the part of the plaintiff tendered by the plea of *nil debet*. Clason v. Parrish, 93 Va. 24, 24 S. E. Rep. 471.

Genuineness Cannot Be Questioned unless Denied under Oath.—Where the declaration avers that the indorser indorsed a note by subscribing his name on the back thereon, and he not having filed an affidavit with his plea according to the statute, he will not be permitted to question the genuineness of the note, or to show that it was altered after it was indorsed by him. Archer v. Ward, 9 Gratt. 622.

Thus, in an action against the indorsers of a negotiable note, they pleaded *nil debet*, and filed an affidavit that at the time the note was indorsed and when it was protested it was not stamped, as required by an act of congress, and that it had been since altered by the collector of the United States revenue putting a stamp on it. As this affidavit did not deny their signatures, it was held not necessary for the plaintiff to offer proof of the signature before introducing the note. Crews v. Farmers' Bank, 31 Gratt. 348.

The Affidavit Required.—In Virginia the affidavit which the defendant is required to make is that the said instrument was not made by him as charged in the declaration, and it is not sufficient to make oath that the name subscribed is not in his handwriting, for, if so, a party who had caused the instru- to be signed by his name and in his presence by a third person, might raise an entirely immaterial question. Archer v. Ward, 9 Gratt. 622.

Burden of Proof Shifts after Filing of Sworn Plea.—Where the answer of the maker of a note denied that the payee indorsed it to the complainant as alleged in the latter's bill, and such denial was supported by affidavit as required by § 3279 of the Code, the burden of proof was held to be upon the complainant to show such indorsement, and in default thereof his bill was dismissed. Piedmont Bank v. Hatcher, 94 Va. 229, 26 S. E. Rep. 505.

This Statute Applies to Suits in Equity as Well as Actions of Law.—The statutes providing that the execution of the instruments shall stand admitted unless it is put in issue by a plea or an answer under oath apply to suits in equity based upon negotiable instruments. Simmons v Simmons, 33 Gratt. 451; James River, etc., Co. v. Littlejohn, 18 Gratt. 53.

Partnership Notes—Necessity for Sworn Plea Denying Partnership.—In Virginia it is provided by statute (Code of 1887, § 3280): "That in all actions which may be hereafter commenced in the names of any persons composing a partnership, and the names of the several persons constituting such partnership shall be set forth in the declaration, the plaintiffs shall not be required to prove the existence of the said partnership, as described in said declaration, unless the defendant or some other person shall, by plea verified by affidavit, deny the existence of such partnership." In Shepherd v. Frys, 3 Gratt. 442, it was held, that this statute applied to negotiable instruments which were signed in the name of the partnership. But the question whether the persons sought to be charged were members of the partnership or not, is still left open.

Thus, in an action of debt brought upon a negotiable note, signed with a partnership name, the declaration charged that the defendants subscribed the note by their partnership name. There was no affidavit by the defendants or any of them putting the execution of the note in issue. They were held estopped from showing that the partnership had been dissolved before the note was made, and that the person making it had no authority to execute it for the other partners. Phaup v. Stratton, 9 Gratt. 615.

Failure of Consideration under the General Issue.—In Keckley v. The Union Bank, 79 Va. 458, it was held that a failure in consideration of a promissory note could not be shown under the general issue but must be specially pleaded under § 3299 of the Va. Code. But this case has been overruled, and it is now held that failure in consideration may be shown under the general issue. Columbia, etc., Association v. Rockey, 93 Va. 678, 25 S. E. Rep. 1009.

Upon this subject, see generally, monographic *note* on "Assumpsit" appended to Kennaird v. Jones, 9 Gratt. 183.

That Plaintiff is Not a Holder for Value May Be Shown under General Issue.—And in an action of debt upon a negotiable note, the defence that the plaintiffs are not holders for value of the note, may be made under the plea of *nil debet*. Fant v. Miller, 17 Gratt. 47.

Plea That Paper Was Unlawfully Issued by an Unchartered Corporation.—To an action of debt on a note alleged to have been made and discounted by the plaintiffs in Virginia, but made payable at a bank out of the state, a plea that the plaintiffs are an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy; and that they as a banking company discounted the said note, contrary to law and public policy, sets up a good defence to the action. So in such a case, a plea that the consideration of the note declared on was the bank paper of the plaintiffs unlawfully issued by them as currency, they being an uncharterd banking company, presents a good defence to the action. Hamtramck v. Selden, 12 Gratt. 28.

Plea of Payment Admits Execution of Instrument.—Where a plea of payment was entered to an action on a bill of exchange, it was held error to require the plaintiff to answer interrogatories which tended to show that the bill was not made for a debt due from the defendant in his individual capacity, but as president of an incorporated company, as the interrogatories were immaterial to the issue, the plea of payment having admitted the execution of the instrument. Rand v. Hale, 3 W. Va. 495.

Plea of Payment by Execution of Judgment Note.—A plea that a judgment note was executed in satisfaction of a note given for the same debt is defective in not alleging that it was accepted in satisfaction of such note. Witz v. Fite, 91 Va. 446, 22 S. E. Rep. 171.

Where Pleas Conclude to Country Similiter Unnecessary.—In an action on a negotiable note, where the plea of nonassumpsit and payment properly conclude to the country, the plaintiff may, without the formal addition of the *similiter*, proceed to trial as though the issue had been formally joined. Wellsburg Bank v. Kimberlands, 16 W. Va. 555.

Where Defendant Pleads Nil Debet Instrument Must Conform to the Declaration.—Where the defendant in an action of debt on a note files the plea of *nil debet*, the note produced in evidence must correspond with that described in the declaration. A note was described in the declaration as a note for three hundred and forty-two dollars payable two months after the date thereof, and the note offered in evidence was for three hundred and forty-two dollars and twenty-five cents, payable sixty days after date. This was held to be a fatal variance and the note was not admissible in evidence. Scott v. Baker, 3 W. Va. 285.

Promissory Note Cannot Be Pleaded in Bar.—In Lazier v. Nevin, 3 W. Va. 622, it was held that a promissory note could not be pleaded in bar to an action upon a simple contract.

Plea of Nil Debet and Usury—Interrogatories.—In an action against the maker and indorsers of a negotiable note, they plead jointly *nil debet* and usury; and file interrogatories to the plaintiff. 1. From whom did you get the note in suit? 2. If from de-

fendant C, what did you pay him for it? He answers to the first: I received the note from C, who, so far as I had any knowledge, was the owner of it. He declines to answer the second question. Defendants move to strike out last part of answer to the first question. *Held*, the only object of the question was to ascertain the character in which C indorsed the note; and the answer is therefore responsive to the question. If that was not the object, the answer was immaterial. The pleas being joint, defendants were not entitled to an answer to the second question to reduce the amount of recovery against C; nor were they entitled to the answer whilst they relied on the defence of usury. Hogshead v. Baylor, 16 Gratt. 99.

5. SET-OFF.

The General Rule.—The right of offset, being of modern statutory creation, is neither an equity nor lien recognized by the law merchant as attaching to a negotiable instrument; and therefore the *bona fide* purchaser of an overdue negotiable note is not required to take notice of existing offsets, in the absence of legislative enactment. Davis v. Noll, 38 W. Va. 66, 17 S. E. Rep. 791; Davis v. Miller, 14 Gratt. 1.

Bill Cannot Be Set Off against a Party without Notice.—And so in an action by an indorsee against the maker of a promissory note, it was held that the latter could not set off a bill of exchange on which the plaintiff was responsible, unless it appeared that the defendant had received such bill before notice of the indorsement of the note to the plaintiff. Ritchie v. Moore, 5 Munf. 388, 7 Am. Dec. 688.

Unliquidated Claim.—An action of assumpsit was brought against the assignor of a note to collect the amount of the note assigned, on the ground that the obligor was insolvent when the note fell due. At the trial the assignor alleged that the assignment was without recourse and proved that there was a written contract, which was lost, that the assignee was to attend a certain sale of real estate belonging to the obligor, which sale was to take place under a decree of the circuit court, and make his money, but the witness could not remember the exact terms of the contract. The assignor then offered to prove the value of the land, and that the assignee did not attend the sale. It was held, that the assignor could not set off the damage which he had sustained by the breach of this collateral contract, in an action on the note, such claim being for unliquidated damages. McSmithee v. Feamster, 4 W. Va. 673.

6. EVIDENCE.

a. ADMISSIBILITY.

Revenue Law Requiring Stamp before the Instrument Can Be Admitted is a Local Law.—A revenue law of a state, which requires a stamp upon the indorsement of an overdue bill or note before such indorsement can be given in evidence, is a local law and has no exterritorial effect. Such note may be given in evidence in the courts of another state although unstamped, as the laws of one state can furnish no rule of evidence for the courts of another. Lambert v. Jones, 2 P. & H. 144.

But under the act of 1812, requiring negotiable notes to be stamped, a note, negotiable at a bank, might be given in evidence if duly stamped, before it became payable, though not so stamped when it was executed. Hannon v. Batte, 5 Munf. 490.

Unstamped Bill or Note is Admissible.—And a bill or note though unstamped, is admissible in evidence, the act of congress not applying to proceedings in state courts. And they are admissible in evidence in the United States courts unless the omission to stamp was with fraudulent intent. Hale v. Wilkinson, 21 Gratt. 75.

In Crews v. Farmers' Bank, 31 Gratt. 348, revenue stamps were placed upon a note by a collector of revenue more than a year after it was made. This could only be done upon the payment of a penalty of $50. It was held, that the payment of a penalty did not tend to show that the failure to affix the stamp when the note was made was with an intent to evade the law, and the note was admitted in evidence.

Admissibility of Bill of Exchange.—In Anderson v. Kanawha Coal Co., 12 W. Va. 526, it was held that bills of exchange drawn by the defendant on its agent, in favor of the plaintiff and described with particularity in the bill of particulars filed with the declaration containing the common counts, ought to be received in evidence on the trial of the issue of nonassumpsit.

Parol Evidence to Show Relation of the Parties.—Parol evidence, by the weight of authority, is admissible, in general, to show the real relation between the parties to a bill or note, and that the actual liability of the parties among themselves is not that which appears upon the face of the instrument; and this is upon the ground that the facts of suretyship is collateral to the written instrument and does not contradict or vary it. Faulkner v. Thomas (W. Va.), 35 S. E. Rep. 915.

Therefore, a written obligation, after payment thereof, does not preclude the makers and indorsers from proving by parol evidence a contemporaneous oral agreement as an inducement thereto; fixing their ultimate liabilities among themselves in accord with the true consideration and purpose of entering into such obligation. Faulkner v. Thomas (W. Va. 1900), 35 S. E. Rep. 915.

Presumption of Payment Rebutted by Parol Evidence.—The fact that the joint maker of a note pays the same at maturity, and does not for a long time require an indorser to come in and contribute his moiety thereof under a verbal arrangement between the parties, but waits until the death of such indorser, and presents the same against his estate, is strong circumstantial evidence in rebuttal of such agreement, but it is not conclusive, and may be explained and overcome by sufficient competent parol evidence. Faulkner v. Thomas (W. Va. 1900), 35 S. E. Rep. 915.

Answer to a Bill of Discovery as Evidence.—It is a general rule that a written evidence of indebtedness cannot be contradicted or altered by evidence of verbal arrangement. But where a bill in equity calls on the defendant for a discovery as to the transaction between the parties the answer must be treated not only as evidence, but as evidence introduced by the plaintiff. Thompson v. Clark, 81 Va. 422. As to admissibility of protest in evidence, see *ante*, "Protest."

b. WEIGHT OF EVIDENCE.

Execution of Note as Evidence of Settlement.—It is a well-settled rule that the execution of a note in settlement of an account is conclusive upon all the items charged in it, unless some accident be shown. Parkersburg Nat. Bank v. Als, 5 W. Va. 50; Johnston v. Zane, 11 Gratt. 552.

Note as Evidence in an Action by Assignee.—In a proceeding by an assignee of a note against a remote assignor to recover on the implied contract of assignment, the note is a necessary piece of evidence for the plaintiff in order to prove the assignments,

and also to show the measure of the plaintiff's recovery. In the absence of proof to the contrary the law presumes that the assignor received for the note a sum equal to that specified in it. The fact that the note was seen and inspected by the court need not appear in the entry of the judgment, but the appearance of it does not vitiate the judgment, nor show that the judgment was rendered on the note, and not on the contract implied from the assignment. Long v. Pence, 98 Va. 584, 25 S. E. Rep. 593.

Note as Evidence in Action by Indorsee.—And in an action on a negotiable note, the note is a necessary part of the plaintiff's evidence, and there can be no judgment for the plaintiff without the production of the note. If judgment be rendered for the plaintiff, and a writ of error awarded to that judgment, the record certified to the appellate court can alone be looked to to ascertain what evidence was introduced in the trial court. In an action on a note where the record failed to disclose the fact that the note was offered in evidence in the trial court the judgment was reversed. The appellate court will never presume what the record fails to disclose. Davis v. Poland, 92 Va. 225, 23 S. E. Rep. 292.

Suits upon Lost Instruments—Evidence.—In order to maintain a suit in equity setting up a lost negotiable note and praying for a decree for the payment thereof, it is indispensable, where the loss of such note is controverted by the answer of the defendants, that the loss should at the hearing of the cause be established by competent and satisfactory proofs. Exch. Bank v. Morrall, 16 W. Va. 546.

Evidence of Ratification of Improper Act.—The fact that a cashier handed the plaintiff a renewed note in lieu of the old note which should have been protested, saying the latter was lost, and the plaintiff retained the former some time, is not conclusive evidence of the plaintiff's ratification of the bank's action, but is evidence from which the jury might or might not infer such ratification. Roanoke Bank v. Hambrick, 82 Va. 135.

Weight of Check as Evidence.—In an action of assumpsit a check may be offered in evidence under the money counts; and if there is no other evidence in the case, it is of itself sufficient to entitle the plaintiff to recover on those counts. But it is only *prima facie* evidence of money lent, paid and advanced, or had and received; and when it is proved that no money had come into the hands of the defendant, the presumption raised by the check is rebutted, and no recovery can be had on those counts. Blair v. Wilson, 28 Gratt. 165.

Check Presumed to Be Given in Payment of Debt.—And a check upon a bank implies that it was given in payment of a debt due by the drawer to the party in whose favor it is drawn, or for money loaned by the latter to the former at the time of the execution of the check. Though such implication may be repelled by evidence that the check was not so given, but was in fact given for a loan by the drawer to the payee, such evidence being in conflict with the apparent purport of the transaction, ought to be very strong to repel the implication and to establish the contrary fact. Terry v. Ragsdale, 33 Gratt. 342; Blair v. Wilson, 28 Gratt. 165.

While the giving of a check by the debtor to a creditor is generally presumed to be only a provisional or conditional payment of the debt for which it is given, yet such check may, by special agreement of the parties, be given and received in full payment and absolute discharge of satisfaction of the debt. Whether it was so given and received is a question of fact for the jury. Blair v. Wilson, 28 Gratt. 165.

Recital in Trust Deed as Evidence.—In Powell v. White, 11 Leigh 309, a recital in a deed of trust, that the *cestuis que trust* were liable as indorsers for the maker of the deed, and that the maker of the deed was willing and desirous to indemnify and secure them from all loss and damage and consequence of their becoming indorsers, by conveying property for the purpose, was held not to entitle the indorsers, after the death of the maker, to rank as specialty creditors, in the administration of his personal assets.

Weight of Evidence a Question for the Jury.—The weight of evidence is in all cases a question for the jury, and it is improper for the court to pass upon the weight of evidence, as this would be usurping the functions of the jury. Thus in an action on a promissory note, the court if requested, should instruct the jury, that twenty years having elapsed between the time when the note became due and the institution of the action, they ought to presume it paid, unless evidence be offered of some acknowledgment of the debt, or of payment of interest, or part payment of principal, in the twenty years. The court cannot be justified in refusing to give such instruction on the ground that the defendant has not stated the evidence given in the cause in his application; or that in the court's opinion the said principle of law does not apply to the case, under the circumstances appearing in evidence; for this would be undertaking to judge of the weight of evidence. Wells v. Washington, 6 Munf. 532. For weight of protest as evidence, see *ante*, "Protest."

c. COMPETENCY OF WITNESSES.

Husband and Wife as Witnesses.—Where a husband and wife are joint makers of a negotiable note, neither party is a competent witness in an action on the note although no relief is prayed for in the bill as against the husband. In such case the payee is also incompetent. Jones v. Degge, 84 Va. 685, 5 S. E. Rep. 799. See monographic *note* on "Husband and Wife."

Plaintiff or Person for Whose Benefit Suit Is Brought.—And under § 3, ch. 130, of the W. Va. Code, as amended by Acts of 1883, neither the plaintiff, nor a person for whose benefit a suit is brought, is a competent witness against a defendant, who is the survivor of himself and a deceased party who with him, was a joint maker of the promissory note on which the action was brought, in regard to any personal transactions or communication, between either of them, and such deceased party. Heffebower v. Detrick, 27 W. Va. 16.

Indorser as Witness in Action against Maker.—But an indorser of a note, whether negotiable or not, is a competent witness in a suit between the holder and maker, to prove that the note was given for a usurious consideration. But where a joint action of debt was brought against the drawers and indorsers, under the act of the assembly allowing a joint action in such case, it was held that one of the indorsers could not render himself a competent witness, by a confession of judgment. Taylor v. Beck, 3 Rand. 316.

Parties Interested.—A negotiable note was indorsed by several parties for the accommodation of the drawer, and at the maturity the last indorser had to take it up. He, thereupon, brought an action against his immediate indorser. At the trial the defendant offered as a witness, the indorser immediately preceding him on the note, to prove that all

of the indorsers had agreed at the time of the execution of the note, to share equally the liability of loss on the note, should any occur, and that, as between themselves, they would be bound as joint securities only, and not be liable the one to the other as successive indorsers of negotiable paper. The trial court held that whether the plaintiff recovered or not, the witness' interest would be the same except as to the costs, which the plaintiff might recover of the defendant, and that the witness might therefore testify, if the defendant would release him from all liability for costs. While the release was being prepared, it was discovered that the plaintiff had paid the money on the note more than five years before the trial, and hence, that if he failed to recover of the defendant in this suit, his recourse against the witness would be barred by the statute of limitations, and the witness was not permitted to testify. Upon a writ of error it was held, that, the right of the witness to plead the statute in such an event, disturbs his equality of interest (if such equality existed before) in the subject-matter of this suit, and rendered him incompetent to testify, but his competency might be restored by an entire release to him, by the defendant, of all claim against him on account of his indorsers. Chapman v. Hiden, 2 P. & H. 91.

Party Interested to a Small Degree Is Incompetent.—In an action of debt against the maker and prior indorsers of a negotiable note, they pleaded jointly *nil debet* and usury. Before the trial the maker confessed a judgment, and there was a final judgment entered against him; and the two prior indorsers released him from all liability to them. As the maker was liable to the two last indorsers under the statute (Code, ch. 146, sec. 6, p. 587), for 5 per cent. damages for any amount of the debt they might have to pay, he was held not a competent witness for the defendants to prove usury. Mills v. Central Savings Bank, 16 Gratt. 94.

Maker an Incompetent Witness to Prove Usury.—In an action for debt against the maker and four indorsers of a negotiable note, they pleaded jointly *nil debet* and usury. Before the trial the maker confessed a judgment, and there was a final judgment entered against him, and the three indorsers released him from all liability to them. The maker was held still liable to the fourth indorser, and was not a competent witness for the defendants to prove usury. An agreement by the plaintiff not to take a judgment against the last indorser unless he recovered against all, did not release him so as to render the maker a competent witness when released by the prior indorsers. Hogshead v. Baylor, 16 Gratt. 99.

7. THE JUDGMENT.

Judgment against Some and in Favor of Others.—In an action of debt by the holder of a negotiable note, against the maker and the four indorsers, upon the plea of usury by the indorsers, the jury found that the note was indorsed by the first three indorsers, for the accommodation of the maker, and was sold by him to the fourth indorser, at a usurious rate of interest; who afterwards and before it became due, indorsed it to the holder, for value. It was held, that upon this verdict, the court should render a judgment in favor of the maker and the first three indorsers, and against the fourth indorser, under the Code, ch. 177, sec. 9, p. 733. Moffett v. Bickle, 21 Gratt. 280.

An action of debt was brought under the statute, against the drawer and indorser of a protested negotiable note. Upon a demurrer by both defendants to the evidence offered by the plaintiff, in which demurrer the plaintiff joined, the court gave judgment against one defendant and in favor of the other. Raine v. Rice, 2 P. & H. 529.

When Final Judgment May Be Entered and When Writ of Inquiry Necessary.—A final judgment, when no plea is filed, may be rendered in the office at rules, for principal and interest, when the action is founded upon any instrument in writing for the payment of an ascertained sum of money. But where the plaintiff showed by a paper filed by himself, that the defendant was entitled to a credit, the judgment ought either to have been entered subject to such credit, or if the plaintiff refused to take judgment in that way, a writ of inquiry should have been awarded; and where a judgment in such case was entered without the allowance of such credit, and without awarding a writ of inquiry, this was held reversible error. Rees v. Conococheague Bank, 5 Rand. 326.

Discontinuance as to a Party Does Not Affect the Validity of Judgment.—A joint action was brought against two partners as makers of a negotiable note, and two other parties as indorsers. One of the partners filed a plea of *nil debet*, which plea was sworn to. On the motion of the plaintiff's counsel the cause was discontinued as to the party so pleading. The other parties not appearing judgment was given against them by default. This judgment was held to be a valid judgment against the other parties, as the discontinuance of the action as to one of the parties did not amount to retraxit. A retraxit can only be entered by the plaintiff in person, and in open court. Muse v. Farmers' Bank, 27 Gratt. 252.

Judgment against Parties Served with Process.—In a joint action against two makers and an indorser of a negotiable note, process was served upon one of the makers and the indorser, but was returned again and again as to the other maker, "not found" or "no inhabitant." Upon a discontinuance of the action as to this maker, he was not thereby released from his liability on the note, and therefore the indorser was not released; and the plaintiff was held entitled to judgment against the indorser and the maker who had been duly summoned. McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

Confession of Judgment.—Where two persons were indorsers at a bank for third parties who are insolvent, and, for the purpose of gaining an extension, one of the indorsers confessed judgment for the whole amount for which he was liable, the third parties agreeing to give certain other collateral security; and to procure the other indorser to likewise confess judgment, neither of which was done, it was held that the first indorser was liable on his confession of judgment, even though the bank had promised to obtain judgment against his coindorser, such promise being void. Kelly v. Taliaferro, 82 Va. 801, 5 S. E. Rep. 85.

Office Judgment Cannot Be Confirmed without Writ of Inquiry.—Where a joint action is brought against the drawer and indorsers of a negotiable note, an office judgment cannot be confirmed against all, or either of the defendants, without a writ of inquiry. In a suit against the drawer alone, a judgment might be rendered against him without the writ of inquiry, but when he is sued with the indorser, no judgment can properly be given finally against him, until a final judgment is also given against all of the defendants. Hatcher v. Lewis, 4 Rand. 152; Metcalfe v. Battaile, Gilmer 191.

Judgment against Second Indorser Not Conclusive as First.—A judgment obtained against a subsequent indorser is not conclusive against a prior indorser; but in order to make him responsible, where the subsequent indorser has paid the debt, his liability must be fixed as though no judgment had ever been obtained. When such liability is fixed, a security of the subsequent indorser in a forthcoming bond, is entitled to be subrogated into the shoes of his principal to the extent of that liability. Conaway v. Odbert, 2 W. Va. 25.

Judgment against Indorsers without the Intervention of a Jury Is Error.—A negotiable note is not considered to be a writing for the payment of money as to the indorser, but it is only a collateral contract to pay it under certain circumstances, and judgment against the indorser without the intervention of a jury is improper. Metcalfe v. Battaile, Gilmer 191.

Void Judgment—Note Still a Valid Security.—Though the judgment upon a note rendered by the court not having jurisdiction of the case is void, the note is still a valid security. Linn v. Carson, 32 Gratt. 170.

8. RELIEF IN EQUITY.

What Is a Sufficient Allegation of Dishonor in Bill.—A charge in a bill in equity that a defendant indorsed certain notes and that "said notes are filed" as exhibits with the bill, does not make the certificates of protest annexed to the notes parts of the bill, and is not a sufficient allegation of dishonor to charge the indorser. Tidball v. The Shenandoah Nat. Bank, 98 Va. 768, 37 S. E. Rep. 318.

Notice of Dishonor a Necessary Allegation.—In a bill to subject a decedent's estate upon his liability as an indorser of a negotiable paper, notice of the dishonor of the paper is a necessary allegation in the bill. Tidball v. Shenandoah Nat. Bank, 98 Va. 768, 37 S. E. Rep. 318.

Parties Primarily Liable Necessary Parties in a Suit against Indorsers.—In a suit in equity to subject the estate of an indorser, persons primarily bound on the paper are necessary parties, as they may have defences unknown to the indorser, and, being first liable, equity will not, except under special circumstances subject the estate of the indorser until that of his principal has been exhausted. Tidball v. The Shenandoah Nat. Bank, 98 Va. 768, 37 S. E. Rep. 318; Horton v. Bond, 28 Gratt. 816.

Maker a Necessary Party to a Suit against Indorser.—And upon a suit in equity to subject the land of an indorser to his liability as an indorser upon a negotiable note, the maker of the note is a necessary party, and in order to charge the indorser, it is necessary to aver and prove dishonor by the maker, and notice thereof to the indorser. Fidelity, etc., Co. v. Engleby (Va. 1901), 37 S. E. Rep. 957.

Assignor Must Be Made Party in a Bill by Assignee.—Where a bill in equity asks relief for a plaintiff as assignee of the rights of another, the assignor must be made a party to the cause, and the assignment averred and proved, though not denied in the answer. Corbin v. Emmerson, 10 Leigh 663.

Where a note was sued on by an alleged assignee which had only been indorsed for collection, it was held necessary to make the alleged assignor a party. Lynchburg Iron Co. v. Tayloe, 79 Va. 671.

Error to Decree Sale of Land of Last Indorser before That of Maker and Prior Indorsers.—On a bill by a judgment creditor to subject the land of his debtors to satisfy a judgment against them as makers and indorsers of a note whose liabilities *inter sese* are successive, it is error for the court to decree a sale of the lands of the last indorser before resorting to the lands of the maker and prior indorsers of such note, unless to require the plaintiff to exhaust the estates of those debtors, whose liabilities are prior to the last indorser, will in the opinion of the court unduly delay the plaintiff in the collection of his debt. Nat. Bank v. Bates, 20 W. Va. 210.

No Adequate Remedy at Law.—A written agreement between the maker and the payee of a note, in relation to the contract in pursuance of which the note was made, having been lost at the time a judgment was recovered on the note, and without which the maker had no defence at law, it was held that equity had jurisdiction of the case. Vathir v. Zane, 6 Gratt. 246.

Jurisdiction of Law and Equity Concurrent in Case of Lost Instruments.—Equity has jurisdiction wherever a lost instrument is to be set up, notwithstanding courts of law now exercise jurisdiction in the same case. In such case, a court of equity, having jurisdiction for one purpose, will adjudicate the whole merits of the cause. Hall v. Wilkinson, 35 W. Va. 167, 13 S. E. Rep. 1118.

Better Rule to Offer Indemnity in the Bill in Case of Lost Note.—Where a bill in equity is filed setting up a lost negotiable note and praying a decree against the maker and indorsers for the debt, while it may not be indispensable, it is safer, and more in conformity with what seems to be a general practice to offer in the bill to give the proper indemnity under the direction of the court. Exch. Bank v. Morrall, 16 W. Va. 546.

Court Must Decree Indemnity.—And in a suit in equity upon a lost negotiable instrument where the court decrees for the debt, it is indispensable for the court to decree ample indemnity for the protection of the makers and indorsers of such notes, and each of them decreed against; and the court should provide in its decree that the plaintiff shall take no benefit thereof until such indemnity be given. Exch. Bank v. Morrall, 16 W. Va. 546.

Court May Fix Liability on Party First Responsible.—On a bill in equity exhibited by the holder of a promissory note against the maker, or the indorsers, the court may fix the debt on the person first responsible, in order to avoid circuity of action. Chalmers v. McMurdo, 5 Munf. 252.

Charging a Wife's Separate Estate—Joinder of Parties.—Equity is the appropriate tribunal for changing a wife's separate estate, and an indorser on her note may be joined as a party. And if from cause developed in the suit, the plaintiff fails in his remedy against that estate, he may have relief in the same suit against the indorser. Walters v. Farmers' Bank, 76 Va. 12.

A Decree Which Does Not Decide the Rights of the Indorsers Inter Sese Does Not Work an Estoppel.—In a suit upon a note against the maker and indorser, a decree was rendered in favor of the first indorser; but it not appearing upon the face of the record, nor by extrinsic evidence, that the adjudication was upon the merits and that it decided the respective rights of the indorsers as between themselves, it was held, that the surety of the second indorser, who had been compelled to pay the note, was not estopped by that adjudication from recourse against the first indorser. Chrisman v. Harman, 29 Gratt. 494.

Moulding the Decree to Fit the Particular Case.—The maker of a note negotiable at the Bank of Virginia, filed a bill of injunction against the payee and his assignee, on the ground of an equity affecting the payee only. It was held, that the court of equity

having before it all the parties concerned, ought not to discharge the maker altogether, nor to turn over the assignee to a suit at law against the payee, but should decree against the latter in the first instance, that he should pay the amount of the note to the assignee, and the costs at law; and liberty should be reserved to the assignee to apply to the court to dissolve the injunction as to the maker for so much of the said debt as he might not be able to recover from the payee; in which case a decree ought also to be rendered in favor of the maker against the said payee, for so much thereof as he might be compelled to pay out as aforesaid. And the decree should further direct that the action at law in favor of the assignee against the payee if any be pending, be perpetually enjoined, except as to costs. In such case, the payee should pay to both the other parties, their costs in chancery, and in the court of appeals, upon a bill taken by himself and the assignee in the decision of which, both the other parties substantially prevailed. McNiel v. Baird, 6 Munf. 316.

Jurisdictional Amount of Appellate Court in Injunction Cases.—The amount in controversy on an appeal from a decree perpetually enjoining a sale under a deed of trust given to secure notes amounting to $500, from which a usurious discount of $52 has been deducted, is the whole sum secured, and the court of appeals has jurisdiction of the case. Schmelz v. Rix, 95 Va. 509, 28 S. E. Rep. 890.

Cancellation of Note Given by Incompetent Party.—A court of equity has power to decree the delivery up and cancellation of a promissory note given by an old man who is clearly shown to be mentally incapable of transacting such business. Hiett v. Shull, 36 W. Va. 563, 15 S. E. Rep. 146.

Indorsers Right to File a Bill Quia Timet.—Where the holder of a note has recovered a judgment against the maker and the two indorsers and has issued execution on such judgment, the second and last indorser has not the right as a matter of course to file a bill *quia timet* asking a court of equity to compel the payment of this judgment out of the sale of the real estate of the maker and first indorser, simply because he alleges that he is afraid that his own real estate may be subjected to the payment of the judgment. Watson v. Wigginton, 28 W. Va. 533.

In Call v. Scott, 4 Call 402, the drawer of a bill of exchange gave a mortgage to indemnify an indorser against future liability, and the indorser was allowed to bring a bill *quia timet* against the representative of the drawer to foreclose the mortgage and pay the whole of the bill of exchange.

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633 ***Galt's Ex'or & als. v. Swain.**

January Term, 1853, Richmond.

[60 Am. Dec. 311.]

(Absent DANIEL, J.*)

1. **Subscriptions—May Be Conditional.**—A subscription of money for the accomplishment of an object, like any other promise or offer, may be conditional. If particular terms are prescribed in the subscription paper, these terms are in themselves conditions, which must be complied with before the subscription is binding.
2. **Same—What Necessary to Make Binding.**—To make a subscription binding, it must be acceded to, and the party must be apprised that his offer is accepted, and this must be done in a reasonable time.
3. **Same—Consideration Necessary.**—A subscription, like any other promise or offer, requires a consideration to support it, either of profit to the party making it, or of loss to the other party.
4. **Same—When Subscriber Bound.**—If a subscription be acceded to on the terms in which it is made, and labor or money is expended on the faith thereof, the party making the subscription is bound thereby.

This was a bill filed in 1824 in the late Chancery court in Richmond, by Levi Swain against a number of parties as subscribers to a scheme for building a church. The plaintiff alleged that he had been employed by some of them on behalf of themselves and others to do the carpenters' work of the building; that he had proceeded to do a large quantity of work, and they had failed to pay him; and he charged that a number of the subscribers had failed to pay up their subscriptions. Among these, he charged, were Galt, Nicholas and Scott. Several of the parties answered, saying that they had paid up the amount they had subscribed, and that by the contract with the plaintiff there was to be no per-
634 sonal liability further than for *their subscription. The defendants above named answered, denying that they were liable. The grounds taken by them and the facts of the case are stated in the opinion of Judge Samuels. Upon the second contract referred to in the opinion, the plaintiff had been paid at the commencement of the suit, all but about 200 dollars, which was paid in the progress of the cause. The court below decreed in favor of the plaintiff against Galt's executor, Nicholas and Scott. Whereupon they applied to this court for an appeal, which was allowed.

Rhodes, for the appellants.
Macfarland, for the appellee.

SAMUELS, J. The case between the parties before the court on this appeal is this: The appellee, by suit in chancery in the court below, sought to recover of the appellants respectively, several sums of money, alleged to have been subscribed for the purpose of building a church. It is alleged in the bill that a number of individuals, including the appellants Scott and Nichols, and the testator of the appellant Galt, associated themselves together and agreed to subscribe certain sums of money, which were placed on a list opposite their respective names, for the purpose of building a church. It is not alleged, however, that the subscriptions or promises were made to Swain: Nor is it alleged to whom or at what time they were made. The bill states that complainant was informed (without asserting the fact) that the persons associated selected certain individuals to make the necessary contracts, and to do what was requisite for the building of the church. It charges that a lot of ground was purchased

*He was related to some of the parties.

for the site of the building, and that certain individuals named in the bill, on behalf of themselves and other subscribers to 635 the scheme, entered *into a contract with complainant for the carpenters' work, and materials necessary to complete the church; which contract, after being partly performed by complainant, he was compelled to abandon by the default of the parties contracted with. It further alleges that another contract was afterwards made by complainant with another individual, acting for himself and others, for finishing the work at a certain price; that the work was finished, but the price not paid.

The defendants in their answers put the plaintiff on proof of the case as alleged in the bill. The plaintiff offered no proof whatever. The case must be decided upon the admissions in the answers. The defendants admit that they did subscribe certain amounts to be expended in the erection of the church. That these subscriptions were not made to complainant Swain, but to others; that certain terms or conditions attended the subscriptions; that these terms were never complied with; that the offers contained in the subscriptions were not accepted within a reasonable time, and if accepted at all, it was without the knowledge of the defendants. That any contract which may have been made with complainant was without their authority, and they deny that it binds them.

On the facts stated in the answers, it must be held that a subscription, like any other promise or offer, may be conditional. If particular terms are prescribed, these terms in themselves are conditions which must be complied with before the subscription is binding. To make such subscription binding it must be acceded to, as any other promise or offer, and the party apprised that his offer is accepted; and this must be done in a reasonable time. A subscription, like any other promise or offer, requires a consideration to support it, either of profit to the party promising or of loss to the other party. If a sub- 636 scription be acceded *to on the terms in which it is made, and labor or money is expended on the faith thereof, the party making the subscription is bound thereby. Story on Contracts, § 453. For these reasons I am of opinion to reverse the decree and dismiss the bill as to the appellants. It would be improper to express any opinion on the questions between complainant and other defendants, not parties to the appeal.

ALLEN and LEE, Js., concurred in the opinion of Samuels, J.

MONCURE, J., dissented.

Decree reversed.

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637 *Morris v. Morris.

January Term, 1853, Richmond.

Arbitration*—Award Affirming a Prior Award—Conclusiveness of—Case at Bar.—A bill is filed to set aside an award on the ground of mistake, misbehavior and corruption in the arbitrators. The defendant answers, denying all the grounds relied on by the plaintiff, and insisting upon the validity of the award; and each party takes testimony to sustain his case. They then, by an order of court, submit the cause to the award of another arbitrator, who is to decide it upon the pleadings and proofs then in the cause without further testimony, except that if he is at a loss on any point, or the counsel should certify that the examination of any witness was indispensable to having justice done to the party, such witness shall be examined by the arbitrator in presence of one counsel on each side and no other person. The award is to be returned by a time certain; and if no award is made or if made shall not be held to be a final determination of the cause, then the parties to stand in their present condition, and the defendant to be at liberty to have the same benefit of the award as he then had. The arbitrator made his award affirming the former award, and taking that as the basis of his settlement, going on to state a further account of matters embraced in the submission. HELD: The order of the court submitted the validity of the first award to the arbitrator and his decision is conclusive upon it.

This was a suit in equity in the Circuit court of Orange county, by George Morris, against Tandy G. Morris, to set aside an award. In the progress of the cause, it was submitted to arbitration again, and the award was to be entered as the decree of the court. The award was made and there was a decree upon it: From which decree George Morris applied to this court for an appeal, which was allowed. The case is fully stated in the opinion of Judge Allen.

Lyons, for the appellant.
Patton, for the appellee.

638 *ALLEN, J. On the 21st day of January 1842 George Morris and his son Tandy G. Morris, entered into an agreement which recited that George Morris had put into the hands of T. G. Morris certain bonds, one on Garland Ballard for 3067 dollars 26 cents, one on Lewis Collins for 1131 dollars 74 cents, and one on Mordecai Collins for 718 dollars 48 cents, all of which bonds were to be accounted for to the said G. Morris, in the way which the parties would state; and to prevent any difficulty between father and son, they agreed to refer the matter of payment of

*Arbitration—When Court Can Examine Evidence before Arbitrators.—The court can look into the testimony, which was before the arbitrators, for the purpose of determining from such evidence and other circumstances, whether the errors were so gross or palpable as to show fraud, corruption, or gross misconduct in the arbitrators, but not to correct any error of judgment into which, in the view of the court, the arbitrators may have innocently fallen. For this proposition, see the principal case cited in Boring v. Boring, 2 W. Va. 303; Fluharty v. Beatty, 22 W. Va. 706; Tennant v. Divine, 24 W. Va. 395. See monographic *note* on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

said bonds, and all other matters with regard to money transactions between them (making no exceptions as to dates) to the award of two arbitrators, who, if they could not agree, were authorized to select an umpire. The arbitrators entered upon the enquiry submitted to them, and not being able to agree upon all the matters in controversy before them, they selected an umpire; and an award was made on the 28th January 1842, and signed by the two arbitrators and the umpire. By this award, the arbitrators and umpire, after reciting that they had been appointed to determine some differences between the said George and Tandy Morris, touching claims which George Morris had against his son on account of certain bonds assigned by George to Tandy, and claims of Tandy against his father on account of moneys due for services rendered, and articles furnished and moneys paid and advanced by Tandy to and for his father, decided that Tandy was entitled to and should receive from his father the sum of 1726 dollars 81 cents, with interest from the date of the award until paid.

On the 23d of June 1842, George Morris filed a bill of injunction in the Circuit court of Orange, in which he alleged that being old and infirm, and confiding in his son Tandy, he assigned him a bond on Mordecai Collins. That the bond was assigned for
639 reasons set *forth in the bill, but with an express agreement that Tandy was to collect the same and pay over the money to him, deducting his costs and charges. That his son had recovered a judgment on the bond and issued execution: That learning that Tandy claimed the judgment as his own, he required him to retransfer it, but to his surprise, Tandy refused to do so, alleging he had purchased the bond. After some other details in relation to this bond, not material to be set forth, the bill prayed for an injunction to restrain his son from collecting the money, and for general relief.

Tandy G. Morris answered, denying that the bond was placed in his hands for collection only, but on the contrary, alleging that it was assigned to him for a valuable consideration paid to his father. On the 18th November 1842, the cause being heard on a motion to dissolve, the injunction was dissolved. The claim set up to the bond on Mordecai Collins, was the only claim preferred in this bill. It was one of the bonds recited in the articles of submission of the 21st January 1842, and had been passed upon by the award of the 28th of January. Yet, for some cause unexplained in the record, neither in the bill nor answer was any allusion made to the award.

After the dissolution of the injunction the appellant filed an amended bill, in which he gives a full and detailed statement of the controversy with his son, growing out of the assignment of the three bonds described in the articles of submission before referred to. He avers that at the time of making the assignment he took from his son an acknowledgment in writing, to the effect that he was to account for all the money received on the bonds, and besides such acknowledgment, a written promise that he would when required give adequate security to pay what might come into his hands as the ostensible assignee of the bonds. The bill further details the cir-
640 cumstances which he thinks *justifies him in charging his son with having purloined the said acknowledgment and promise in writing; sets forth the difficulties to which the loss of such testimony subjected him, the proposition of his son to arbitrate the controversy, and his reluctant assent to such arbitration, the circumstances attending the preparation of the submission bond, the proceedings of the arbitrators and umpire and their award, an office copy of which was filed with and prayed to be taken as part of the bill. The bill then avers that Tandy G. Morris founding himself upon the decision in his favor, had ever since claimed to be absolutely entitled to the bond on Mordecai Collins in dispute, besides claiming the large sum awarded to him, without venturing however to sue for it; and avers that it is obvious that as long as the award shall stand in force, it will afford his son sufficient pretext for claiming the amount of the bond of M. Collins as his own property, and will be an insuperable barrier to his obtaining relief in respect to that debt which he was seeking to recover by his original and amended bill. It then proceeds to set forth his various objections to the award, alleging that the arbitrators and umpire misconstrued the terms of the submission by going into an investigation of claims for services and other matters not having regard to the money transactions of the parties, and that the arbitrators were guilty of numerous other acts, which are elaborately detailed, of the grossest irregularity. That their proceedings evinced gross partiality to his adversary, and that the arbitrator and umpire who concurred in the award, were guilty of corruption. He therefore prays for the reasons assigned, that the award should be set aside and the copy delivered to T. G. Morris brought into court and canceled, and his right to the bond of Mordecai Collins be vindicated; and to save further litigation, that his right to the proceeds of the other two bonds, one on Lewis Col-
641 lins, the other on *Ballard, should also be vindicated. And the bill concludes with prayers for an account of the proceeds of said bonds, and for general relief.

The appellee in his answer, after responding to the various allegations of the appellant in regard to their dealings and controversy, which it is unnecessary in my view of this case further to notice, comes to that portion of the amended bill which seeks to impeach the award, and avers that the proposal to arbitrate came from his father; insists upon the awards being within the terms of the submission, and that everything decided by the award was contemplated and intended as the subject of reference by both parties from the time

of the submission down to the moment when the award was made. He denies that either the arbitrators or umpire acted irregularly or against the rules of law, or showed any partiality to the appellee, or were guilty of any corruption; and he insists that the award is right in all its parts, was rightly made up and announced; denies that it can be opened or reinvestigated; maintains that it ruled and controlled the rights of the parties in the premises; and claimed the full benefit of it.

The parties being thus at issue upon the validity of this award, proceeded to take their testimony, some of it tending to prove and disprove the allegations of misconduct and fraud and forgery, reciprocally charged by the father against the son and the son against the father; and much of the evidence tending to sustain and repel the charges of irregularities, misbehavior, partiality and corruption on the part of the arbitrators and umpire. In this condition of the cause, an order was entered on the 4th of May 1844, by the consent of the parties, referring the cause to Charles S. Jones, whose award should be final, and should be made the decree of the court. The arbitrator was to govern himself by the following principles, agreed on 642 *between the parties: He was to make up his award upon the pleadings, papers and evidence then filed in the cause, without further testimony, and without the interference of parties or others, except that if the arbitrator should be at a loss upon any point, or the counsel should certify that the examination of any witness was indipensable to having justice done to the party, the arbitrator should examine such witness in the presence of one of the counsel on each side and of no other person. The order contained a provision for arguments, directed the award should be completed and filed at least one month before the next term of the court, unless the parties should agree in writing to prolong the time; and further provided that if the arbitrator failed to render an award within the time and in the manner prescribed, or if he should render one, and such award should not for any reason be a final determination of the cause, then the parties were to stand in all respects precisely as they then stood, and in the same plight and condition; and the said Tandy G. Morris should be at liberty to insist on any objections to the jurisdiction of the court or the frame of the bill, and have the same benefit of the award referred to in the bill, as he then might have, so that the order in the event supposed should have no influence on the cause or the respective positions of the parties in reference thereto, but should be regarded as a nonentity. And here it may be as well, before tracing the history of the case farther, to enquire what was the extent of the submission to this arbitrator as contained in the order of the court. The original bill merely claimed the amount of the Mordecai Collins bond, and was silent as to the award; nor did the answer set it up in bar of the claim. But the amended bill brought the whole subject of controversy before the court. The bond on Mordecai Collins and two other bonds, are the bonds named in the submission of the 21st January 1842, the matter of pay- 643 ment *of which they agreed to refer.

The arbitrators in their award describe the claim of George Morris upon which they were acting, as a claim on account of certain bonds assigned by George Morris to his son; and upon this claim on the one side, with the rebutting claims on the other, they proceeded to act, and their award, if valid, finally disposed of the claims on both sides, by deciding that Tandy G. Morris was entitled to a certain sum which they awarded to him. The appellant therefore truly stated in the amended bill filed by him that it was obvious as long as the award should stand in force it would interpose an insuperable barrier to his obtaining any relief in respect to the bond on Mordecai Collins or either of the other bonds. His claim to the proceeds of these bonds had been passed upon by the arbitrators. It was res adjudicata, and could never be revived whilst the award continued in force. The validity of the award became, therefore, the main subject of controversy in the cause. No other question involved could be looked into until it was determined whether the award should stand. The appellee in his answer maintained its validity, claimed the benefit of it, denied the right of the appellant to go behind it, and insisted upon it as controlling the rights of the parties involved in that suit. This was the issue made up by the pleadings, and to this issue the testimony was mainly directed. In this state of things the parties, by a consent order, referred the cause to an arbitrator, whose award was to be final and to be made the decree of the court. What did they refer by this order? The cause as it then stood. And what question was involved in the cause? The pleadings which have been referred to show that the main, and until determined only way or the other, the sole question was the validity of the award. To leave no doubt as to their intent, they declare that he is to make up his award on the 644 pleadings, *papers and evidence then filed in the cause. The issue by the pleadings was as to the validity of the award; the prayer of the bill was to have it set aside and canceled; the award was a paper in the cause, and the evidence on each side was mainly directed to the issue thus made up by the pleadings. The arbitrator stood in the place of the court. He was the substituted and selected judge of the parties to decide that cause upon all the issues of law and fact raised by the pleadings; and a judge whose decision was to be final. It could not be pretended that, upon the issues as made by the pleadings in the cause, the court, if the case had been submitted for hearing, would not have been constrained to consider first; whether the award was or was not valid.

If valid, upon the concession of the appellant in his bill, it barred all further relief. In like manner the main question submitted to the arbitrator was as to the validity of the award; and it was as competent for him, as it would have been for the court in the case supposed, to have rendered his award confirming the former award. The parties in submitting a cause upon pleadings and proofs, raising principally the question whether an award was or was not valid, cannot be supposed to have intended to set aside the award entirely with a view to an enquiry into all the matters embraced in that award. That they did not so intend in this case is made more manifest from the fact that they supposed it possible the arbitrator might decide on the pleadings, papers and evidence then in the cause without further testimony. Provision, it is true, was made for further testimony, but he could, according to the terms of the submission, have acted finally on the case as it then stood. Yet the evidence in regard to some of the accounts acted upon by the arbitrators, and the vouchers in respect to most of the items contained in the statement furnished by the first arbitrators, were not then 645 and have *not since been filed or placed in the record. If the last arbitrator had supposed any of the allegations going to the validity of the whole award were sustained, and the award should be set aside entirely, this evidence and these vouchers would have been necessary to enable him to make out a new award upon all the matters in controversy between the parties. The provision in the latter part of the order that it should be regarded as a nonentity in case no award, or one which did not finally determine the controversy, was made in the time and manner prescribed, does not change the construction of so much of the order as pointed out the duty of and conferred authority on the arbitrator. The reservation of the right to have the same benefit of the award as if no such reference had been made, so far from showing an intention to abrogate the award for the purposes of the reference, indicates a determination to insist upon it under all circumstances; before the arbitrator if he acted, if not, before the court.

Considering the submission, then, as leaving the award in full force, and authorizing the arbitrator to determine upon its validity in whole or in part, it becomes necessary to ascertain from the face of his award, how he has construed his authority. The arbitrator states in this award that he had examined the bond of submission to the first arbitrators, the award of the arbitrators and umpire, the bills and answers, pleadings of counsel and depositions to annul the award on one side and support it on the other; and after mature deliberation, he had come to the conclusion that there was no testimony in the cause to prevent the award from being the basis of his statements. He therefore adopted it, and charged the appellant with the amount, subject to a deduction for certain errors and omissions, which he proceeds to make, and ascertains the balance against the appellant by this mode of 646 proceedings to be *951 dollars 81 cents, which, with interest, he awards against him. He further awarded that Tandy G. Morris should assign to the appellant without recourse to him, a bond taken from Ballard for the alleged balance of his debt, a matter embraced in the controversy as raised by the amended bill, but not comprehended in the first award. It thus appears from the face of the award, that the arbitrator supposed that the principal matter referred to him was the validity of the award impeached by the amended bill. He states that he had carefully examined the submission, pleadings and evidence to annul it on one side and support it on the other. There is nothing to show that he took up the claims of the parties as a new question, and it is manifest he did not; for the first arbitrators made up their award from the statements of the parties and the vouchers laid before them. There is no evidence in the record of those statements in respect to the items of charge on either side, nor were the vouchers exhibited to the last arbitrator. If we could look beyond the award to the deposition of the arbitrator, he states that he considered the first award binding on the parties on its face, but that they had a right to change it by any additional testimony, or by showing any error on its face, and so far as it appeared on its face or was shown by testimony to be incorrect, he corrected it.

Considering for the reasons already given, that it was the duty of the arbitrator, as it would have been of the court to which he was substituted, first to determine whether the award had been successfully impeached upon any of the issues made by the pleadings or the proof, that the want of authority, the irregularity, the partiality, the corruption of the arbitrators, were questions he had to pass upon, it seems to me the arbitrator did not misconstrue or exceed his authority in deciding upon the conduct of the first arbitrators; and if he thought 647 the award could not be impeached *for any of the causes alleged in the pleadings or made out by the evidence, it was competent for him to adopt it as the basis of his award. This it appears from the face of the award he has done, and from his decision on the questions submitted to him, there is no appeal. Where the submission clearly shows, as I think it does in this case, that the whole matter in controversy, and every question of law and fact arising in the cause was left to the arbitrator, who was substituted to the place of the court, and whose decision was to be final; and the arbitrator, without referring any question to the consideration of the court, makes a general award deciding the questions submitted to him, the award is conclusive. The rule of law and equity requires that the reasons for setting aside an award must appear on the face of it; or there must be misbehavior or corruption in the arbitra-

tors, or some palpable mistake. Though the court upon a review of the facts might arrive at a different conclusion from the arbitrator, it cannot for this reason set aside the award. The court can look to the testimony for the purpose of determining from the evidence and other circumstances, whether the error was so gross and palpable as to show misbehavior or corruption in the arbitrator, but not to correct any error of judgment to which in the view of the court, the arbitrator may have innocently fallen. Otherwise most awards, instead of ending, would be themselves the foundation of controversies, and courts would be called upon to exercise an appellate jurisdiction over the proceedings of arbitrators in the county upon proof of what may have transpired before them.

I think therefore that unless some error on the face of the last award or palpable mistake or misbehavior of the last arbitrator is shown, his award concludes every matter alleged as to the want of authority or misbehavior of the first arbitrators. Until his award is successfully impeached, the party should not be permitted to go behind it.

648 *No error or mistake appears on the face of this award. It was returned by the arbitrator to the fall term of the court in 1844, and lay until the spring term 1845. No rule or proceeding was taken to impeach it. An affidavit of counsel was filed tending to show some misunderstanding growing out of conversations before the submission as to the principles which should govern an arbitrator upon such a reference. The affidavit shows no misbehavior and presents no objection to the award. The presence of the appellee for a short time during the examination of a witness, is sufficiently accounted for both by the affidavit of the counsel and of N. Mills. He was called in it appears, on the suggestion of the counsel of the appellant, for the purpose of obtaining information of the time of a particular occurrence. The court properly overruled the objections presented by this affidavit, and pronounced a decree in conformity with the award.

After this decree, the appellant on the 7th of October 1846, filed by the leave of the court, a bill of review to the decree, in which he goes into all the matters of controversy between himself and his son, which were passed upon by the first arbitrators and concluded by their award. Nothing is alleged or shown impeaching the second award for misbehavior in the arbitrator, and upon the coming in of the answer, the court dismissed the bill with costs; a decision clearly right, if the arbitrator did not misunderstand the terms of the submission by the order of court; for if he acted in conformity therewith, there was no error in the decree made in pursuance of the award. I am of opinion that the decree appealed from should be affirmed.

DANIEL and LEE, Js., concurred in the opinion of Allen, J.

MONCURE and SAMUELS, Js., dissented.

Decree affirmed.

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649 *Perkins' Adm'r v. Hawkins' Adm'x.

January Term, 1853, Richmond.

(Absent DANIEL, J.*)

1. **Practice—Pleadings—Amendment—Delay†—Case at Bar.**—Defendant may have leave to file an additional account of set-offs when it will not produce delay to the plaintiffs, and it is necessary to attain the justice of the case. And if the plaintiff obtains leave to amend his declaration, as defendant is entitled to a continuance, there can be no objection to filing the account on the ground of delay.

2. **Deposition De Bene Esse—Affidavit—Case at Bar.**—Three successive actions were brought on a bond; the plaintiff having suffered a nonsuit in the first and second. Pending the second action which was referred to arbitrators, the deposition of a witness was taken by the defendant in December 1829, to be read *de bene esse*, and it was relied on before the arbitrators without objection by the plaintiff. On the trial of the third action in 1846, the deposition was offered in evidence by the defendant, and was objected to by the plaintiff on the ground that there was no affidavit made before the clerk of the court in which the second action was pending, for the issuing of the commission to take the deposition. HELD:

1. **Same—Same—Lapse of Time—Presumption‡—Case at Bar.**—That if an affidavit was necessary, it may well be presumed after the lapse of nearly eighteen years, and under all the circumstances of the case, that it had been taken and lost.

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*He had been counsel in the cause.

†**Practice—Pleadings—Amendments—Delay.**—In Keckley v. Union Bank, 79 Va. 467, it is said: "It only remains to consider plea No. 8 offered at the trial. This was a plea of usury in the terms prescribed by the statute. It was properly rejected as coming too late. 'A defendant should be permitted to amend his pleadings *or* add to his pleas whenever justice requires it, if delay be not thereby occasioned, or if a good reason be shown for not having done so sooner.' *Perkins' Adm'r v. Hawkins, 9 Gratt. 658.* In this case the delay was unreasonable, not only as to this plea (No. 8), but as to the whole series of pleas offered in July, 1883."

In Perry v. McHuffman, 7 W. Va. 309, it is said: "The second error is not well taken, because the record of the judgment of the 8th of December, 1871, declares that the cause had been regularly continued, at the several intervening terms of the court, and the case was 'submitted to the court' by the parties, for trial, without objection. 'The Suitor's Test Oath,' which the order of December, 1869, states is filed, is not disclosed by the record, and, under the circumstances, and the declaration and recitals of the judgment of December 30, 1871, this court would be authorized, if necessary, to sustain the judgment of the court below to presume that the plaintiff did file the affidavits required by the orders of court of October and December. *Perkins' Adm'r v. Hawkins' Adm'x, 9 Gratt. 649.*"

‡**Bonds—Presumption of Payment.**—On this question, see *foot-note* to Erskine v. North, 14 Gratt. 60, where

2. **Same—Same—Failure to Object to Deposition—Effect.**—That independent of such presumption, no objection having been made until after the deposition had been read as evidence before the arbitrators, and after the death of the witness, the objection was properly overruled.

3. **Evidence—Proof of Agency—Record of Suit—Competent—Case at Bar.**—The payments and set-offs relied on by defendant were for the most part transacted through a brother of the plaintiff's intestate, so that it becomes necessary to prove the agency of the brother. The defendant, after introducing evidence tending to prove the agency, offers in evidence, as corroborating the previous evidence of agency, the record of a suit instituted by the defendant's intestate against the plaintiff's intestate, which was settled by the brother, and the suit thereupon dismissed, to which 650 objection was *never made by the plaintiff's intestate. HELD: The record is competent evidence for the purpose for which it is offered.

4. **Bonds—Lapse of Time—Presumption of Payment—Evidence.**—The bond sued upon was executed in 1813; and the intestate of the plaintiff having died in 1816, his brother qualified as one of his administrators. In order to sustain the presumption of payment from lapse of time and other circumstances, the defendant offered in evidence a deed by which he conveyed to the brother whilst he acted as administrator, a lot of ground for the price of $3205. HELD: That it was competent evidence.

5. **Same—Payment—Evidence to Prove—Case at Bar.**—Plaintiff's intestate applied to defendant's intestate for a draft on P, in part of the bond sued on, who promised to come the next morning and give it to him. A receipt from the brother dated the next day, for the draft which was paid at maturity by the acceptor, is competent evidence to sustain the payment; the plaintiff's intestate never having objected to it during his life.

6. **Same—Set-Off§—Case at Bar.**—A bond of the plaintiff's intestate and his brother, though not a legal set-off against the bond given to the former, yet may be made a set-off by agreement between the parties, and is competent evidence coupled with proof of such an agreement, of the set-off claimed.

7. **Evidence—Proof of Agency—Case at Bar.**—Evidence being offered tending to prove the agency of the brother, a paper signed by the brother showing he had settled the price of certain hogsheads of tobacco, for the plaintiff's intestate with the defendant's intestate, is competent evidence to sustain the set-off.

8. **Same—Draft in Favor of Third Person—Case at Bar.**—A draft in favor of a third person without any evidence to connect the defendant's intestate with it, is not competent evidence against him.

9. **Same—Receipt—Competent.**—A paper consisting of figures with a receipt attached to it, accompanied with evidence explaining what was meant by the figures, is competent evidence.

10. **Bills of Exception—Reference to Another Bill—Exception to Rule.**|—Although it is generally true that the evidence set out in one bill of exceptions, taken in the progress of a trial, cannot be looked to in considering another, yet where a bill of exception is taken after all the evidence has been submitted to the jury, and the bill of exception purports to set out all the evidence, it seems that evidence set out in this bill of exception may be looked to in considering the question raised in another bill taken in the progress of the trial: And this, though the evidence had not been introduced when the first bill of exception was taken.

This was an action of debt in the Circuit court of Lynchburg, instituted by the administrator of John Perkins against the administratrix of Robert Hawkins. The case is fully stated in the opinion of 651 Moncure, J. *There was a verdict and judgment for the defendant: And Perkins' administrator applied to this court for a supersedeas, which was allowed.

Cooke, for the appellant.
Garland, for the appellee.

MONCURE, J. This suit was brought on an obligation of Robert Hawkins to John Perkins, dated the 4th day of May 1813, payable thirty days after date, for 1400 dollars, "for value received in flour." John Perkins died before the 4th of April 1816, on which day administration on his estate was granted to Benjamin Perkins, Richard Perkins and James W. Dibrell of the Court of hustings of Lynchburg. In the spring of 1819, suit was brought on the bond in the Superior court of Campbell, by the said administrators of John Perkins against Robert Hawkins, who pleaded payment; on which issue was joined. On the

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the principal case is cited. See also, citing the principal case, Sadler v. Kennedy, 11 W. Va. 192, 194; Calwell v. Prindle, 19 W. Va. 640; Lightfoot v. Green, 91 Va. 514, 22 S. E. Rep. 242.

§**Set-Off—Joint and Several Demand.**—In Elliott v. Bell, 37 W. Va. 835, 17 S. E. Rep. 399, it is said: "This set-off, be it ever so valid a demand, is shut off as a set-off by that rule in the law of set-off, that a joint demand cannot be set off against a separate demand. Porter v. Nekervis, 4 Rand. (Va.) 359: *Perkins v. Hawkins, 9 Gratt. 650;* Choen v. Guthrie, 15 W. Va. 102."

|**Bills of Exception—Reference to Another Bill of Exceptions—Exception to Rule.**—In the last headnote of the principal case it is held that, although it is generally true that the evidence set out in one bill of exceptions, taken, in the progress of a trial, cannot be looked to in considering another, yet where a bill of exceptions is taken after all the evidence has been submitted to the jury, and the bill of exceptions purports to set out all the evidence, it seems that evidence set out in this bill of exceptions may be looked to in considering the question raised in another bill taken in the progress of the trial. And this, though the evidence had not been introduced when the first bill of exceptions was taken.

The following cases cite and approve the principal case for the general rule and the exception thereto as laid down above: Olinger v. Shepherd, 12 Gratt. 475; Fant v. Miller, 17 Gratt. 55; Moore v. City of Richmond, 85 Va. 543, 8 S. E. Rep. 387; Mathews v. Traders' Bank, 2 Va. Dec. 541; Hall v. Hall, 12 W. Va. 21; Klinkler v. Wheeling Steel, etc., Co., 43 W. Va. 221, 27 S. E. Rep. 238. See, citing the principal case for the general rule, Zumbro v. Stump, 38 W. Va. 335, 18 S. E. Rep. 447; Roanoke Bank v. Hambrick, 82 Va. 138. But in the last two cases there was no certificate of all the facts proved. See monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

4th of April 1821, the death of the defendant was suggested, and the suit was revived, by consent, against Nancy Hawkins, his administratrix. On the 6th of April 1824 a jury was sworn in the case; but the plaintiff suffered a nonsuit. Pending that suit, to wit, on the 6th of August 1821, the letters of administration which had been granted on John Perkins' estate were revoked, and on the 8th day of the same month administration de bonis non was granted to Richard Perkins, one of the three original administrators. On the 6th of April 1825, a second suit was brought on the bond; which was brought in the County court of Bedford by Richard Perkins, administrator de bonis non of John Perkins, against Nancy Hawkins, administratrix of Robert Hawkins. The defendant pleaded payment and fully administered. The suit was regularly continued until March court 1828, when it was referred to arbitration by consent of parties.

It was then regularly continued for an 652 *award till the 27th day of October 1838, when, on the motion of the defendant, the order of reference was set aside; and on the 29th of August 1839 a nonsuit was entered. It appears from a certificate of the clerk annexed to a copy of the record of the suit, that "C. Anthony, the plaintiff's attorney, having died, there was no counsel for the plaintiff at the time of rendering the judgment" of nonsuit. On the 4th of December 1843, a third suit was brought on the bond; which was brought in the Circuit court of Bedford, but in September 1844 was, by consent of parties, removed to the Circuit court of Lynchburg. Before such removal, to wit, in April 1844, the defendant demurred generally to the declaration, and the plaintiff joined in the demurrer. On the 7th of November 1844, the defendant pleaded severally, payment by her intestate in his lifetime, and by herself since his death; to which pleas the plaintiff replied generally; and issues were thereon joined. At the same time, it would seem, though it is not expressly so stated in the record, an account of payments and setoffs was filed in the suit, such as had been filed in each of the two former suits, consisting of

Bal. of Benj. and Jno. Perkins' bond, dated 12 Dec. 1811,		$836 08
Bal. of 5 hhds. of tobacco, per rec't 8 Nov. 1812,	£99 6s. 11d.	
Off advances,	30 0 00	
		231 16
Draft on Vilbert and Peryear, per rec't 25 May 1813,		600 00

At November term 1845, the defendant, by leave of the court, added to the above three other offsets, viz: 1st, a receipt of Benjamin Perkins to R. Hawkins for wheat receipts for 926 bushels 30 lbs.; 2d, the price of a lot sold by Hawkins to Benjamin Perkins in the year 1818, amounting to 653 3200 dollars; and 3d, the costs *and damages of the two former suits and nonsuits. At the same term the plaintiff, by leave of the court, amended his declaration, and by consent of parties the cause retained its place on the docket. A bill of exceptions was taken by the plaintiff to the opinion of the court, granting leave to the defendant to file an additional account of payments and setoffs. Also, at the same term, the defendant pleaded severally, payment by her intestate to John Perkins, and his first administrators, and each of them; to which pleas the plaintiff replied generally, and issues were joined thereon. The trial of the issues commenced on the 4th and ended on the 12th of June 1846, when a verdict and judgment were rendered for the defendant. Eight exceptions were taken by the plaintiff and three by the defendant to opinions given by the court during the trial. An exception was also taken by the plaintiff to an opinion of the court overruling his motion for a new trial. A supersedeas having been awarded to the judgment, it is now to be determined whether or not the same is erroneous.

I will briefly consider the questions presented by the exceptions of the plaintiff, in the order in which they were taken.

The first exception was to the opinion of the court giving leave to the defendant to file an additional account of payments and setoffs. The reason assigned in the bill of exceptions for giving such leave was, "because of obtaining the justice of the case, and because the plaintiff had just amended his declaration;" and was, I think, sufficient. A defendant should be permitted to amend his pleadings, or add to his pleas, whenever justice requires it, if delay be not thereby occasioned, or a good reason be shown for not having done so sooner. 1 Rob. Pr. 231, and cases cited. No delay was occasioned by giving the leave in this case; the defendant being entitled to 654 a continuance after the *plaintiff had amended his declaration. When leave was given the plaintiff to amend his declaration, the cause would have been remanded to rules for that purpose, but for the consent of the defendant that it should retain its place on the docket.

The second exception was to the opinion of the court overruling the objection of the plaintiff to the reading of the deposition of Littleberry Hawkins, because, as he alleged, "there was no affidavit ever made before the clerk of the County court of Bedford for the issuing of a commission to take the said deposition." The deposition was taken on the 12th of December 1829, to be read as evidence, de bene esse, in the second suit which had been brought on the bond, and which had been referred to arbitration. It was taken in pursuance of a commission bearing date the 28th of July 1828, and of a written notice served on the plaintiff, who was present when it was taken, and cross examined the witness. It was read before the arbitrators, and relied on in the argument of the counsel for the defendant, without any objection from the plaintiff; and no objection appears ever to have been

made to it by him until the trial of the third suit on the bond in June 1846; and then the only objection was, that no affidavit had been taken for the issuing of the commission. The bare statement of the case is sufficient, I think, to show that the objection was rightly overruled by the court. It does not appear whether the commission was issued under the 15th or 19th sections of the act 1 Rev. Code 1819, p. 519 and 521. An affidavit was required by the former, but only an oath by the latter. If an affidavit was necessary in this case, it might well have been presumed, after the lapse of nearly 18 years, and under all the circumstances of the case, that it had been taken and lost. But it was not necessary to rely on that presumption as a ground for overruling the objection. It is enough
655 that no objection *was made until after the deposition had been read as evidence before the arbitrators, and after the death of the witness. See Buddicum v. Kirk, 3 Cranch's R. 293.

The third exception was to the opinion of the court overruling the objection of the plaintiff to the introduction of a record of the proceedings in a suit in the County court of Campbell, brought by Robert Hawkins against John Perkins, as evidence in this suit. Benjamin Perkins, who was a brother of John, seems to have had some connection with nearly all the offsets and payments claimed by the defendant; and it therefore became important for the defendant to prove that Benjamin was the agent of John. Accordingly, evidence was introduced by the defendant, which tended to prove that Benjamin, who was the older of the two brothers, commenced business in Lynchburg, probably about 1808, and John lived with him; that afterwards they did business in partnership till 1812, when it was dissolved; after which they did business separately and occupied different houses in the same town; and that at the time of the execution of the bond on which the suit was brought, and before, and afterwards, they were in the habit of transacting business for each other, as paying or receiving money, settling accounts, and generally such business as an agent would execute in the absence of his principal. The record in question was introduced as further evidence of the agency of Benjamin for John; and was, I think, admissible evidence thereof. The suit of Robert Hawkins v. John Perkins was brought in February 1812, the year preceding that in which the bond of Hawkins to Perkins above mentioned, was executed. John Perkins was preparing to defend the suit, when Benjamin Perkins, on the 9th of November 1812, agreed and settled it for him with Hawkins; and on the 25th of January 1814, Hawkins gave an order to the clerk to dismiss
656 the suit *at his costs. No objection appears ever to have been made to this settlement by John Perkins, though he did not die until March 1816.

The fourth exception was to the opinion of the court overruling the objection of the plaintiff to the introduction of a deed from Robert Hawkins to Benjamin Perkins, dated 2d January 1818, conveying a lot of ground in Lynchburg, "in consideration of 3205 dollars in hand paid;" which deed the defendant offered in evidence, "as a circumstance tending to show a presumption of payment of the bond sued on." I think the deed was admissible evidence for the purpose for which it was offered and admitted. The lapse of twenty years, without explanatory circumstances, affords a presumption of law that the debt is paid, even though it be due by specialty. 2 Greenl. Evi. § 528. In this case more than thirty-one years elapsed after the debt became due and before the institution of the last suit. It may be said that the institution and prosecution of the first and second suits are sufficient explanatory circumstances to repel the legal presumption. But payment may be inferred by the jury from circumstances coupled with the lapse of a shorter period than twenty years. Id.; Best on Presumptions, § 137. And therefore on the trial of an issue made up on the plea of payment, evidence tending to show on the one hand that the creditor was in want of money, and on the other, that the debtor had the means of payment when the debt became due and afterwards, is admissible evidence to be weighed by the jury with the other evidence in the case. Accordingly, evidence was given, without objection in this case, tending to show that John Perkins was doing an extensive business, requiring all his means, and needed all the money he could get to carry it on; and that Hawkins "was a man of considerable property, small family, (one child only,) industrious and economical; made large crops, (from
657 *one to two thousand bushels of wheat,) and could have paid a debt of one or two thousand dollars in a year." The deed in question tended to show not only that Hawkins had ample means to pay the debt after it became due and before the first suit was brought, but that during that period 3205 dollars of his money, a sum greatly exceeding the amount of the debt, was actually in the hands of Benjamin Perkins, one of the administrators of John. From which and the other circumstances of the case the jury might have inferred that the debt was either paid out of that money, or was not because it had been previously paid.

The fifth exception was to the opinion of the court overruling the objection of the plaintiff to the introduction, as evidence, of a receipt from Benjamin Perkins to Robert Hawkins, in these words and figures:

"Lynchburg, 28th May 1813. Received from Mr. Robert Hawkins a draft on Messrs. Vilbert & Peryear, at 60 days after date, which when paid, will be placed to the credit of his bond to John Perkins.

Benj. Perkins.

Teste: John Moore."

The signature of Benjamin Perkins was admitted to be genuine. Evidence was exhibited tending to prove that Benjamin

Perkins was the agent of John, especially in his transactions with Hawkins; that John applied to Hawkins for a draft on Peryear of Richmond, for 600 dollars, on account of said Hawkins' bond for a larger amount given for flour bought by him of said John Perkins; that said Hawkins promised to call the next morning and give the draft; and that the draft mentioned in the receipt was paid at maturity. It did not appear that John Perkins ever objected to the draft as a payment (being the draft mentioned in the defendant's list of payments and setoffs). The above state-
658 ment *is sufficient to show that the receipt was admissible evidence.

The sixth exception was to the opinion of the court overruling the objection of the plaintiff to the introduction, as evidence, of a bond of Benjamin and John Perkins for 836 dollars 8 cents, dated 12th December 1811, payable 25th December 1812, with two credits endorsed thereon, the execution of which bond was proved; (being the same which is mentioned in the defendant's list of payments and setoffs). This bond was not a legal setoff to that on which this suit was brought, the debts not being mutual; but might, by the parties, have been applied as a payment on account of the latter; and the evidence strongly tended to show that it was so applied: at least the balance due thereon after deducting the two credits endorsed. There cannot be the least doubt about the admissibility of this bond as evidence, and I therefore deem it unnecessary to say anything more upon the subject.

The seventh exception was to the opinion of the court overruling the objection of the plaintiff to the introduction as evidence of a paper signed by Benjamin Perkins, in these words and figures:

"I have this day agreed to settle the within five hhds. tobacco for my brother John, at 27s. for each and every hundred, and have paid Robert Hawkins 100 dollars in part thereof. The balance is due and payable in ninety days from the date hereof, after said Hawkins' deducting charges, say carriage to Richmond, &c., &c.

Benj. Perkins.

Witness: William Fowler.

Lynchburg, 8 Nov. 1812."

Then follows a statement of the number and weights of the 5 hhds. of tobacco, weighing together 7359 lbs., at 27s., £99 6s. 11d. (or 231 dollars 15 cents, which is
659 *the first item in the defendant's list of payments and setoffs). This paper was admissible in connection with the evidence which was exhibited tending to prove that Benjamin Perkins was the agent of John. That this tobacco was in fact purchased by John Perkins, is further shown by another paper introduced by the defendant as evidence, signed by John Perkins and admitted to be genuine, containing a statement of the numbers and weights of 5 hhds. of tobacco, corresponding precisely with the statement above mentioned, having the name of Robert Hawkins at the head of it, and endorsed thereon these words:

"Mr. Fox will please give Mr. Hawkins an account of sales of any part of the within tobacco that he may have sold.

J. Perkins."

The latter paper is not referred to in the bill of exceptions now under consideration; and seems not to have been offered in evidence until after that exception was taken. It is set out as part of the evidence in the cause, all of which is contained in the bill of exception to the opinion of the court overruling the motion for a new trial. But still I think it may be considered in determining the question raised by this exception, notwithstanding the rule laid down in some of the cases that facts stated in one bill of exceptions cannot be noticed by an appellate court in considering another; unless indeed the first bill of exceptions should be referred to in and adopted as part of the second. 1 Rob. Pr. 347, and cases cited. The reason of that rule does not apply, and therefore the rule does not extend to a case like this, in which one of the bills of exceptions contains all the evidence which was given on the trial. This is obvious from what was said by Judge Carr in delivering the opinion of the court in
660 Brooke v. Young, *3 Rand. 106. In that case there were two bills of exceptions taken to opinions of the court given on the trial In the first, it was stated that the evidence therein set out was all the evidence in the cause; and for that reason Judge Carr was of opinion that resort might be had thereto in deciding the question raised by the second bill of exceptions, in which a small part only of the evidence was contained. But he acquiesced in the opinion of his brethren who thought otherwise; "because, although the evidence stated in the first bill might be all, when it was sealed, there might be other important facts brought forward afterwards; and because, by thus supplying the defects of one exception from another, we may shut out evidence material for the other party not noticed in either bill." In this case the bill of exceptions containing all the evidence was taken after the trial was over, and therefore other important facts could not have been brought forward afterwards. No objection was made to the introduction of the latter paper. Considering the two papers together, the former was not only admissible evidence, but was favorable to the plaintiff. For while the latter tended to charge the plaintiff's testator with the whole price of the tobacco, the former gave him credit for 100 dollars. And the price of 27s. fixed by the former does not appear to have been too high, nor ever objected to by the said testator. But with or without the latter paper, I think the former was admissible evidence.

The eighth exception was to the opinion of the court sustaining the motion of the defendant to exclude from the jury a draft of Benjamin Perkins on Anderson & Blair of Richmond, dated Lynchburg, January 16th, 1813, payable at sight to Samuel Garland or order, for 343 dollars 20 cents, en-

fendant C, what did you pay him for it? He answers to the first: I received the note from C, who, so far as I had any knowledge, was the owner of it. He declines to answer the second question. Defendants move to strike out last part of answer to the first question. *Held*, the only object of the question was to ascertain the character in which C indorsed the note; and the answer is therefore responsive to the question. If that was not the object, the answer was immaterial. The pleas being joint, defendants were not entitled to an answer to the second question to reduce the amount of recovery against C; nor were they entitled to the answer whilst they relied on the defence of usury. Hogshead v. Baylor, 16 Gratt. 99.

5. SET-OFF.

The General Rule.—The right of offset, being of modern statutory creation, is neither an equity nor lien recognized by the law merchant as attaching to a negotiable instrument; and therefore the *bona fide* purchaser of an overdue negotiable note is not required to take notice of existing offsets, in the absence of legislative enactment. Davis v. Noll, 38 W. Va. 66, 17 S. E. Rep. 791; Davis v. Miller, 14 Gratt. 1.

Bill Cannot Be Set Off against a Party without Notice.—And so in an action by an indorsee against the maker of a promissory note, it was held that the latter could not set off a bill of exchange on which the plaintiff was responsible, unless it appeared that the defendant had received such bill before notice of the indorsement of the note to the plaintiff. Ritchie v. Moore, 5 Munf. 388, 7 Am. Dec. 688.

Unliquidated Claim.—An action of assumpsit was brought against the assignor of a note to collect the amount of the note assigned, on the ground that the obligor was insolvent when the note fell due. At the trial the assignor alleged that the assignment was without recourse and proved that there was a written contract, which was lost, that the assignee was to attend a certain sale of real estate belonging to the obligor, which sale was to take place under a decree of the circuit court, and make his money, but the witness could not remember the exact terms of the contract. The assignor then offered to prove the value of the land, and that the assignee did not attend the sale. It was held, that the assignor could not set off the damage which he had sustained by the breach of this collateral contract, in an action on the note, such claim being for unliquidated damages. McSmithee v. Feamster, 4 W. Va. 673.

6. EVIDENCE.

a. ADMISSIBILITY.

Revenue Law Requiring Stamp before the Instrument Can Be Admitted is a Local Law.—A revenue law of a state, which requires a stamp upon the indorsement of an overdue bill or note before such indorsement can be given in evidence, is a local law and has no exterritorial effect. Such note may be given in evidence in the courts of another state although unstamped, as the laws of one state can furnish no rule of evidence for the courts of another. Lambert v. Jones, 2 P. & H. 144.

But under the act of 1812, requiring negotiable notes to be stamped, a note, negotiable at a bank, might be given in evidence if duly stamped, before it became payable, though not so stamped when it was executed. Hannon v. Batte, 5 Munf. 490.

Unstamped Bill or Note is Admissible.—And a bill or note though unstamped, is admissible in evidence, the act of congress not applying to proceedings in state courts. And they are admissible in evidence in the United States courts unless the omission to stamp was with fraudulent intent. Hale v. Wilkinson, 21 Gratt. 75.

In Crews v. Farmers' Bank, 31 Gratt. 348, revenue stamps were placed upon a note by a collector of revenue more than a year after it was made. This could only be done upon the payment of a penalty of $50. It was held, that the payment of a penalty did not tend to show that the failure to affix the stamp when the note was made was with an intent to evade the law, and the note was admitted in evidence.

Admissibility of Bill of Exchange.—In Anderson v. Kanawha Coal Co., 12 W. Va. 526, it was held that bills of exchange drawn by the defendant on its agent, in favor of the plaintiff and described with particularity in the bill of particulars filed with the declaration containing the common counts, ought to be received in evidence on the trial of the issue of nonassumpsit.

Parol Evidence to Show Relation of the Parties.—Parol evidence, by the weight of authority, is admissible, in general, to show the real relation between the parties to a bill or note, and that the actual liability of the parties among themselves is not that which appears upon the face of the instrument; and this is upon the ground that the facts of suretyship is collateral to the written instrument, and does not contradict or vary it. Faulkner v. Thomas (W. Va.), 35 S. E. Rep. 915.

Therefore, a written obligation, after payment thereof, does not preclude the makers and indorsers from proving by parol evidence a contemporaneous oral agreement as an inducement thereto; fixing their ultimate liabilities among themselves in accord with the true consideration and purpose of entering into such obligation. Faulkner v. Thomas (W. Va. 1900), 35 S. E. Rep. 915.

Presumption of Payment Rebutted by Parol Evidence.—The fact that the joint maker of a note pays the same at maturity, and does not for a long time require an indorser to come in and contribute his moiety thereof under a verbal arrangement between the parties, but waits until the death of such indorser, and presents the same against his estate, is strong circumstantial evidence in rebuttal of such agreement, but it is not conclusive, and may be explained and overcome by sufficient competent parol evidence. Faulkner v. Thomas (W. Va. 1900), 35 S. E. Rep. 915.

Answer to a Bill of Discovery as Evidence.—It is a general rule that a written evidence of indebtedness cannot be contradicted or altered by evidence of verbal arrangement. But where a bill in equity calls on the defendant for a discovery as to the transaction between the parties the answer must be treated not only as evidence, but as evidence introduced by the plaintiff. Thompson v. Clark, 81 Va. 422. As to admissibility of protest in evidence, see *ante*, "Protest."

b. WEIGHT OF EVIDENCE.

Execution of Note as Evidence of Settlement.—It is a well-settled rule that the execution of a note in settlement of an account is conclusive upon all the items charged in it, unless some accident be shown. Parkersburg Nat. Bank v. Als, 5 W. Va. 50; Johnston v. Zane, 11 Gratt. 552.

Note as Evidence in an Action by Assignee.—In a proceeding by an assignee of a note against a remote assignor to recover on the implied contract of assignment, the note is a necessary piece of evidence for the plaintiff in order to prove the assignments,

and also to show the measure of the plaintiff's recovery. In the absence of proof to the contrary the law presumes that the assignor received for the note a sum equal to that specified in it. The fact that the note was seen and inspected by the court need not appear in the entry of the judgment, but the appearance of it does not vitiate the judgment, nor show that the judgment was rendered on the note, and not on the contract implied from the assignment. Long v. Pence, 93 Va. 584, 25 S. E. Rep. 593.

Note as Evidence in Action by Indorsee.—And in an action on a negotiable note, the note is a necessary part of the plaintiff's evidence, and there can be no judgment for the plaintiff without the production of the note. If judgment be rendered for the plaintiff, and a writ of error awarded to that judgment, the record certified to the appellate court can alone be looked to to ascertain what evidence was introduced in the trial court. In an action on a note where the record failed to disclose the fact that the note was offered in evidence in the trial court the judgment was reversed. The appellate court will never presume what the record fails to disclose. Davis v. Poland, 92 Va. 225, 23 S. E. Rep. 292.

Suits upon Lost Instruments—Evidence.—In order to maintain a suit in equity setting up a lost negotiable note and praying for a decree for the payment thereof, it is indispensable, where the loss of such note is controverted by the answer of the defendants, that the loss should at the hearing of the cause be established by competent and satisfactory proofs. Exch. Bank v. Morrall, 16 W. Va. 546.

Evidence of Ratification of Improper Act.—The fact that a cashier handed the plaintiff a renewed note in lieu of the old note which should have been protested, saying the latter was lost, and the plaintiff retained the former some time, is not conclusive evidence of the plaintiff's ratification of the bank's action, but is evidence from which the jury might or might not infer such ratification. Roanoke Bank v. Hambrick, 83 Va. 135.

Weight of Check as Evidence.—In an action of assumpsit a check may be offered in evidence under the money counts; and if there is no other evidence in the case, it is of itself sufficient to entitle the plaintiff to recover on those counts. But it is only *prima facie* evidence of money lent, paid and advanced, or had and received; and when it is proved that no money had come into the hands of the defendant, the presumption raised by the check is rebutted, and no recovery can be had on those counts. Blair v. Wilson, 28 Gratt. 165.

Check Presumed to Be Given in Payment of Debt.—And a check upon a bank implies that it was given in payment of a debt due by the drawer to the party in whose favor it is drawn, or for money loaned by the latter to the former at the time of the execution of the check. Though such implication may be repelled by evidence that the check was not so given, but was in fact given for a loan by the drawer to the payee, such evidence being in conflict with the apparent purport of the transaction, ought to be very strong to repel the implication and to establish the contrary fact. Terry v. Ragsdale, 33 Gratt. 342; Blair v. Wilson, 28 Gratt. 165.

While the giving of a check by the debtor to a creditor is generally presumed to be only a provisional or conditional payment of the debt for which it is given, yet such check may, by special agreement of the parties, be given and received in full payment and absolute discharge of satisfaction of the debt. Whether it was so given and received is a question of fact for the jury. Blair v. Wilson, 28 Gratt. 165.

Recital in Trust Deed as Evidence.—In Powell v. White, 11 Leigh 309, a recital in a deed of trust, that the *cestuis que trust* were liable as indorsers for the maker of the deed, and that the maker of the deed was willing and desirous to indemnify and secure them from all loss and damage and consequence of their becoming indorsers, by conveying property for the purpose, was held not to entitle the indorsers, after the death of the maker, to rank as specialty creditors, in the administration of his personal assets.

Weight of Evidence a Question for the Jury.—The weight of evidence is in all cases a question for the jury, and it is improper for the court to pass upon the weight of evidence, as this would be usurping the functions of the jury. Thus in an action on a promissory note, the court if requested, should instruct the jury, that twenty years having elapsed between the time when the note became due and the institution of the action, they ought to presume it paid, unless evidence be offered of some acknowledgment of the debt, or of payment of interest, or part payment of principal, in the twenty years. The court cannot be justified in refusing to give such instruction on the ground that the defendant has not stated the evidence given in the cause in his application; or that in the court's opinion the said principle of law does not apply to the case, under the circumstances appearing in evidence; for this would be undertaking to judge of the weight of evidence. Wells v. Washington, 6 Munf. 533. For weight of protest as evidence, see *ante*, "Protest."

c. COMPETENCY OF WITNESSES.

Husband and Wife as Witnesses.—Where a husband and wife are joint makers of a negotiable note, neither party is a competent witness in an action on the note although no relief is prayed for in the bill as against the husband. In such case the payee is also incompetent. Jones v. Degge, 84 Va. 685, 5 S. E. Rep. 799. See monographic *note* on "Husband and Wife."

Plaintiff or Person for Whose Benefit Suit is Brought.—And under § 3, ch. 130, of the W. Va. Code, as amended by Acts of 1883, neither the plaintiff, nor a person for whose benefit a suit is brought, is a competent witness against a defendant, who is the survivor of himself and a deceased party who with him, was a joint maker of the promissory note on which the action was brought, in regard to any personal transactions or communication, between either of them, and such deceased party. Heffebower v. Detrick, 27 W. Va. 16.

Indorser as Witness in Action against Maker.—But an indorser of a note, whether negotiable or not, is a competent witness in a suit between the holder and maker, to prove that the note was given for a usurious consideration. But where a joint action of debt was brought against the drawers and indorsers, under the act of the assembly allowing a joint action in such case, it was held that one of the indorsers could not render himself a competent witness, by a confession of judgment. Taylor v. Beck, 3 Rand. 316.

Parties Interested.—A negotiable note was indorsed by several parties for the accommodation of the drawer, and at the maturity the last indorser had to take it up. He, thereupon, brought an action against his immediate indorser. At the trial the defendant offered as a witness, the indorser immediately preceding him on the note, to prove that all

of the indorsers had agreed at the time of the execution of the note, to share equally the liability of loss on the note, should any occur, and that, as between themselves, they would be bound as joint securities only, and not be liable the one to the other as successive indorsers of negotiable paper. The trial court held that whether the plaintiff recovered or not, the witness' interest would be the same except as to the costs, which the plaintiff might recover of the defendant, and that the witness might therefore testify, if the defendant would release him from all liability for costs. While the release was being prepared, it was discovered that the plaintiff had paid the money on the note more than five years before the trial, and hence, that if he failed to recover of the defendant in this suit, his recourse against the witness would be barred by the statute of limitations, and the witness was not permitted to testify. Upon a writ of error it was held, that, the right of the witness to plead the statute in such an event, disturbs his equality of interest (if such equality existed before) in the subject-matter of this suit, and rendered him incompetent to testify, but his competency might be restored by an entire release to him, by the defendant, of all claim against him on account of his indorsers. Chapman v. Hiden, 2 P. & H. 91.

Party Interested to a Small Degree is Incompetent.—In an action of debt against the maker and prior indorsers of a negotiable note, they pleaded jointly *nil debet* and usury. Before the trial the maker confessed a judgment, and there was a final judgment entered against him; and the two prior indorsers released him from all liability to them. As the maker was liable to the two last indorsers under the statute (Code, ch. 146, sec. 6, p. 587), for 5 per cent. damages for any amount of the debt they might have to pay, he was held not a competent witness for the defendants to prove usury. Mills v. Central Savings Bank, 16 Gratt. 94.

Maker an Incompetent Witness to Prove Usury.—In an action for debt against the maker and four indorsers of a negotiable note, they pleaded jointly *nil debet* and usury. Before the trial the maker confessed a judgment, and there was a final judgment entered against him, and the three indorsers released him from all liability to them. The maker was held still liable to the fourth indorser, and was not a competent witness for the defendants to prove usury. An agreement by the plaintiff not to take a judgment against the last indorser unless he recovered against all, did not release him so as to render the maker a competent witness when released by the prior indorsers. Hogshead v. Baylor, 16 Gratt. 99.

7. THE JUDGMENT.

Judgment against Some and in Favor of Others.—In an action of debt by the holder of a negotiable note, against the maker and the four indorsers, upon the plea of usury by the indorsers, the jury found that the note was indorsed by the first three indorsers, for the accommodation of the maker, and was sold by him to the fourth indorser, at a usurious rate of interest; who afterwards and before it became due, indorsed it to the holder, for value. It was held, that upon this verdict, the court should render a judgment in favor of the maker and the first three indorsers, and against the fourth indorser, under the Code, ch. 177, sec. 9, p. 733. Moffett v. Bickle, 21 Gratt. 280.

An action of debt was brought under the statute, against the drawer and indorser of a protested negotiable note. Upon a demurrer by both defendants to the evidence offered by the plaintiff, in which demurrer the plaintiff joined, the court gave judgment against one defendant and in favor of the other. Raine v. Rice, 2 P. & H. 529.

When Final Judgment May Be Entered and When Writ of Inquiry Necessary.—A final judgment, when no plea is filed, may be rendered in the office at rules, for principal and interest, when the action is founded upon any instrument in writing for the payment of an ascertained sum of money. But where the plaintiff showed by a paper filed by himself, that the defendant was entitled to a credit, the judgment ought either to have been entered subject to such credit, or if the plaintiff refused to take judgment in that way, a writ of inquiry should have been awarded; and where a judgment in such case was entered without the allowance of such credit, and without awarding a writ of inquiry, this was held reversible error. Rees v. Conococheague Bank, 5 Rand. 326.

Discontinuance as to a Party Does Not Affect the Validity of Judgment.—A joint action was brought against two partners as makers of a negotiable note, and two other parties as indorsers. One of the partners filed a plea of *nil debet*, which plea was sworn to. On the motion of the plaintiff's counsel the cause was discontinued as to the party so pleading. The other parties not appearing judgment was given against them by default. This judgment was held to be a valid judgment against the other parties, as the discontinuance of the action as to one of the parties did not amount to retraxit. A retraxit can only be entered by the plaintiff in person, and in open court. Muse v. Farmers' Bank, 27 Gratt. 252.

Judgment against Parties Served with Process.—In a joint action against two makers and an indorser of a negotiable note, process was served upon one of the makers and the indorser, but was returned again and again as to the other maker, "not found" or "no inhabitant." Upon a discontinuance of the action as to this maker, he was not thereby released from his liability on the note, and therefore the indorser was not released; and the plaintiff was held entitled to judgment against the indorser and the maker who had been duly summoned. McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

Confession of Judgment.—Where two persons were indorsers at a bank for third parties who are insolvent, and, for the purpose of gaining an extension, one of the indorsers confessed judgment for the whole amount for which he was liable, the third parties agreeing to give certain other collateral security; and to procure the other indorser to likewise confess judgment, neither of which was done, it was held that the first indorser was liable on his confession of judgment, even though the bank had promised to obtain judgment against his coindorser, such promise being void. Kelly v. Taliaferro, 82 Va. 801, 5 S. E. Rep. 85.

Office Judgment Cannot Be Confirmed without Writ of Inquiry.—Where a joint action is brought against the drawer and indorsers of a negotiable note, an office judgment cannot be confirmed against all, or either of the defendants, without a writ of inquiry. In a suit against the drawer alone, a judgment might be rendered against him without the writ of inquiry, but when he is sued with the indorser, no judgment can properly be given finally against him, until a final judgment is also given against all of the defendants. Hatcher v. Lewis, 4 Rand. 152; Metcalfe v. Battaile, Gilmer 191.

Judgment against Second Indorser Not Conclusive as First.—A judgment obtained against a subsequent indorser is not conclusive against a prior indorser; but in order to make him responsible, where the subsequent indorser has paid the debt, his liability must be fixed as though no judgment had ever been obtained. When such liability is fixed, a security of the subsequent indorser in a forthcoming bond, is entitled to be subrogated into the shoes of his principal to the extent of that liability. Conaway v. Odbert, 2 W. Va. 25.

Judgment against Indorsers without the Intervention of a Jury Is Error.—A negotiable note is not considered to be a writing for the payment of money as to the indorser, but it is only a collateral contract to pay it under certain circumstances, and judgment against the indorser without the intervention of a jury is improper. Metcalfe v. Battaile, Gilmer 191.

Void Judgment—Note Still a Valid Security.—Though the judgment upon a note rendered by the court not having jurisdiction of the case is void, the note is still a valid security. Linn v. Carson, 32 Gratt. 170.

8. RELIEF IN EQUITY.

What Is a Sufficient Allegation of Dishonor in Bill.—A charge in a bill in equity that a defendant indorsed certain notes and that "said notes are filed" as exhibits with the bill, does not make the certificates of protest annexed to the notes parts of the bill, and is not a sufficient allegation of dishonor to charge the indorser. Tidball v. The Shenandoah Nat. Bank, 98 Va. 768, 37 S. E. Rep. 318.

Notice of Dishonor a Necessary Allegation.—In a bill to subject a decedent's estate upon his liability as an indorser of a negotiable paper, notice of the dishonor of the paper is a necessary allegation in the bill. Tidball v. Shenandoah Nat. Bank, 98 Va. 768, 37 S. E. Rep. 318.

Parties Primarily Liable Necessary Parties in a Suit against Indorsers.—In a suit in equity to subject the estate of an indorser, persons primarily bound on the paper are necessary parties, as they may have defences unknown to the indorser, and, being first liable, equity will not, except under special circumstances subject the estate of the indorser until that of his principal has been exhausted. Tidball v. The Shenandoah Nat. Bank, 98 Va. 768, 37 S. E. Rep. 318; Horton v. Bond, 28 Gratt. 816.

Maker a Necessary Party to a Suit against Indorser.—And upon a suit in equity to subject the land of an indorser to his liability as an indorser upon a negotiable note, the maker of the note is a necessary party, and in order to charge the indorser, it is necessary to aver and prove dishonor by the maker, and notice thereof to the indorser. Fidelity, etc., Co. v. Engleby (Va. 1901), 37 S. E. Rep. 957.

Assignor Must Be Made Party in a Bill by Assignee.—Where a bill in equity asks relief for a plaintiff as assignee of the rights of another, the assignor must be made a party to the cause, and the assignment averred and proved, though not denied in the answer. Corbin v. Emmerson, 10 Leigh 663.

Where a note was sued on by an alleged assignee which had only been indorsed for collection, it was held necessary to make the alleged assignor a party. Lynchburg Iron Co. v. Tayloe, 79 Va. 671.

Error to Decree Sale of Land of Last Indorser before That of Maker and Prior Indorsers.—On a bill by a judgment creditor to subject the land of his debtors to satisfy a judgment against them as makers and indorsers of a note whose liabilities *inter sese* are successive, it is error for the court to decree a sale of the lands of the last indorser before resorting to the lands of the maker and prior indorsers of such note, unless to require the plaintiff to exhaust the estates of those debtors, whose liabilities are prior to the last indorser, will in the opinion of the court unduly delay the plaintiff in the collection of his debt. Nat. Bank v. Bates, 20 W. Va. 210.

No Adequate Remedy at Law.—A written agreement between the maker and the payee of a note, in relation to the contract in pursuance of which the note was made, having been lost at the time a judgment was recovered on the note, and without which the maker had no defence at law, it was held that equity had jurisdiction of the case. Vathir v. Zane, 6 Gratt. 246.

Jurisdiction of Law and Equity Concurrent in Case of Lost Instruments.—Equity has jurisdiction wherever a lost instrument is to be set up, notwithstanding courts of law now exercise jurisdiction in the same case. In such case, a court of equity, having jurisdiction for one purpose, will adjudicate the whole merits of the cause. Hall v. Wilkinson, 35 W. Va. 167, 12 S. E. Rep. 1118.

Better Rule to Offer Indemnity in the Bill in Case of Lost Note.—Where a bill in equity is filed setting up a lost negotiable note and praying a decree against the maker and indorsers for the debt, while it may not be indispensable, it is safer, and more in conformity with what seems to be a general practice to offer in the bill to give the proper indemnity under the direction of the court. Exch. Bank v. Morrall, 16 W. Va. 546.

Court Must Decree Indemnity.—And in a suit in equity upon a lost negotiable instrument where the court decrees for the debt, it is indispensable for the court to decree ample indemnity for the protection of the makers and indorsers of such notes, and each of them decreed against; and the court should provide in its decree that the plaintiff shall take no benefit thereof until such indemnity be given. Exch. Bank v. Morrall, 16 W. Va. 546.

Court May Fix Liability on Party First Responsible.—On a bill in equity exhibited by the holder of a promissory note against the maker, or the indorsers, the court may fix the debt on the person first responsible, in order to avoid circuity of action. Chalmers v. McMurdo, 5 Munf. 252.

Charging a Wife's Separate Estate—Joinder of Parties.—Equity is the appropriate tribunal for changing a wife's separate estate, and an indorser on her note may be joined as a party. And if from cause developed in the suit, the plaintiff fails in his remedy against that estate, he may have relief in the same suit against the indorser. Walters v. Farmers' Bank, 76 Va. 12.

A Decree Which Does Not Decide the Rights of the Indorsers Inter Sese Does Not Work an Estoppel.—In a suit upon a note against the maker and indorser, a decree was rendered in favor of the first indorser; but it not appearing upon the face of the record, nor by extrinsic evidence, that the adjudication was upon the merits and that it decided the respective rights of the indorsers as between themselves, it was held, that the surety of the second indorser, who had been compelled to pay the note, was not estopped by that adjudication from recourse against the first indorser. Chrisman v. Harman, 29 Gratt. 494.

Moulding the Decree to Fit the Particular Case.—The maker of a note negotiable at the Bank of Virginia, filed a bill of injunction against the payee and his assignee, on the ground of an equity affecting the payee only. It was held, that the court of equity

having before it all the parties concerned, ought not to discharge the maker altogether, nor to turn over the assignee to a suit at law against the payee, but should decree against the latter in the first instance, that he should pay the amount of the note to the assignee, and the costs at law; and liberty should be reserved to the assignee to apply to the court to dissolve the injunction as to the maker for so much of the said debt as he might not be able to recover from the payee; in which case a decree ought also to be rendered in favor of the maker against the said payee, for so much thereof as he might be compelled to pay out as aforesaid. And the decree should further direct that the action at law in favor of the assignee against the payee if any be pending, be perpetually enjoined, except as to costs. In such case, the payee should pay to both the other parties, their costs in chancery, and in the court of appeals, upon a bill taken by himself and the assignee in the decision of which, both the other parties substantially prevailed. McNiel v. Baird, 6 Munf. 316.

Jurisdictional Amount of Appellate Court in Injunction Cases.—The amount in controversy on an appeal from a decree perpetually enjoining a sale under a deed of trust given to secure notes amounting to $500, from which a usurious discount of $52 has been deducted, is the whole sum secured, and the court of appeals has jurisdiction of the case. Schmelz v. Rix, 95 Va. 509, 28 S. E. Rep. 890.

Cancellation of Note Given by Incompetent Party.—A court of equity has power to decree the delivery up and cancellation of a promissory note given by an old man who is clearly shown to be mentally incapable of transacting such business. Hiett v. Shull, 36 W. Va. 563, 15 S. E. Rep. 146.

Indorsers Right to File a Bill Quia Timet.—Where the holder of a note has recovered a judgment against the maker and the two indorsers and has issued execution on such judgment, the second and last indorser has not the right as a matter of course to file a bill *quia timet* asking a court of equity to compel the payment of this judgment out of the sale of the real estate of the maker and first indorser, simply because he alleges that he is afraid that his own real estate may be subjected to the payment of the judgment. Watson v. Wigginton, 28 W. Va. 583.

In Call v. Scott, 4 Call 402, the drawer of a bill of exchange gave a mortgage to indemnify an indorser against future liability, and the indorser was allowed to bring a bill *quia timet* against the representative of the drawer to foreclose the mortgage and pay the whole of the bill of exchange.

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633 ***Galt's Ex'or & als. v. Swain.**

January Term, 1858, Richmond.

[60 Am. Dec. 311.]

(Absent DANIEL, J.*)

1. **Subscriptions—May Be Conditional.**—A subscription of money for the accomplishment of an object, like any other promise or offer, may be conditional. If particular terms are prescribed in the subscription paper, these terms are in themselves conditions, which must be complied with before the subscription is binding.
2. **Same—What Necessary to Make Binding.**—To make a subscription binding, it must be acceded to, and the party must be apprised that his offer is accepted, and this must be done in a reasonable time.
3. **Same—Consideration Necessary.**—A subscription, like any other promise or offer, requires a consideration to support it, either of profit to the party making it, or of loss to the other party.
4. **Same—When Subscriber Bound.**—If a subscription be acceded to on the terms in which it is made, and labor or money is expended on the faith thereof, the party making the subscription is bound thereby.

This was a bill filed in 1824 in the late Chancery court in Richmond, by Levi Swain against a number of parties as subscribers to a scheme for building a church. The plaintiff alleged that he had been employed by some of them on behalf of themselves and others to do the carpenters' work of the building; that he had proceeded to do a large quantity of work, and they had failed to pay him; and he charged that a number of the subscribers had failed to pay up their subscriptions. Among these, he charged, were Galt, Nicholas and Scott. Several of the parties answered, saying that they had paid up the amount they had subscribed, and that by the contract with the plaintiff there was to be no per-
634 sonal liability further than for *their subscription. The defendants above named answered, denying that they were liable. The grounds taken by them and the facts of the case are stated in the opinion of Judge Samuels. Upon the second contract referred to in the opinion, the plaintiff had been paid at the commencement of the suit, all but about 200 dollars, which was paid in the progress of the cause. The court below decreed in favor of the plaintiff against Galt's executor, Nicholas and Scott. Whereupon they applied to this court for an appeal, which was allowed.

Rhodes, for the appellants.
Macfarland, for the appellee.

SAMUELS, J. The case between the parties before the court on this appeal is this: The appellee, by suit in chancery in the court below, sought to recover of the appellants respectively, several sums of money, alleged to have been subscribed for the purpose of building a church. It is alleged in the bill that a number of individuals, including the appellants Scott and Nichols, and the testator of the appellant Galt, associated themselves together and agreed to subscribe certain sums of money, which were placed on a list opposite their respective names, for the purpose of building a church. It is not alleged, however, that the subscriptions or promises were made to Swain: Nor is it alleged to whom or at what time they were made. The bill states that complainant was informed (without asserting the fact) that the persons associated selected certain individuals to make the necessary contracts, and to do what was requisite for the building of the church. It charges that a lot of ground was purchased

*He was related to some of the parties.

for the site of the building, and that certain individuals named in the bill, on behalf of themselves and other subscribers to
635 the scheme, entered *into a contract with complainant for the carpenters' work, and materials necessary to complete the church; which contract, after being partly performed by complainant, he was compelled to abandon by the default of the parties contracted with. It further alleges that another contract was afterwards made by complainant with another individual, acting for himself and others, for finishing the work at a certain price; that the work was finished, but the price not paid.

The defendants in their answers put the plaintiff on proof of the case as alleged in the bill. The plaintiff offered no proof whatever. The case must be decided upon the admissions in the answers. The defendants admit that they did subscribe certain amounts to be expended in the erection of the church. That these subscriptions were not made to complainant Swain, but to others; that certain terms or conditions attended the subscriptions; that these terms were never complied with; that the offers contained in the subscriptions were not accepted within a reasonable time, and if accepted at all, it was without the knowledge of the defendants. That any contract which may have been made with complainant was without their authority, and they deny that it binds them.

On the facts stated in the answers, it must be held that a subscription, like any other promise or offer, may be conditional. If particular terms are prescribed, these terms in themselves are conditions which must be complied with before the subscription is binding. To make such subscription binding it must be acceded to, as any other promise or offer, and the party apprised that his offer is accepted; and this must be done in a reasonable time. A subscription, like any other promise or offer, requires a consideration to support it, either of profit to the party promising or of loss to the other party. If a sub-
636 scription be acceded *to on the terms in which it is made, and labor or money is expended on the faith thereof, the party making the subscription is bound thereby. Story on Contracts, § 453. For these reasons I am of opinion to reverse the decree and dismiss the bill as to the appellants. It would be improper to express any opinion on the questions between complainant and other defendants, not parties to the appeal.

ALLEN and LEE, Js., concurred in the opinion of Samuels, J.

MONCURE, J., dissented.

Decree reversed.

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637 *Morris v. Morris.

January Term, 1858, Richmond.

Arbitration*—Award Affirming a Prior Award—Conclusiveness of—Case at Bar.—A bill is filed to set aside an award on the ground of mistake, misbehavior and corruption in the arbitrators. The defendant answers, denying all the grounds relied on by the plaintiff, and insisting upon the validity of the award; and each party takes testimony to sustain his case. They then, by an order of court, submit the cause to the award of another arbitrator, who is to decide it upon the pleadings and proofs then in the cause without further testimony, except that if he is at a loss on any point, or the counsel should certify that the examination of any witness was indispensable to having justice done to the party, such witness shall be examined by the arbitrator in presence of one counsel on each side and no other person. The award is to be returned by a time certain; and if no award is made or if made shall not be held to be a final determination of the cause, then the parties to stand in their present condition, and the defendant to be at liberty to have the same benefit of the award as he then had. The arbitrator made his award affirming the former award, and taking that as the basis of his settlement, going on to state a further account of matters embraced in the submission. HELD: The order of the court submitted the validity of the first award to the arbitrator and his decision is conclusive upon it.

This was a suit in equity in the Circuit court of Orange county, by George Morris, against Tandy G. Morris, to set aside an award. In the progress of the cause, it was submitted to arbitration again, and the award was to be entered as the decree of the court. The award was made and there was a decree upon it: From which decree George Morris applied to this court for an appeal, which was allowed. The case is fully stated in the opinion of Judge Allen.

Lyons, for the appellant.
Patton, for the appellee.

638 *ALLEN, J. On the 21st day of January 1842 George Morris and his son Tandy G. Morris, entered into an agreement which recited that George Morris had put into the hands of T. G. Morris certain bonds, one on Garland Ballard for 3067 dollars 26 cents, one on Lewis Collins for 1131 dollars 74 cents, and one on Mordecai Collins for 718 dollars 48 cents, all of which bonds were to be accounted for to the said G. Morris, in the way which the parties would state; and to prevent any difficulty between father and son, they agreed to refer the matter of payment of

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*Arbitration—When Court Can Examine Evidence before Arbitrators.—The court can look into the testimony, which was before the arbitrators, for the purpose of determining from such evidence and other circumstances, whether the errors were so gross or palpable as to show fraud, corruption, or gross misconduct in the arbitrators, but not to correct any error of judgment into which, in the view of the court, the arbitrators may have innocently fallen. For this proposition, see the principal case cited in Boring v. Boring, 2 W. Va. 303; Fluharty v. Beatty, 22 W. Va. 706; Tennant v. Divine, 24 W. Va. 395. See monographic *note* on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

said bonds, and all other matters with regard to money transactions between them (making no exceptions as to dates) to the award of two arbitrators, who, if they could not agree, were authorized to select an umpire. The arbitrators entered upon the enquiry submitted to them, and not being able to agree upon all the matters in controversy before them, they selected an umpire; and an award was made on the 28th January 1842, and signed by the two arbitrators and the umpire. By this award, the arbitrators and umpire, after reciting that they had been appointed to determine some differences between the said George and Tandy Morris, touching claims which George Morris had against his son on account of certain bonds assigned by George to Tandy, and claims of Tandy against his father on account of moneys due for services rendered, and articles furnished and moneys paid and advanced by Tandy to and for his father, decided that Tandy was entitled to and should receive from his father the sum of 1726 dollars 81 cents, with interest from the date of the award until paid.

On the 23d of June 1842, George Morris filed a bill of injunction in the Circuit court of Orange, in which he alleged that being old and infirm, and confiding in his son Tandy, he assigned him a bond on Mordecai Collins. That the bond was assigned for 639 reasons set *forth in the bill, but with an express agreement that Tandy was to collect the same and pay over the money to him, deducting his costs and charges. That his son had recovered a judgment on the bond and issued execution: That learning that Tandy claimed the judgment as his own, he required him to retransfer it, but to his surprise, Tandy refused to do so, alleging he had purchased the bond. After some other details in relation to this bond, not material to be set forth, the bill prayed for an injunction to restrain his son from collecting the money, and for general relief.

Tandy G. Morris answered, denying that the bond was placed in his hands for collection only, but on the contrary, alleging that it was assigned to him for a valuable consideration paid to his father. On the 18th November 1842, the cause being heard on a motion to dissolve, the injunction was dissolved. The claim set up to the bond on Mordecai Collins, was the only claim preferred in this bill. It was one of the bonds recited in the articles of submission of the 21st January 1842, and had been passed upon by the award of the 28th of January. Yet, for some cause unexplained in the record, neither in the bill nor answer was any allusion made to the award.

After the dissolution of the injunction the appellant filed an amended bill, in which he gives a full and detailed statement of the controversy with his son, growing out of the assignment of the three bonds described in the articles of submission before referred to. He avers that at the time of making the assignment he took from his son an acknowledgment in writing, to the effect that he was to account for all the money received on the bonds, and besides such acknowledgment, a written promise that he would when required give adequate security to pay what might come into his hands as the ostensible assignee of the bonds. The bill further details the circumstances 640 which he thinks *justifies him in charging his son with having purloined the said acknowledgment and promise in writing; sets forth the difficulties to which the loss of such testimony subjected him, the proposition of his son to arbitrate the controversy, and his reluctant assent to such arbitration, the circumstances attending the preparation of the submission bond, the proceedings of the arbitrators and umpire and their award, an office copy of which was filed with and prayed to be taken as part of the bill. The bill then avers that Tandy G. Morris founding himself upon the decision in his favor, had ever since claimed to be absolutely entitled to the bond on Mordecai Collins in dispute, besides claiming the large sum awarded to him, without venturing however to sue for it; and avers that it is obvious that as long as the award shall stand in force, it will afford his son sufficient pretext for claiming the amount of the bond of M. Collins as his own property, and will be an insuperable barrier to his obtaining relief in respect to that debt which he was seeking to recover by his original and amended bill. It then proceeds to set forth his various objections to the award, alleging that the arbitrators and umpire misconstrued the terms of the submission by going into an investigation of claims for services and other matters not having regard to the money transactions of the parties, and that the arbitrators were guilty of numerous other acts, which are elaborately detailed, of the grossest irregularity. That their proceedings evinced gross partiality to his adversary, and that the arbitrator and umpire who concurred in the award, were guilty of corruption. He therefore prays for the reasons assigned, that the award should be set aside and the copy delivered to T. G. Morris brought into court and canceled, and his right to the bond of Mordecai Collins be vindicated; and to save further litigation, that his right to the proceeds of the other two bonds, one on Lewis Col- 641 lins, the other on *Ballard, should also be vindicated. And the bill concludes with prayers for an account of the proceeds of said bonds, and for general relief.

The appellee in his answer, after responding to the various allegations of the appellant in regard to their dealings and controversy, which it is unnecessary in my view of this case further to notice, comes to that portion of the amended bill which seeks to impeach the award, and avers that the proposal to arbitrate came from his father; insists upon the awards being within the terms of the submission, and that everything decided by the award was contemplated and intended as the subject of reference by both parties from the time

of the submission down to the moment when the award was made. He denies that either the arbitrators or umpire acted irregularly or against the rules of law, or showed any partiality to the appellee, or were guilty of any corruption; and he insists that the award is right in all its parts, was rightly made up and announced; denies that it can be opened or reinvestigated; maintains that it ruled and controlled the rights of the parties in the premises; and claimed the full benefit of it.

The parties being thus at issue upon the validity of this award, proceeded to take their testimony, some of it tending to prove and disprove the allegations of misconduct and fraud and forgery, reciprocally charged by the father against the son and the son against the father; and much of the evidence tending to sustain and repel the charges of irregularities, misbehavior, partiality and corruption on the part of the arbitrators and umpire. In this condition of the cause, an order was entered on the 4th of May 1844, by the consent of the parties, referring the cause to Charles S. Jones, whose award should be final, and should be made the decree of the court. The arbitrator was to govern himself by the following principles, agreed on 642 *between the parties: He was to make up his award upon the pleadings, papers and evidence then filed in the cause, without further testimony, and without the interference of parties or others, except that if the arbitrator should be at a loss upon any point, or the counsel should certify that the examination of any witness was indipensable to having justice done to the party, the arbitrator should examine such witness in the presence of one of the counsel on each side and of no other person. The order contained a provision for arguments, directed the award should be completed and filed at least one month before the next term of the court, unless the parties should agree in writing to prolong the time; and further provided that if the arbitrator failed to render an award within the time and in the manner prescribed, or if he should render one, and such award should not for any reason be a final determination of the cause, then the parties were to stand in all respects precisely as they then stood, and in the same plight and condition; and the said Tandy G. Morris should be at liberty to insist on any objections to the jurisdiction of the court or the frame of the bill, and have the same benefit of the award referred to in the bill, as he then might have, so that the order in the event supposed should have no influence on the cause or the respective positions of the parties in reference thereto, but should be regarded as a nonentity. And here it may be as well, before tracing the history of the case farther, to enquire what was the extent of the submission to this arbitrator as contained in the order of the court. The original bill merely claimed the amount of the Mordecai Collins bond, and was silent as to the award; nor did the answer set it up in bar of the claim. But the amended bill brought the whole subject of controversy before the court. The bond on Mordecai Collins and two other bonds, are the bonds named in the submission of the 21st January 1842, the matter of payment 643 *of which they agreed to refer. The arbitrators in their award describe the claim of George Morris upon which they were acting, as a claim on account of certain bonds assigned by George Morris to his son; and upon this claim on the one side, with the rebutting claims on the other, they proceeded to act, and their award, if valid, finally disposed of the claims on both sides, by deciding that Tandy G. Morris was entitled to a certain sum which they awarded to him. The appellant therefore truly stated in the amended bill filed by him that it was obvious as long as the award should stand in force it would interpose an insuperable barrier to his obtaining any relief in respect to the bond on Mordecai Collins or either of the other bonds. His claim to the proceeds of these bonds had been passed upon by the arbitrators. It was res adjudicata, and could never be revived whilst the award continued in force. The validity of the award became, therefore, the main subject of controversy in the cause. No other question involved could be looked into until it was determined whether the award should stand. The appellee in his answer maintained its validity, claimed the benefit of it, denied the right of the appellant to go behind it, and insisted upon it as controlling the rights of the parties involved in that suit. This was the issue made up by the pleadings, and to this issue the testimony was mainly directed. In this state of things the parties, by a consent order, referred the cause to an arbitrator, whose award was to be final and to be made the decree of the court. What did they refer by this order? The cause as it then stood. And what question was involved in the cause? The pleadings which have been referred to show that the main, and until determined only way or the other, the sole question was the validity of the award. To leave no doubt as to their intent, they declare that he is to make up his award on the 644 pleadings, *papers and evidence then filed in the cause. The issue by the pleadings was as to the validity of the award; the prayer of the bill was to have it set aside and canceled; the award was a paper in the cause, and the evidence on each side was mainly directed to the issue thus made up by the pleadings. The arbitrator stood in the place of the court. He was the substituted and selected judge of the parties to decide that cause upon all the issues of law and fact raised by the pleadings; and a judge whose decision was to be final. It could not be pretended that, upon the issues as made by the pleadings in the cause, the court, if the case had been submitted for hearing, would not have been constrained to consider first; whether the award was or was not valid.

If valid, upon the concession of the appellant in his bill, it barred all further relief. In like manner the main question submitted to the arbitrator was as to the validity of the award; and it was as competent for him, as it would have been for the court in the case supposed, to have rendered his award confirming the former award. The parties in submitting a cause upon pleadings and proofs, raising principally the question whether an award was or was not valid, cannot be supposed to have intended to set aside the award entirely with a view to an enquiry into all the matters embraced in that award. That they did not so intend in this case is made more manifest from the fact that they supposed it possible the arbitrator might decide on the pleadings, papers and evidence then in the cause without further testimony. Provision, it is true, was made for further testimony, but he could, according to the terms of the submission, have acted finally on the case as it then stood. Yet the evidence in regard to some of the accounts acted upon by the arbitrators, and the vouchers in respect to most of the items contained in the statement furnished by the first arbitrators, were not then 645 and have *not since been filed or placed in the record. If the last arbitrator had supposed any of the allegations going to the validity of the whole award were sustained, and the award should be set aside entirely, this evidence and these vouchers would have been necessary to enable him to make out a new award upon all the matters in controversy between the parties. The provision in the latter part of the order that it should be regarded as a nonentity in case no award, or one which did not finally determine the controversy, was made in the time and manner prescribed, does not change the construction of so much of the order as pointed out the duty of and conferred authority on the arbitrator. The reservation of the right to have the same benefit of the award as if no such reference had been made, so far from showing an intention to abrogate the award for the purposes of the reference, indicates a determination to insist upon it under all circumstances; before the arbitrator if he acted, if not, before the court.

Considering the submission, then, as leaving the award in full force, and authorizing the arbitrator to determine upon its validity in whole or in part, it becomes necessary to ascertain from the face of his award, how he has construed his authority. The arbitrator states in this award that he had examined the bond of submission to the first arbitrators, the award of the arbitrators and umpire, the bills and answers, pleadings of counsel and depositions to annul the award on one side and support it on the other; and after mature deliberation, he had come to the conclusion that there was no testimony in the cause to prevent the award from being the basis of his statements. He therefore adopted it, and charged the appellant with the amount, subject to a deduction for certain errors and omissions, which he proceeds to make, and ascertains the balance against the appellant by this mode of 646 proceedings to be *951 dollars 81 cents, which, with interest, he awards against him. He further awarded that Tandy G. Morris should assign to the appellant without recourse to him, a bond taken from Ballard for the alleged balance of his debt, a matter embraced in the controversy as raised by the amended bill, but not comprehended in the first award. It thus appears from the face of the award, that the arbitrator supposed that the principal matter referred to him was the validity of the award impeached by the amended bill. He states that he had carefully examined the submission, pleadings and evidence to annul it on one side and support it on the other. There is nothing to show that he took up the claims of the parties as a new question, and it is manifest he did not; for the first arbitrators made up their award from the statements of the parties and the vouchers laid before them. There is no evidence in the record of those statements in respect to the items of charge on either side, nor were the vouchers exhibited to the last arbitrator. If we could look beyond the award to the deposition of the arbitrator, he states that he considered the first award binding on the parties on its face, but that they had a right to change it by any additional testimony, or by showing any error on its face, and so far as it appeared on its face or was shown by testimony to be incorrect, he corrected it.

Considering for the reasons already given, that it was the duty of the arbitrator, as it would have been of the court to which he was substituted, first to determine whether the award had been successfully impeached upon any of the issues made by the pleadings or the proof, that the want of authority, the irregularity, the partiality, the corruption of the arbitrators, were questions he had to pass upon, it seems to me the arbitrator did not misconstrue or exceed his authority in deciding upon the conduct of the first arbitrators; and if he thought 647 the award could not be impeached *for any of the causes alleged in the pleadings or made out by the evidence, it was competent for him to adopt it as the basis of his award. This it appears from the face of the award he has done, and from his decision on the questions submitted to him, there is no appeal. Where the submission clearly shows, as I think it does in this case, that the whole matter in controversy, and every question of law and fact arising in the cause was left to the arbitrator, who was substituted to the place of the court, and whose decision was to be final; and the arbitrator, without referring any question to the consideration of the court, makes a general award deciding the questions submitted to him, the award is conclusive. The rule of law and equity requires that the reasons for setting aside an award must appear on the face of it; or there must be misbehavior or corruption in the arbitra-

tors, or some palpable mistake. Though the court upon a review of the facts might arrive at a different conclusion from the arbitrator, it cannot for this reason set aside the award. The court can look to the testimony for the purpose of determining from the evidence and other circumstances, whether the error was so gross and palpable as to show misbehavior or corruption in the arbitrator, but not to correct any error of judgment to which in the view of the court, the arbitrator may have innocently fallen. Otherwise most awards, instead of ending, would be themselves the foundation of controversies, and courts would be called upon to exercise an appellate jurisdiction over the proceedings of arbitrators in the county upon proof of what may have transpired before them.

I think therefore that unless some error on the face of the last award or palpable mistake or misbehavior of the last arbitrator is shown, his award concludes every matter alleged as to the want of authority or misbehavior of the first arbitrators. Until his award is successfully impeached, the party should not be permitted to go behind it.

648 *No error or mistake appears on the face of this award. It was returned by the arbitrator to the fall term of the court in 1844, and lay until the spring term 1845. No rule or proceeding was taken to impeach it. An affidavit of counsel was filed tending to show some misunderstanding growing out of conversations before the submission as to the principles which should govern an arbitrator upon such a reference. The affidavit shows no misbehavior and presents no objection to the award. The presence of the appellee for a short time during the examination of a witness, is sufficiently accounted for both by the affidavit of the counsel and of N. Mills. He was called in it appears, on the suggestion of the counsel of the appellant, for the purpose of obtaining information of the time of a particular occurrence. The court properly overruled the objections presented by this affidavit, and pronounced a decree in conformity with the award.

After this decree, the appellant on the 7th of October 1846, filed by the leave of the court, a bill of review to the decree, in which he goes into all the matters of controversy between himself and his son, which were passed upon by the first arbitrators and concluded by their award. Nothing is alleged or shown impeaching the second award for misbehavior in the arbitrator, and upon the coming in of the answer, the court dismissed the bill with costs; a decision clearly right, if the arbitrator did not misunderstand the terms of the submission by the order of court; for if he acted in conformity therewith, there was no error in the decree made in pursuance of the award. I am of opinion that the decree appealed from should be affirmed.

DANIEL and LEE, Js., concurred in the opinion of Allen, J.

MONCURE and SAMUELS, Js., dissented.

Decree affirmed.

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649 *Perkins' Adm'r v. Hawkins' Adm'x.

January Term, 1858, Richmond.

(Absent DANIEL, J.*)

1. **Practice—Pleadings—Amendment—Delay†—Case at Bar.**—Defendant may have leave to file an additional account of set-offs when it will not produce delay to the plaintiffs, and it is necessary to attain the justice of the case. And if the plaintiff obtains leave to amend his declaration, as defendant is entitled to a continuance, there can be no objection to filing the account on the ground of delay.
2. **Deposition De Bene Esse—Affidavit—Case at Bar.**—Three successive actions were brought on a bond; the plaintiff having suffered a nonsuit in the first and second. Pending the second action which was referred to arbitrators, the deposition of a witness was taken by the defendant in December 1829, to be read *de bene esse*, and it was relied on before the arbitrators without objection by the plaintiff. On the trial of the third action in 1846, the deposition was offered in evidence by the defendant, and was objected to by the plaintiff on the ground that there was no affidavit made before the clerk of the court in which the second action was pending, for the issuing of the commission to take the deposition. HELD:
   1. **Same—Same—Lapse of Time—Presumption‡—Case at Bar.**—That if an affidavit was necessary, it may well be presumed after the lapse of nearly eighteen years, and under all the circumstances of the case, that it had been taken and lost.

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*He had been counsel in the cause.

†**Practice—Pleadings—Amendments—Delay.**—In Keckley v. Union Bank, 79 Va. 467, it is said: "It only remains to consider plea No. 8 offered at the trial. This was a plea of usury in the terms prescribed by the statute. It was properly rejected as coming too late. 'A defendant should be permitted to amend his pleadings *or* add to his pleas whenever justice requires it, if delay be not thereby occasioned, or if a good reason be shown for not having done so sooner.' *Perkins' Adm'r v. Hawkins, 9 Gratt. 653.* In this case the delay was unreasonable, not only as to this plea (No. 8), but as to the whole series of pleas offered in July, 1883."

In Perry v. McHuffman, 7 W. Va. 309, it is said: "The second error is not well taken, because the record of the judgment of the 8th of December, 1871, declares that the cause had been regularly continued, at the several intervening terms of the court, and the case was 'submitted to the court' by the parties, for trial, without objection. 'The Suitor's Test Oath,' which the order of December, 1869, states is filed, is not disclosed by the record, and, under the circumstances, and the declaration and recitals of the judgment of December 30, 1871, this court would be authorized, if necessary, to sustain the judgment of the court below to presume that the plaintiff did file the affidavits required by the orders of court of October and December. *Perkins' Adm'r v. Hawkins' Adm'x, 9 Gratt. 649.*"

‡**Bonds—Presumption of Payment.**—On this question, see *foot-note* to Erskine v. North, 14 Gratt. 60, where

2. **Same—Same—Failure to Object to Deposition—Effect.**—That independent of such presumption, no objection having been made until after the deposition had been read as evidence before the arbitrators, and after the death of the witness, the objection was properly overruled.

3. **Evidence—Proof of Agency—Record of Suit—Competent—Case at Bar.**—The payments and set-offs relied on by defendant were for the most part transacted through a brother of the plaintiff's intestate, so that it becomes necessary to prove the agency of the brother. The defendant, after introducing evidence tending to prove the agency, offers in evidence, as corroborating the previous evidence of agency, the record of a suit instituted by the defendant's intestate against the plaintiff's intestate, which was settled by the brother, and the suit thereupon dismissed, to which 650 objection was *never made by the plaintiff's intestate. HELD: The record is competent evidence for the purpose for which it is offered.

4. **Bonds—Lapse of Time—Presumption of Payment—Evidence.**—The bond sued upon was executed in 1813: and the intestate of the plaintiff having died in 1816, his brother qualified as one of his administrators. In order to sustain the presumption of payment from lapse of time and other circumstances, the defendant offered in evidence a deed by which he conveyed to the brother whilst he acted as administrator, a lot of ground for the price of $3205. HELD: That it was competent evidence.

5. **Same—Payment—Evidence to Prove—Case at Bar.**—Plaintiff's intestate applied to defendant's intestate for a draft on P, in part of the bond sued on, who promised to come the next morning and give it to him. A receipt from the brother dated the next day, for the draft which was paid at maturity by the acceptor, is competent evidence to sustain the payment; the plaintiff's intestate never having objected to it during his life.

6. **Same—Set-Off§—Case at Bar.**—A bond of the plaintiff's intestate and his brother, though not a legal set-off against the bond given to the former, yet may be made a set-off by agreement between the parties, and is competent evidence coupled with proof of such an agreement, of the set-off claimed.

7. **Evidence—Proof of Agency—Case at Bar.**—Evidence being offered tending to prove the agency of the brother, a paper signed by the brother showing he had settled the price of certain hogsheads of tobacco, for the plaintiff's intestate with the defendant's intestate, is competent evidence to sustain the set-off.

8. **Same—Draft in Favor of Third Person—Case at Bar.**—A draft in favor of a third person without any evidence to connect the defendant's intestate with it, is not competent evidence against him.

9. **Same—Receipt—Competent.**—A paper consisting of figures with a receipt attached to it, accompanied with evidence explaining what was meant by the figures, is competent evidence.

10. **Bills of Exception—Reference to Another Bill—Exception to Rule.**|—Although it is generally true that the evidence set out in one bill of exceptions, taken in the progress of a trial, cannot be looked to in considering another, yet where a bill of exception is taken after all the evidence has been submitted to the jury, and the bill of exception purports to set out all the evidence, it seems that evidence set out in this bill of exception may be looked to in considering the question raised in another bill taken in the progress of the trial: And this, though the evidence had not been introduced when the first bill of exception was taken.

This was an action of debt in the Circuit court of Lynchburg, instituted by the administrator of John Perkins against the administratrix of Robert Hawkins. The case is fully stated in the opinion of 651 Moncure, J. *There was a verdict and judgment for the defendant: And Perkins' administrator applied to this court for a supersedeas, which was allowed.

Cooke, for the appellant.
Garland, for the appellee.

MONCURE, J. This suit was brought on an obligation of Robert Hawkins to John Perkins, dated the 4th day of May 1813, payable thirty days after date, for 1400 dollars, "for value received in flour." John Perkins died before the 4th of April 1816, on which day administration on his estate was granted to Benjamin Perkins, Richard Perkins and James W. Dibrell of the Court of hustings of Lynchburg. In the spring of 1819, suit was brought on the bond in the Superior court of Campbell, by the said administrators of John Perkins against Robert Hawkins, who pleaded payment; on which issue was joined. On the

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the principal case is cited. See also, citing the principal case, Sadler v. Kennedy, 11 W. Va. 192, 194; Calwell v. Prindle, 19 W. Va. 640; Lightfoot v. Green, 91 Va. 514, 22 S. E. Rep. 242.

§**Set-Off—Joint and Several Demand.**—In Elliott v. Bell, 37 W. Va. 835, 17 S. E. Rep. 399, it is said: "This set-off, be it ever so valid a demand, is shut off as a set-off by that rule in the law of set-off, that a joint demand cannot be set off against a separate demand. Porter v. Nekervis, 4 Rand. (Va.) 359; *Perkins v. Hawkins, 9 Gratt. 650;* Choen v. Guthrie, 15 W. Va. 102."

|**Bills of Exception—Reference to Another Bill of Exceptions—Exception to Rule.**—In the last headnote of the principal case it is held that, although it is generally true that the evidence set out in one bill of exceptions, taken, in the progress of a trial, cannot be looked to in considering another, yet where a bill of exceptions is taken after all the evidence has been submitted to the jury, and the bill of exceptions purports to set out all the evidence, it seems that evidence set out in this bill of exceptions may be looked to in considering the question raised in another bill taken in the progress of the trial. And this, though the evidence had not been introduced when the first bill of exceptions was taken.

The following cases cite and approve the principal case for the general rule and the exception thereto as laid down above: Olinger v. Shepherd, 12 Gratt. 475; Fant v. Miller, 17 Gratt. 55; Moore v. City of Richmond, 85 Va. 543, 8 S. E. Rep. 387; Mathews v. Traders' Bank, 2 Va. Dec. 541; Hall v. Hall, 12 W. Va. 21; Klinkler v. Wheeling Steel, etc., Co., 43 W. Va. 221, 27 S. E. Rep. 238. See, citing the principal case for the general rule, Zumbro v. Stump, 38 W. Va. 335, 18 S. E. Rep. 447; Roanoke Bank v. Hambrick, 82 Va. 138. But in the last two cases there was no certificate of all the facts proved. See monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

4th of April 1821, the death of the defendant was suggested, and the suit was revived, by consent, against Nancy Hawkins, his administratrix. On the 6th of April 1824 a jury was sworn in the case; but the plaintiff suffered a nonsuit. Pending that suit, to wit, on the 6th of August 1821, the letters of administration which had been granted on John Perkins' estate were revoked, and on the 8th day of the same month administration de bonis non was granted to Richard Perkins, one of the three original administrators. On the 6th of April 1825, a second suit was brought on the bond; which was brought in the County court of Bedford by Richard Perkins, administrator de bonis non of John Perkins, against Nancy Hawkins, administratrix of Robert Hawkins. The defendant pleaded payment and fully administered. The suit was regularly continued until March court 1828, when it was referred to arbitration by consent of parties.

It was then regularly continued for an 652 *award till the 27th day of October 1838, when, on the motion of the defendant, the order of reference was set aside; and on the 29th of August 1839 a nonsuit was entered. It appears from a certificate of the clerk annexed to a copy of the record of the suit, that "C. Anthony, the plaintiff's attorney, having died, there was no counsel for the plaintiff at the time of rendering the judgment" of nonsuit. On the 4th of December 1843, a third suit was brought on the bond; which was brought in the Circuit court of Bedford, but in September 1844 was, by consent of parties, removed to the Circuit court of Lynchburg. Before such removal, to wit, in April 1844, the defendant demurred generally to the declaration, and the plaintiff joined in the demurrer. On the 7th of November 1844, the defendant pleaded severally, payment by her intestate in his lifetime, and by herself since his death; to which pleas the plaintiff replied generally; and issues were thereon joined. At the same time, it would seem, though it is not expressly so stated in the record, an account of payments and setoffs was filed in the suit, such as had been filed in each of the two former suits, consisting of

Bal. of Benj. and Jno. Perkins' bond, dated 12 Dec. 1811,		$836 08
Bal. of 5 hhds. of tobacco, per rec't 8 Nov. 1812,	£99 6s. 11d.	
Off advances,	30 0 00	
		231 16
Draft on Vilbert and Peryear, per rec't 25 May 1813,		600 00

At November term 1845, the defendant, by leave of the court, added to the above three other offsets, viz: 1st, a receipt of Benjamin Perkins to R. Hawkins for wheat receipts for 926 bushels 30 lbs.; 2d, the price of a lot sold by Hawkins to Benjamin Perkins in the year 1818, amounting to 653 3200 dollars; and 3d, the costs *and damages of the two former suits and nonsuits. At the same term the plaintiff, by leave of the court, amended his declaration, and by consent of parties the cause retained its place on the docket. A bill of exceptions was taken by the plaintiff to the opinion of the court, granting leave to the defendant to file an additional account of payments and setoffs. Also, at the same term, the defendant pleaded severally, payment by her intestate to John Perkins, and his first administrators, and each of them; to which pleas the plaintiff replied generally, and issues were joined thereon. The trial of the issues commenced on the 4th and ended on the 12th of June 1846, when a verdict and judgment were rendered for the defendant. Eight exceptions were taken by the plaintiff and three by the defendant to opinions given by the court during the trial. An exception was also taken by the plaintiff to an opinion of the court overruling his motion for a new trial. A supersedeas having been awarded to the judgment, it is now to be determined whether or not the same is erroneous.

I will briefly consider the questions presented by the exceptions of the plaintiff, in the order in which they were taken.

The first exception was to the opinion of the court giving leave to the defendant to file an additional account of payments and setoffs. The reason assigned in the bill of exceptions for giving such leave was, "because of obtaining the justice of the case, and because the plaintiff had just amended his declaration;" and was, I think, sufficient. A defendant should be permitted to amend his pleadings, or add to his pleas, whenever justice requires it, if delay be not thereby occasioned, or a good reason be shown for not having done so sooner. 1 Rob. Pr. 231, and cases cited. No delay was occasioned by giving the leave in this case; the defendant being entitled to 654 a continuance after the *plaintiff had amended his declaration. When leave was given the plaintiff to amend his declaration, the cause would have been remanded to rules for that purpose, but for the consent of the defendant that it should retain its place on the docket.

The second exception was to the opinion of the court overruling the objection of the plaintiff to the reading of the deposition of Littleberry Hawkins, because, as he alleged, "there was no affidavit ever made before the clerk of the County court of Bedford for the issuing of a commission to take the said deposition." The deposition was taken on the 12th of December 1829, to be read as evidence, de bene esse, in the second suit which had been brought on the bond, and which had been referred to arbitration. It was taken in pursuance of a commission bearing date the 28th of July 1828, and of a written notice served on the plaintiff, who was present when it was taken, and cross examined the witness. It was read before the arbitrators, and relied on in the argument of the counsel for the defendant, without any objection from the plaintiff; and no objection appears ever to have been

made to it by him until the trial of the third suit on the bond in June 1846; and then the only objection was, that no affidavit had been taken for the issuing of the commission. The bare statement of the case is sufficient, I think, to show that the objection was rightly overruled by the court. It does not appear whether the commission was issued under the 15th or 19th sections of the act 1 Rev. Code 1819, p. 519 and 521. An affidavit was required by the former, but only an oath by the latter. If an affidavit was necessary in this case, it might well have been presumed, after the lapse of nearly 18 years, and under all the circumstances of the case, that it had been taken and lost. But it was not necessary to rely on that presumption as a ground for overruling the objection. It is enough
655 that no objection *was made until after the deposition had been read as evidence before the arbitrators, and after the death of the witness. See Buddicum v. Kirk, 3 Cranch's R. 293.

The third exception was to the opinion of the court overruling the objection of the plaintiff to the introduction of a record of the proceedings in a suit in the County court of Campbell, brought by Robert Hawkins against John Perkins, as evidence in this suit. Benjamin Perkins, who was a brother of John, seems to have had some connection with nearly all the offsets and payments claimed by the defendant; and it therefore became important for the defendant to prove that Benjamin was the agent of John. Accordingly, evidence was introduced by the defendant, which tended to prove that Benjamin, who was the older of the two brothers, commenced business in Lynchburg, probably about 1808, and John lived with him; that afterwards they did business in partnership till 1812, when it was dissolved; after which they did business separately and occupied different houses in the same town; and that at the time of the execution of the bond on which the suit was brought, and before, and afterwards, they were in the habit of transacting business for each other, as paying or receiving money, settling accounts, and generally such business as an agent would execute in the absence of his principal. The record in question was introduced as further evidence of the agency of Benjamin for John; and was, I think, admissible evidence thereof. The suit of Robert Hawkins v. John Perkins was brought in February 1812, the year preceding that in which the bond of Hawkins to Perkins above mentioned, was executed. John Perkins was preparing to defend the suit, when Benjamin Perkins, on the 9th of November 1812, agreed and settled it for him with Hawkins; and on the 25th of January 1814, Hawkins gave an order to the clerk to dismiss
656 the suit *at his costs. No objection appears ever to have been made to this settlement by John Perkins, though he did not die until March 1816.

The fourth exception was to the opinion of the court overruling the objection of the plaintiff to the introduction of a deed from Robert Hawkins to Benjamin Perkins, dated 2d January 1818, conveying a lot of ground in Lynchburg, "in consideration of 3205 dollars in hand paid;" which deed the defendant offered in evidence, "as a circumstance tending to show a presumption of payment of the bond sued on." I think the deed was admissible evidence for the purpose for which it was offered and admitted. The lapse of twenty years, without explanatory circumstances, affords a presumption of law that the debt is paid, even though it be due by specialty. 2 Greenl. Evi. § 528. In this case more than thirty-one years elapsed after the debt became due and before the institution of the last suit. It may be said that the institution and prosecution of the first and second suits are sufficient explanatory circumstances to repel the legal presumption. But payment may be inferred by the jury from circumstances coupled with the lapse of a shorter period than twenty years. Id.; Best on Presumptions, § 137. And therefore on the trial of an issue made up on the plea of payment, evidence tending to show on the one hand that the creditor was in want of money, and on the other, that the debtor had the means of payment when the debt became due and afterwards, is admissible evidence to be weighed by the jury with the other evidence in the case. Accordingly, evidence was given, without objection in this case, tending to show that John Perkins was doing an extensive business, requiring all his means, and needed all the money he could get to carry it on; and that Hawkins "was a man of considerable property, small family, (one child only,) industrious and economical; made large crops, (from
657 *one to two thousand bushels of wheat,) and could have paid a debt of one or two thousand dollars in a year." The deed in question tended to show not only that Hawkins had ample means to pay the debt after it became due and before the first suit was brought, but that during that period 3205 dollars of his money, a sum greatly exceeding the amount of the debt, was actually in the hands of Benjamin Perkins, one of the administrators of John. From which and the other circumstances of the case the jury might have inferred that the debt was either paid out of that money, or was not because it had been previously paid.

The fifth exception was to the opinion of the court overruling the objection of the plaintiff to the introduction, as evidence, of a receipt from Benjamin Perkins to Robert Hawkins, in these words and figures:

"Lynchburg, 28th May 1813. Received from Mr. Robert Hawkins a draft on Messrs. Vilbert & Peryear, at 60 days after date, which when paid, will be placed to the credit of his bond to John Perkins.

Benj. Perkins.

Teste: John Moore."

The signature of Benjamin Perkins was admitted to be genuine. Evidence was exhibited tending to prove that Benjamin

Perkins was the agent of John, especially in his transactions with Hawkins; that John applied to Hawkins for a draft on Peryear of Richmond, for 600 dollars, on account of said Hawkins' bond for a larger amount given for flour bought by him of said John Perkins; that said Hawkins promised to call the next morning and give the draft; and that the draft mentioned in the receipt was paid at maturity. It did not appear that John Perkins ever objected to the draft as a payment (being the draft mentioned in the defendant's list of payments and setoffs). The above state-
658 ment *is sufficient to show that the receipt was admissible evidence.

The sixth exception was to the opinion of the court overruling the objection of the plaintiff to the introduction, as evidence, of a bond of Benjamin and John Perkins for 836 dollars 8 cents, dated 12th December 1811, payable 25th December 1812, with two credits endorsed thereon, the execution of which bond was proved; (being the same which is mentioned in the defendant's list of payments and setoffs). This bond was not a legal setoff to that on which this suit was brought, the debts not being mutual; but might, by the parties, have been applied as a payment on account of the latter; and the evidence strongly tended to show that it was so applied: at least the balance due thereon after deducting the two credits endorsed. There cannot be the least doubt about the admissibility of this bond as evidence, and I therefore deem it unnecessary to say anything more upon the subject.

The seventh exception was to the opinion of the court overruling the objection of the plaintiff to the introduction as evidence of a paper signed by Benjamin Perkins, in these words and figures:

"I have this day agreed to settle the within five hhds. tobacco for my brother John, at 27s. for each and every hundred, and have paid Robert Hawkins 100 dollars in part thereof. The balance is due and payable in ninety days from the date hereof, after said Hawkins' deducting charges, say carriage to Richmond, &c., &c.

Benj. Perkins.

Witness: William Fowler.

Lynchburg, 8 Nov. 1812."

Then follows a statement of the number and weights of the 5 hhds. of tobacco, weighing together 7359 lbs., at 27s., £99 6s. 11d. (or 231 dollars 15 cents, which is
659 *the first item in the defendant's list of payments and setoffs). This paper was admissible in connection with the evidence which was exhibited tending to prove that Benjamin Perkins was the agent of John. That this tobacco was in fact purchased by John Perkins, is further shown by another paper introduced by the defendant as evidence, signed by John Perkins and admitted to be genuine, containing a statement of the numbers and weights of 5 hhds. of tobacco, corresponding precisely with the statement above mentioned, having the name of Robert Hawkins at the head of it, and endorsed thereon these words:

"Mr. Fox will please give Mr. Hawkins an account of sales of any part of the within tobacco that he may have sold.

J. Perkins."

The latter paper is not referred to in the bill of exceptions now under consideration; and seems not to have been offered in evidence until after that exception was taken. It is set out as part of the evidence in the cause, all of which is contained in the bill of exception to the opinion of the court overruling the motion for a new trial. But still I think it may be considered in determining the question raised by this exception, notwithstanding the rule laid down in some of the cases that facts stated in one bill of exceptions cannot be noticed by an appellate court in considering another; unless indeed the first bill of exceptions should be referred to in and adopted as part of the second. 1 Rob. Pr. 347, and cases cited. The reason of that rule does not apply, and therefore the rule does not extend to a case like this, in which one of the bills of exceptions contains all the evidence which was given on the trial. This is obvious from what was said by Judge Carr in delivering the opinion of the court in
660 Brooke v. Young, *3 Rand. 106. In that case there were two bills of exceptions taken to opinions of the court given on the trial In the first, it was stated that the evidence therein set out was all the evidence in the cause; and for that reason Judge Carr was of opinion that resort might be had thereto in deciding the question raised by the second bill of exceptions, in which a small part only of the evidence was contained. But he acquiesced in the opinion of his brethren who thought otherwise; "because, although the evidence stated in the first bill might be all, when it was sealed, there might be other important facts brought forward afterwards; and because, by thus supplying the defects of one exception from another, we may shut out evidence material for the other party not noticed in either bill." In this case the bill of exceptions containing all the evidence was taken after the trial was over, and therefore other important facts could not have been brought forward afterwards. No objection was made to the introduction of the latter paper. Considering the two papers together, the former was not only admissible evidence, but was favorable to the plaintiff. For while the latter tended to charge the plaintiff's testator with the whole price of the tobacco, the former gave him credit for 100 dollars. And the price of 27s. fixed by the former does not appear to have been too high, nor ever objected to by the said testator. But with or without the latter paper, I think the former was admissible evidence.

The eighth exception was to the opinion of the court sustaining the motion of the defendant to exclude from the jury a draft of Benjamin Perkins on Anderson & Blair of Richmond, dated Lynchburg, January 16th, 1813, payable at sight to Samuel Garland or order, for 343 dollars 20 cents, en-

dorsed by S. Garland to William Bar-
661 rett, and receipted by the latter *12th February 1813; which draft was offered in evidence by the plaintiff, as tending to prove the correctness of the following item in the account of Robert Hawkins with Benjamin Perkins, which was exhibited before the jury, viz: "1813, January 19th. My draft on Anderson & Blair, in favor of Samuel Garland, £102 19s. 9d." No evidence was exhibited or offered to connect Robert Hawkins in any way with this draft; which was therefore inadmissible evidence against him.

The ninth exception was to the introduction of the paper called "wheat receipts," and of the statements of the witness Miller in relation thereto, as evidence for any purpose in the case. The plaintiff had introduced and offered to prove before the jury an account of Robert Hawkins with Benjamin Perkins, amounting to £350 11s. 4d., credited by £91 12s. 3d., commencing 3d July 1811, and ending 3d June 1813; to which the defendant objected, but the court overruled his objection, and he excepted. This account was probably introduced to repel to some extent the effect of the bond of Benjamin and John Perkins to Hawkins, and the deed from Hawkins to Benjamin Perkins, which had been introduced by the defendant, and was, I think, admissible for that purpose. The paper called "the wheat receipts" was introduced as tending to show that the said account, or so much of it as the plaintiff might prove to be due, should be credited by the price of the wheat mentioned in the receipts, and that the balance really due on said account, if any, was much less than appeared on its face. The said paper contains two columns of figures, which may represent bushels and pounds of wheat; and if they do, the aggregate amount is 926 bushels 30 pounds; annexed to which is a receipt in these words:

"Lynchburg, October 1812. Received from Mr. Robert Hawkins receipts for
662 the within as annexed, *agreeable to an agreement entered into this day. As witness my hand, as dated above.

Benj. Perkins.

Witness: Booker Shelton."

The witness Miller, who was clerk and salesman of Benjamin Perkins in 1812 and for several years thereafter, stated that he "would take the paper to be a wheat receipt, the figures of which are in the handwriting of Richard Perkins. The receipt is in the handwriting of Benjamin Perkins, whose name it bears. Mr. Shelton, the subscribing witness, was once in the employment of Benjamin Perkins; the time not remembered. Mr. Shelton has long since been dead. His attestation to the receipt is his proper handwriting."—"The wheat receipt is not credited in the account."—"Every regular merchant should have made the necessary entry on his books showing the exact transaction." The witness made some other statements in relation to the paper, which need not be noticed. I think the paper and statements of Miller in relation thereto were admissible evidence.

The tenth and last exception was to the opinion of the court overruling the plaintiff's motion to set aside the verdict and judgment, and award him a new trial: 1st, because the court had suffered evidence to go to the jury on the trial which was illegal and improper (referring to the evidence excepted to by the eight last mentioned exceptions); and 2d, because the verdict was plainly contrary to and unsustained by the evidence, all of which, on either side, was set out in a paper marked EEE, which, as the court certified and directed to be entered of record, contained all the facts proved on the trial of the suit. I have already disposed of the first ground of the motion in disposing of the previous exceptions, and am, therefore, of opinion that a new trial should not have been granted on that ground. The only remaining question
663 is, whether *the second ground of the motion was well founded, and whether the verdict was plainly contrary to, and unsustained by, the evidence. Without considering whether the facts proved on the trial were properly certified, but considering all the evidence on either side (in which there does not appear to be any conflict), as true, which is the most favorable view that can be taken of it for the exceptant, I am of opinion that the verdict was well warranted by the evidence. The defence relied on throughout this protracted litigation, which commenced in 1819 and has continued, with brief intervals, ever since, consisted of three items of payment or setoff which arose about the time of the date of the bond in May 1813, and were together about equal to its amount, the existence of which, as good demands at that time, was either admitted or proved beyond controversy, with each of which Benjamin as well as John Perkins was in some way connected; and although John lived until March 1816, and Benjamin till a much later period, no attempt was ever made to show that either of these demands was otherwise settled than by applying them as payments of the bond. The form, terms and consideration of the bond, the manner of business and situation of the parties, all render it improbable that the bond, if not settled, would have been permitted to stand so long without suit or demand. But, besides all this, is the evidence of Littleberry Hawkins, that one of the said three items of payment or setoff, to wit, the bond of Benjamin and John Perkins to Hawkins, was to go to the credit of the flour bond of Hawkins to John Perkins; that he was at the store of John Perkins with Hawkins when Perkins applied to Hawkins for a draft upon Peryear of Richmond for 600 dollars on account of his said Hawkins' bond for flour; that Hawkins remarked he did not think he owed him so much, and asked him
664 if he had credited *the bond for the previous payment; he said he had not, but would do so, and if the draft exceeded the balance due on the bond he would re-

fund to said Hawkins; and that said Hawkins promised to call the next morning and give the draft. It was proved that about ten days before the flour bond became due, such a draft was accordingly given by Hawkins to Benjamin Perkins for his brother John, and on account of the flour bond, and was paid at maturity: And, besides the evidence tending to show the general agency of Benjamin for John, it does not appear that the latter ever objected to the former's agency in this matter, or pretended that he had not received the proceeds of the draft. I do not see how the jury could have found any other than a verdict for the defendant.

Upon the whole, I am for affirming the judgment.

The other judges concurred in the opinion of Moncure, J.

Judgment affirmed.

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665 *Miller v. Holcombe's Ex'or & als.

January Term, 1853, Richmond.

(Absent DANIEL, J.)

1. **Commissioner's Report—Exception—Want of Notice*—Case at Bar.**—A commissioner's report made in a cause, had been returned for more than six years, and the cause was then taken up and heard, the argument concluded, and the opinion of the court pronounced; and then the party against whom the opinion was expressed, excepts to the report for want of notice. HELD: That the exception should be disregarded.

2. **Deed of Trust—To Secure Creditors†—Preferred Debts.**—A deed of trust is made to secure certain creditors, for some of whose debts sureties are bound: And the deed directs the trustees so to dispose of the trust property that no surety in the said debts shall suffer or be injured on account thereof. HELD: The debts for which sureties are bound are preferred debts, and to be first satisfied.

3. **Same—Same†—Joint Trustee—Liability.**—Property is conveyed to two trustees to be sold for the payment of certain creditors of the grantor. HELD: Under the circumstances of this case both trustees are responsible for the proper application of the whole trust subject.

4. **Same—Sale of Trust Property—No Security for Purchase Money†—Liability of Trustee.‡**—Trustees having sold slaves, a part of the trust subject, to three partners, all of whom were men of wealth, without taking any security for the purchase money; and having permitted them to retain it for years until they all became insolvent, are personally bound for the amount of the fund so lost.

5. **Same—Compromise—Liability of Trustee for Profits.§**—A trustee making a compromise with a third person in relation to a trust subject, though he may purchase the subject for himself, is bound to account as trustee for all the profits made on the transaction.

By deed bearing date the 20th of September 1821, Nicholas Harrison of the town of Lynchburg, conveyed to Robert L. Coleman and Thomas A. Holcombe a large property, consisting of lands, slaves and other personal property, and choses in action, in trust, first to pay certain debts therein specified, due to Boyd Miller, Ellis & Allen, Garland, Walton & Penn, and 666 others. *And the deed then directs that the trustees "shall so dispose of the said property that no security in the debts aforesaid, shall suffer or be injured on account thereof." And if the trustees should be security for any debt not enumerated in the deed, they were to be indemnified for such security out of the trust property. And after effecting all the purposes of the trust, the balance of the property, if any, to be restored to Harrison or his legal representative.

In November 1823, Boyd Miller, Ellis & Allen, Garland, Walton & Penn, and others, creditors mentioned in the deed of Harrison, instituted a suit in the late Chancery court of Lynchburg against the trustees Coleman and Holcombe, and others, for the purpose of enforcing the execution of the trust; which was finally heard at the spring term 1845 of the Circuit court of Lynchburg. The questions which had been the subject of controversy were then reduced to three; and upon these, as well as upon a question of practice arising in the cause, the facts are stated by Judge Lee in his opinion. The plaintiff Miller having received a payment upon his debt upon executing a bond with surety to refund it if it was more than his share of the trust subject, and that having proved to be the case upon the principles established by the court below, the final decree was against him for the excess so received by him. From this decree he applied to this court for an appeal, which was allowed.

Garland and Patton, for the appellant.
Cooke and Robinson, for the appellee.

LEE, J. The first question to be considered in this cause is that arising on the exception taken on behalf of the appellant and others to the report of commissioner Wyatt, for want of legal notice. The report was returned on the 11th of October 667 1838; and this *exception was not made until the 24th of April 1845; upwards of six years afterwards, nor until after the cause had come on to be heard at the special term without objection, and been argued by counsel, and the opinion of the court pro-

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*Commissioner's Report.—See monographic *note* on "Commissioners in Chancery" appended to Whitehead v. Whitehead, 23 Gratt. 876.

†See monographic *note* on "Assignments for the Benefit of Creditors"; monographic *note* on "Deeds of Trust."

‡Executors—Duty to Take Security for Credit Sales.—See principal case cited in Southall v. Taylor, 14 Gratt. 278; *foot-note* to Boaz v. Hamner, 27 Gratt. 883.

Same—Negligence—Liability.—See principal case cited in Cogbill v. Boyd, 77 Va. 459; *foot-note* to Southall v. Taylor, 14 Gratt. 269. See monographic *note* on "Executors and Administrators."

§Purchase of Trust Property by Trustee—Liability of Trustee for Profits.—See principal case approved in Feamster v. Feamster, 35 W. Va. 13, 13 S. E. Rep. 57.

nounced against the parties so excepting. During this interval, and while the report was lying in the office, Holcombe, who was best acquainted with the various transactions in question, had departed this life. Under these circumstances it would have been proper for the court to disregard the exception. But in point of fact it appears from the report itself, and from the deposition of the commissioner which was afterwards taken, that due notice was acknowledged by the counsel for the appellant; and that the said counsel attended him during the time of taking the account, was informed by him of the principles on which the account was taken, and that he caused a special statement to be made in the report, gave strict attention to the business, and was perhaps better acquainted with the details than any other person interested. On every ground therefore, this exception was properly overruled.

I come next to consider the construction to be placed on the deed of trust from Harrison to the trustees Holcombe and Coleman, as to the manner in which the proceeds of the trust fund were to be paid out to the several creditors entitled thereto. It is contended by the appellant that no preference is given by the deed to any creditor or class of creditors, but that all come in pari passu.

In the exception taken by the appellant in the Circuit court, the appellant does not appear to have taken ground against the existence of any preference under the deed; but he insisted that the trustees, either as such or as individuals, stood in no better condition than other creditors having sureties for their debts; and so the court expressly held in its decree. But it
668 *is now insisted that no preference whatever is created by the deed in favor of any of the creditors provided for.

The deed conveys to the trustees Holcombe and Coleman, various subjects of property, real and personal, and choses in action, from the proceeds of which the trustees are to pay certain debts enumerated in the deed; and the surplus, if any, to be returned to the said Harrison. The deed then directs that the trustees "shall so dispose of the said property that no security on the debts aforesaid shall suffer or be injured on account thereof." And the trustees were to permit the said Harrison to enjoy such portion of the property as might not be necessary to be sold for the purposes aforesaid: and in case the said Holcombe and Coleman should be security for any debt not enumerated in that deed, they were to be indemnified as such sureties out of the property aforesaid.

It is true, as argued by the appellant's counsel, that in general a deed of trust will not give priority to one creditor or class of creditors, unless so provided expressly or by proper implication; and in the absence of such a provision, the creditors will participate in the fund pari passu. And it is contended that the clause above cited was only intended to prescribe the times and manner in which the trustees should dispose of the property, with a view to the protection of the sureties, Harrison the grantor, being as it is alleged, under the belief that the trust fund was ample to meet all the debts intended to be secured. This inference as to Harrison's impression, is drawn from the provision in the deed requiring the surplus after satisfying the object of the trust, to be returned to him, a provision to be found in almost all trusts of this character, and often doubtless inserted without regard to the amount of the debts and the value of the property conveyed; and sometimes as a matter of form per-
669 haps, *even in cases in which it is perfectly certain that the property conveyed will be wholly inadequate to the payment of the debts provided for. But even if that inference is properly to be drawn in this case, still some meaning is to be assigned to the clause in question, more than that of a mere direction as to the manner of disposing of the subject. If there were no such clause in the deed, the trustees might do precisely all that this clause directed, if its meaning is to be restricted to the sense contended for by the appellant. Something more, that was not yet expressed, must have been intended. To give it any meaning, it seems to me that it must be construed as creating a preference in favor of the security debts; the grantor in this case, as is a very common practice, desiring and taking care that those who had befriended him by becoming his sureties, should be indemnified before his other debts should be paid. The necessary operation and effect of the clause is to create a preference; for if, as seems to be conceded, the trustees could at any time sell property enough to prevent any surety from suffering or being injured, no creditor whose debt had been paid from the proceeds of property sold under this provision, for the purpose of saving the security harmless, could be called on to refund, if the fund should prove inadequate to pay the debts for which no one was bound as security. I think, therefore, that the deed of trust divided the creditors of Harrison into two classes; first, the creditors for whose debts sureties were bound; and second, the other creditors; the former, including those creditors of Harrison, to whom the trustees might stand bound as his sureties, having preference to the latter, but coming in pari passu as among themselves; and the latter coming in pari passu as among themselves, for the surplus, if any, after the debts of the former were satisfied. I am of opinion, therefore, the Circuit court did not err in the construction placed upon the provisions of the deed.

670 *The next and a most material enquiry in this cause, is as to the manner in which the trustees are to be charged with the trust subject; whether jointly with the whole, or separately with several portions thereof; and if to be charged jointly with a part and severally with the rest, what items are to be so severally charged, and to whom? The commissioner, in mak-

ing up his account in this cause in 1836, charged Coleman with a portion of the trust fund, to wit, the amount of his own purchases, certain bonds given by purchasers of property at the sale, the value of a slave called Tipton, B. Harrison's purchase, and with the price of three slaves sold to Garland, Walton & Penn; and he charged Holcombe with the residue of the trust effects. It is insisted by the counsel for the appellant that he erred in thus separating the accounts, and that Holcombe should be charged conjointly with Coleman with all those items thus charged to the latter separately.

It appears that in the year 1822, Harrison, the debtor, filed a bill against his trustees and creditors, charging the former with a breach of the trust reposed in them, and calling upon them to give an account of all their transactions as trustees in the premises. To this bill Holcombe and Coleman filed a joint answer in May 1822, in which they speak of their transactions, sales and collections, as having been conducted jointly, and in effect admit their joint liability for all the proceeds of the trust subject. Nothing is intimated whatever in any part of it of any separate action on the part of either trustee for which he was to be severally answerable. An account was directed to be taken in the cause by a commissioner; and to enable him to perform this duty, Holcombe filed with the commissioner a book containing an account of sales made by him and Coleman as trustees, and their account of the trust fund, and how disposed of, all which was in the handwriting of Holcombe. In this book, and in the 671 *account and report made by the commissioner, no discrimination is made between items to be charged to the one or the other of the trustees, but all stand alike chargeable to both. Nothing whatever is intimated at that time of any necessity or propriety of a separation of the accounts, but a joint liability for the whole trust fund would seem to be distinctly admitted. This suit was dismissed in 1826 for want of security for costs, but no exception was ever taken to the report of the commissioner. In May 1823, Elias Wills, who was security for Harrison in the debt due Edmond Taylor & Co., filed a bill and obtained an injunction against the trustees, charging them with default and neglect of duty, and seeking to compel them to give security for the faithful performance of their duty as trustees, or to take the trust fund out of their hands. Holcombe thereupon deposited bonds in the Bank of Virginia, to be collected and applied to the payment of the debt due Taylor & Co., and this suit was abandoned by the said Wills. The appellant afterwards filed his bill in this cause in November 1823. Process was executed and a decree nisi taken in July 1824. The bill charged a joint liability for the trust fund, but Holcombe failed to file his answer, and in February 1835 an order was made for an account upon the bill then taken for confessed as to Holcombe. Upon the taking of this account in 1836, the first intimation is given that there should be a separation of accounts; and the commissioner adopts the statement which he says was made by Coleman, (who had in the mean time become insolvent,) as to the items which he charged to him, charging Holcombe with the residue only. During all this period, from 1822 to 1836, the creditors of the trust fund were justified by the acts of Holcombe in thinking him liable conjointly with Coleman for all these items; and were thus prevented from taking any measures to protect the trust fund against the failing 672 *circumstances of Coleman. It appears, indeed, that Holcombe was the acting manager and fiscal agent throughout the whole business. Coleman states in his answer and in his deposition, and also in a petition sworn to and filed by him, that he had given up the trust subject to the entire control and management of Holcombe. Holcombe kept the accounts, took the bonds given for the property sold, and held them in his possession; and it must be inferred that all such as came to Coleman's possession he must have received from him.

Without therefore entering into an examination of the general doctrine of the court of equity in regard to the manner in which joint trustees should be charged in the settlement of their accounts, I cannot but think that, considering the nature and character of the trust reposed by the deed of Harrison, manifestly intended to be exercised jointly, and the acts and conduct and declarations of the trustee Holcombe, he ought to be charged conjointly with Coleman, with all the items which the commissioner held Coleman alone accountable for; that the creditors had a right to consider and treat him as so chargeable, and that this right could not be in any degree modified or affected by the admissions which he states were made by Coleman, that he alone was chargeable with those items; and that those declarations, however effectual they might be, even if conclusive against Coleman in the settlement of the account between him and Holcombe, yet as against the creditors of the trust fund, are not to be received in evidence, or serve to discharge Holcombe from liability on account of the matters to which they relate.

Thinking it apparent in this general view of the subject that Holcombe should be charged jointly with Coleman with all the items (including Coleman's purchases at the sale) which the commissioner undertook to charge to Coleman separately, 673 I shall not stop to *consider the special grounds and reasons applicable to each particular item, and tending to show the propriety of charging Holcombe with it also; though many such suggest themselves upon the record.

I proceed next to consider the subject of the sale of the three negroes to Garland, Walton & Penn. This sale, it appears, was made by Coleman under the impression, as he states, that it had been agreed to by Holcombe, and was only consummated by

him. At the time of the sale the negroes were hired, and they were to be delivered at Christmas following. Before the time at which they were to be delivered, Holcombe was apprised of what had been done, but failed to express his dissent or to take any measures to prevent the sale from being effected by the delivery of the negroes. He collected the hires of these negroes for that year, and doubtless could have controlled the possession. Coleman denies that he delivered the possession of the negroes, and as Holcombe had the chief management of the business, it cannot be doubted that he suffered the negroes to go into the possession of the purchasers, and in effect ratified the sale and became jointly responsible for the transaction with Coleman. That this sale was to be regarded as the act of both is further shown by the statement made to commissioner Benagh when taking the account in the case of Harrison v. Carter. For Holcombe directed the commissioner to report that the trustees (not Coleman) had sold three negroes to Garland at the price of 2050 dollars, the negroes to be delivered at Christmas. This was in September 1822, and when he had ample opportunity to stop the sale, as it was his duty to do. The answer of Holcombe some seventeen years afterwards explaining this statement, cannot have the effect of overcoming its force and effect, and giving a different character to the transaction. I think, therefore, that if Coleman is chargeable with the 674 value of these *negroes, Holcombe must bear the burden along with him. The commissioner did charge Coleman with their value, but the court sustained his exception, and held that he ought not to be charged therewith.

The sale of these three negroes was not for cash, but upon a credit for a period which is not ascertained, and no security was taken for the purchase money, nor even the bond of the purchasers of the property. Coleman indeed says that a bond was or was to be given with Samuel Garland who was the agent and counsel of the parties, as security; but this is denied, and it is not proven by any competent testimony.

It is true that courts of equity look with indulgence upon the acts of trustees and other fiduciaries, and have not been disposed to lay down too stringent a rule by which to hold them responsible personally for losses sustained in the management of the trust funds. The doctrines on this subject were referred to with some detail in the case of Elliott v. Carter, decided during the present term of this court, supra 541. But however favorably disposed the court may be towards trustees, I apprehend it would be going farther than any court has yet gone, to hold a trustee excusable for selling personal property belonging to the fund upon a credit, without taking security deemed good at the time for the purchase money. Indeed, the question which has been made on a similar subject is, whether a trustee would be justified in suffering money to remain on personal security alone. But from all the cases on the subject I deduce, that to suffer money due the trust fund to remain on the mere personal credit of the debtor, even though the party who created the trust had left it in that state; or to sell property on the mere personal credit of the debtor will be such a dereliction of duty on the part of the trustee as to make himself responsible if the debt be lost. Harden v. Parsons, 1 Eden's R. 145, 675 and note; Waller v. Symmonds, *3 Swanst. R. 82, and note; Lawson v. Copeland, 2 Bro. C. C. 156; Powell v. Evans, 5 Ves. R. 839; Tebbs v. Carpenter, 1 Madd. R. 162-290.

It is in vain to say that the purchasers Garland, Walton & Penn were highly responsible and wealthy at the time of this transaction, and abundantly good for all their engagements. No distinction is admitted having its foundation in the situation and circumstances of the purchaser. However ample his means might appear to be at the time, prudence would dictate that he should be required to give security for the amount he may owe. Nor do I think that the fact that the purchaser may be a mercantile firm composed of several different individuals, all of whom may be at the time perfectly responsible, will release the trustee from the duty of requiring security to be given. The fact that there is one bound as surety merely for the debt gives an assurance, in addition to his mere responsibility, that the debt will be collected when due; and if the creditor fail to proceed he may compel him by a bill quia timet, or a notice under our act of assembly.

We do not learn from the record what was the terms of the credit on which these slaves were sold. If it was for the usual period of one or two years, why was not the debt collected? Why suffered to remain in the hands of Garland, Walton & Penn? If, as may be possibly inferred from the fact that the purchasers were creditors of the trust fund, though of the second class, it was intended that the credit should continue till the settlement of the trust, it was an undue and improper credit; or at least, it was the bounden duty of the trustees to take security; and the rather, because it appears from their answer to the bill of Harrison, they knew, or had reason to believe, that the trust fund would prove inadequate to the payment of the debts, before they made this sale to Garland, Walton & Penn. 676 *I see nothing in the fact that Samuel Garland, who chanced to be the attorney of the appellant, took a part on behalf of Garland, Walton & Penn, for whom he was also attorney, in bringing about the sale to them of these negroes; and that the appellant and the said Garland, Walton & Penn have united as complainants in this cause. The appellant could not be bound by the act of Garland on behalf of others, nor could his authority from the appellant be construed to extend so far as to sanction a breach of trust which he may have induced the trustees to commit on behalf of others. And although these parties

join in the bill in this cause, yet they make several allegations, and these are to be regarded as constituting a separate bill on behalf of each.

I think therefore that the Circuit court erred in not holding both the trustees jointly responsible for the price of the negroes sold to Garland, Walton & Penn.

I come next to consider the subject of what is called the "Calloway compromise." Harrison had purchased a tract of land of one Calloway at the price of 12000 dollars; but before the title was conveyed, it was ascertained that it was defective, and Harrison brought a suit to rescind the contract and recover back the amount he had paid. He claimed to have paid about 4000 dollars, though Calloway in his answer only admitted payments to the amount of 2480 dollars and 14 cents. Pending this suit, Harrison made his conveyance in trust to the said Holcombe and Coleman, including the claim set up in that cause. Shortly afterwards a decree was pronounced rescinding the contract between Harrison and Calloway, and requiring the latter to refund to the former the amount of purchase money received by him with interest, first deducting the rents and profits of the land during the time it was held in possession by Harrison under the purchase. After this decree had been rendered, a compro-
677 mise was *made by Holcombe, as he states, with Calloway, by which it was agreed that the appeal which Calloway had taken from the decree should be dismissed, and that Holcombe should take the land, pay Calloway 2500 dollars, and pay the amount of the decree. And by this arrangement the decree was satisfied and adjusted. Holcombe afterwards sold the land for a sum sufficient to pay the 2500 dollars to Calloway and 2000 dollars to the trust fund, and yet leave a considerable balance for the profit on the transaction. This profit it is insisted, should be carried to the credit of the trust fund; while it is contended on the part of Holcombe, that this transaction was a purchase by him individually of the land from Calloway; and that he is entitled to claim the benefit of it as such. And the Circuit court sustained the pretensions of Holcombe in this respect.

It is a well settled doctrine that where a trustee or other person standing in a fiduciary character, makes a profit out of any transactions within the scope of his agency, that profit will belong to the cestui que trust. Fawcett v. Whitehouse, 1 Russ. & Mylne 132, 4 Cond. Eng. Ch. R. 357; Com. Dig. Chancery, 4 W. 30. And if a trustee should lay out money in land when not so authorized by the terms of the trust, the cestui que trust has an option either to take the property or to claim the money. 2 Story's Eq. Jur. § 1260, et seq. § 1262; 2 Spence's Eq. 944. And it seems to me that Holcombe was brought in the transaction in question, within the influence of the rules upon the subject. He availed himself of his office of trustee to make this compromise: the thing compromised was the decree in favor of Harrison, part of the trust fund. He takes the land of Calloway in satisfaction of the decree, paying also out of it 2500 dollars to Calloway. He sells this land, and after he had received the proceeds, it may be inferred he credits the trust
678 fund with *2000 dollars. Why did he not credit this sum at the time of the compromise? He says he bought the land on his individual account and with his own means. Yet we see that at the time of this arrangement he had a large amount of the trust funds in his hands. The principal circumstance which he states as a color for the individual character he seeks to give to the transaction is that he incurred a personal responsibility by warranting the title to the land to the purchasers to whom he sold it; but in this it appears that he was entirely mistaken, doubtless through an error of memory, for it appears that the deeds that he made to the purchasers were all with special warranty against himself and his heirs, just as deeds made by trustees usually are. Harrison in his answer states that he made the compromise with Calloway, and that the proceeds were for the benefit of the trust fund; but that Holcombe, for causes unknown, had caused the deed to be made to himself individually, instead of as trustee. He denies the character imputed to this transaction by Holcombe; and says that the amount to be paid to Calloway, which he states at 2000 dollars instead of 2500 dollars as stated by Holcombe, was paid out of the proceeds of the sale of the land. It will be observed that Holcombe directed commissioner Benagh in September 1822, to report to the court that an arrangement had been entered into with Calloway that would, if finally closed, produce to the trust fund a sum between 2000 and 3000 dollars. It would not appear from this that he contemplated an individual transaction, but himself supposed that the profit would enure to the benefit of the trust fund. The arrangement was consummated shortly after; and he seems to have sold most of the land immediately after, for four of his deeds bear date in October 1822, and the fifth in February 1824; and yet he never credits the fund with the sum which he
679 *thought proper to allow, until February 1826, when it may be supposed he had collected the proceeds of his sales. The sum for which he credited the fund was an arbitrary amount, fixed by himself, less than that he had stated would be the yield of the arrangement to the fund; although in his answer he states that all the fund could claim was 1576 dollars.

These views militate strongly against the pretensions of Holcombe; but there is yet another which I think conclusive.

The principle on which the prohibition to one standing in a fiduciary character to deal with the trust subject with reference to his own individual interests, rests, is that not only would it be contrary to the design under which he has obtained the control of the subject, but he would be placed in such a situation as that his interests might, in

reference to the conduct of the trust, by possibility come into conflict with those of the cestui que trust. 2 Spence's Eq. 299; 2 Fonb. 189. And this case furnishes a most apt illustration of this principle. It will be remembered that at the time this compromise took place, the amount due from Calloway to Harrison was unascertained, depending upon an account ordered by the court to be taken of the amount paid by Harrison, upon the purchase, on the one hand, and the rents and profits of the property during the time it was held by him on the other. Now in this state of the case, it was Holcombe's bounden duty to see that the account was taken correctly, and that the full amount paid was allowed, and not more than the just value of the rents and profits charged against it so as to make the net balance accruing to the fund as large as might be. But after the compromise, as he is to pay according to his account, only what is actually due to the trust fund, it of course becomes his interest to reduce the amount as much as possible; and thus that very conflict between duty on the one 680 hand *and interest on the other, is brought about, which the court of equity, by its rules, seeks to avoid.

It is in vain to say that the arrangement was a judicious one, yielding more to the fund in the credit actually given, than it was really entitled to. The court will not go into that enquiry, but requires that the whole profit yielded shall be accounted for.

I think, therefore, the Circuit court erred in not requiring Holcombe to bring to the credit of the trust fund all the profits realized from the arrangement made with Calloway.

It results from the foregoing, that the court also erred in decreeing against the appellant for the supposed excess which he had received over and above the amount to which he was declared entitled: because upon the true construction of his bond, the appellant was only bound to refund in case of a deficiency of the trust fund; and no such deficiency had been shown by any account stated upon the principles which, according to my view, should govern the case.

In the view I have taken of this case, it is rendered unnecessary to consider several of the questions discussed in the argument, their solution being embraced in the opinions I have already expressed. But as I have expressed the opinion that Holcombe should be charged conjointly with Coleman with the various items charged by the commissioner against the latter separately, upon his admissions, as the commissioner states, it is proper I should add that the parties should be credited upon the account of the trust subject, not only with what they may have properly paid out in the proper administration of the trust subject, but also with any portion of the trust property or any debt belonging to it, that they may shew has been lost to the fund without any neglect of duty or other default on their part.

I am of opinion to reverse the de- 681 cree so far as it *affects the appellant, and to remand the cause with directions to the Circuit court to ascertain the amount that may be due to Miller, he being the only appellant, by causing a report to be made upon the principles hereinbefore declared; and otherwise to proceed according to the same.

The other judges concurred in the opinion of Lee, J.

The decree was as follows:

The court having maturely considered the transcript of the record of the decree aforesaid, together with the argument of counsel thereupon, is of opinion, that the exception taken by the appellant to the report of the commissioner on the 24th of April 1845, was unduly and improperly delayed, and was moreover unfounded in point of fact; it appearing that the counsel for the appellant had received notice, and did in fact attend the commissioner when taking the accounts; and that the said exception was therefore properly overruled by the Circuit court.

And the court is further of opinion, that upon the true construction of the deed of trust executed by Nicholas Harrison to the said Holcombe and Coleman, preference was given out of the proceeds of the trust subject, to those creditors thereby secured, for whose debts other persons were bound as sureties; and that the Circuit court did not err in holding that such preference should be allowed; and that the debts, if any, for which either or both of the said trustees were bound as sureties, should stand on the same footing as the other security debt secured by said trust deed: This court being further of opinion, that all the creditors for whose debts others were bound as sureties, should come in pari passu as among themselves; and that the other creditors 682 should come in pari passu *among themselves for the surplus, if any, left after satisfying the preferred creditors.

But the court is further of opinion, that the trustee Holcombe should be charged conjointly with Coleman, with all those items which the commissioner charged to Coleman separately, upon the admissions made as he states by the said Coleman, that he alone was accountable for the same.

And the court is further of opinion, that the said trustees should be charged jointly with the sum of 2050 dollars, the amount of the sale of the three negroes sold to Garland, Walton & Penn, as of the 25th December 1822.

And the court is further of opinion, that the said Holcombe should be charged with the whole amount of the proceeds of the sales of the land taken by him from the said Calloway, (all proper costs and expenses first deducted,) after allowing the said sum paid by him to said Calloway, instead of with the sum of 2000 dollars, which was charged to him by the said commissioner by his direction; this court being of opinion that said Holcombe must be regarded as having made the arrangement with Calloway as trustee, or on account of the trust fund, and not individually on

his own account; and that he must therefore account to the trust fund for all the profits accruing from said arrangement.

And the court is further of opinion, that upon the true construction of the bond given by the appellant on receiving a portion of the trust fund, he was only liable to refund any portion thereof upon its being ascertained that there was a deficiency of the trust fund to satisfy his whole debt; and that as no such deficiency had been ascertained by any account stated upon the principles which in the opinion of this court should govern it, it was improper to render a decree against him for the said sum of 858 dollars 9½ cents, with interest, or any other sum at that time.

683 *Wherefore the court is of opinion that the said decree is erroneous: and it is therefore ordered and decreed that the same be reversed and annulled so far as it affects the said appellant; and that the said Charles L. Mosby, out of the assets of his testator in his hands, to be administered if so much he hath, and the said Robert L. Coleman do pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And it is further ordered that said cause be remanded to the said Circuit court, with directions to ascertain the amount that may be properly due out of the trust fund to the appellant, by causing an account to be stated upon the principles hereinbefore indicated, (the appellant being the only party appealing from said decree, and alone entitled to a restatement of said account and to a decree founded thereupon,) in which account the said trustees are to be entitled to credit for all sums disbursed by them in the proper administration of the fund, and for any part of the trust subject or any debt belonging to it, that they may show has been lost without any default on their part; and for further proceedings according to the views and principles hereinbefore declared. Which is ordered to be certified to the said Circuit court of Lynchburg.

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684 *Bassett's Adm'r v. Cunningham's Adm'r.*

Four cases.

January Term, 1853, Richmond.

(Absent LEE, J.)

1. **Arbitration and Award§—Umpire Differs from Both Arbitrators†—Effect.**—Six causes are referred by order of the court to D and L, and in case of disagreement between them, then to T as the umpire to decide such difference, for their arbitrament and award, which when made by them or their umpire, and duly certified by them, to be entered as the judgment of the court. Upon the disagreement of the arbitrators D and L, the whole matter is to be adjudged by the umpire T; and his decision is valid and conclusive though he differs from both the arbitrators.

2. **Same§—No Reference to Evidence in Award—Effect.**—The arbitrators and umpire sit together and hear the evidence, of which a note is taken by one for the convenience of all. Upon the disagreement of the arbitrators the umpire makes his award, in which he does not refer to any of the evidence, or state the principles or facts upon which it is based; but in sending his award to the clerk of the court in which the causes are pending, he sends with it all the papers and the note of the evidence taken before the arbitrators. These papers and evidence are not a part of the award or connected with it, so that they may be considered upon a motion to set aside the award.

3. **Same§—Validity of Award—Case at Bar.**—The arbitrators differing in opinion, each made out his own report of his opinion upon the different questions arising in the cause. And in this there was no error. Though if it was error in them, it would not affect the validity of the award made by the umpire.

4. **Same§—Admission of Improper Evidence—Presumption.**—Evidence offered before the arbitrators and umpire was excepted to, but it was heard reserving the question of its competency until they were ready to decide the case. The question was not formally acted on; but the arbitrators having been the counsel in the cause, and the umpire a distinguished lawyer, it will be presumed in the absence of evidence to the contrary, that as both arbitrators and umpire were selected in part for their high legal attainments, all improper testimony was discarded from their consideration in making their decisions.

5. **Same§—Mistake on Face of Award—Effect.‡**—A mere

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*For monographic note on Arbitration and Award, see end of case.

†**Umpire—Function.**—An umpire is a person, whom two or more arbitrators under authority of the parties to the submission select. His function is to decide the controversy, which the arbitrators have been unable to decide. He is not to act in conjunction with them, but as a substitute for them. He is, as it were, a sole arbitrator, with the same duty of hearing the whole case *de novo*, as would have devolved upon him had he been originally appointed alone. Rogers v. Corrothers, 26 W. Va. 245, citing the principal case.

‡**Award—Setting Aside—Error Must Appear on Face of Award.**—In Boring v. Boring, 2 W. Va. 303, it is said: "Of the causes assigned to set aside the award, several of them, if true, would be sufficient, while others of them would not be sufficient, if true. If these 'are errors appearing on the face of said award,' that is good cause to set it aside. It is insisted in argument here that such errors do exist, and that they are manifestly apparent, if the whole record is looked into. But the rule seems to be well established that the errors must be apparent on the face of the award, and that other parts of the record cannot be looked into to show that there is error of law or fact in the award, for the arbitrators are the judges of both law and facts. See *Bassett's Adm'r v. Cunningham's Adm'r*, 9 *Gratt.* 688, and the authorities there cited, and Kline v. Cotard, 2 Gallison's Reports 69, and authorities cited."

See also, the principal case cited in Pollock v. Sutherlin, 25 Gratt. 95, 96; City of Portsmouth v. Norfolk Co., 31 Gratt. 734 (see also, *foot-note* to this case); Tennant v. Divine, 24 W. Va. 390, 395; Mathews v. Miller, 25 W. Va. 828.

§See generally, monographic *note* on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

mistake of a date from which interest on a particular debt is to run, obvious on the face of the award, is not ground for setting it aside; the party in whose favor it is, consenting that it shall be corrected in the judgment entered upon the award.

6. **Same*—Error of Judgment—Effect.**—An error of judgment on the part of the umpire in regard to the facts, is not ground for setting aside his award.

685 *These were four actions of debt in the Circuit court of Hanover county, three of them by William Cunningham's adm'r against George W. Bassett as adm'r of John Bassett deceased, and the fourth by the same plaintiff against George W. Bassett individually. And at the same time there were in the same court two actions of assumpsit by the same plaintiff against the same defendant. The facts of the cases are sufficiently stated by Judge Allen in his opinion.

Patton, Griswold and Claiborne, for the appellant.

Robinson, Stanard and Bouldin, for the appellee.

ALLEN, J. On the 5th of April 1836, the appellee as administrator instituted four actions against the appellant in his character of administrator, two upon bonds executed by the testator of the appellant to William Cunningham, and a third upon a small bond executed by the testator of the appellant to Joshua Drinkard; the fourth was an action of assumpsit. On the same day a fifth action was instituted by the appellee as such administrator against the appellant as surviving obligor of his testator upon a fourth bond; and on the 6th of October 1836, the appellee as such administrator, instituted another action of assumpsit against the appellant individually.

On the 7th October 1836 the two actions of debt on the large bonds executed by the testator of the appellant to the appellee's intestate, were consolidated on the motion of the appellant. Issues having been made up in these two cases upon pleas of payment accompanied with an account of offsets, an ineffectual effort to try them was made in October 1839; a jury was empanelled, but a juror was afterwards withdrawn. The plea of payment was put in to each of the other two actions of debt, and the pleas of nonassumpsit and the statute of limitations to the two actions 686 *of assumpsit. The six cases stood on these issues until the 10th of April 1840, when, by consent of parties, an order was made referring the six causes "to James Lyons and Raleigh T. Daniel, and in case of disagreement between them, then to Benjamin W. Leigh, and if he should refuse to act, then to Samuel Taylor, as the umpire to decide such difference for their arbitrament and award, which, when made by them or their umpire, and duly certified by them, should be entered as the judgment of the court."

Mr. Leigh declined to act, and the two arbitrators, with Mr. Taylor, proceeded together to hear the testimony of the parties. The arbitrators being unable to agree, the umpire alone made out and returned his award on the 16th of April 1846. At a subsequent term the appellant having filed exceptions and moved to set aside the award, the court overruled the exceptions, confirmed the award, and proceeded to enter judgment in all the cases in pursuance thereof. From the four judgments against him the appellant has applied for and obtained writs of supersedeas, assigning for error the same matters which were relied on in the court below by way of exceptions to the award.

In his award, the umpire refers to the reports of the two arbitrators as showing that they had differed in each case, and that therefore the contingency had occurred which made it his duty to decide the six suits referred. It is argued here that in this conclusion, the umpire misconstrued the extent of his authority: that under the submission, it was not his function to decide the six suits referred, but merely to settle the differences between the arbitrators; and that in effect, it was a submission to the award of any two of the three who might agree on an award. This, it seems to me, is rather a forced and technical construction of the order of reference. The causes were referred to the arbitrators in the first instance; if they agreed, 687 there *would be no occasion for the intervention of the selected umpire. There was no necessity, although in view of a possible disagreement, it was convenient and legal for the umpire to act with them in investigating the facts; but he could have acted separately after such disagreement. They would scarcely have provided for an umpire, if they had contemplated it as no more than a mere submission to three arbitrators, with authority to any two to make an award. If they had so designed, they would have provided that the arbitrators with the umpire should make the award; and not that the umpire in case of disagreement, should decide the difference. An umpire means a sole arbitrator, one who is to make an end of the matter, if the others cannot. 1 Bac. Abr. 319, Arbitrament and Award, letter D. In providing for an umpire to settle such difference in case of a disagreement between the arbitrators, they must have intended that he should be empowered to do what the term implied, and what the arbitrators had been unable to accomplish, that he should make his own award. If his sole function was to settle isolated questions upon which the arbitrators disagreed, in conformity with the views of one or the other, and he should have differed from both, as was the fact, there could have been no award, as two could not have concurred in any conclusion. The parties never contemplated such a state of things; for in the same clause they pro-

*See generally, monographic *note* on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

vide that the award when made by them or their umpire, and certified by them, shall be entered as the judgment of the court, showing that they looked to the contingency of a sole award by the umpire. As the arbitrators disagreed in each case, it became the duty of the umpire to decide all the cases: And no question arises as to what would have been the consequence, if the arbitrators had agreed as to one or more of the cases, and disagreed as to the others.

The umpire sets out the facts 688 *as they actually existed, a disagreement between the arbitrators in each of the six cases, and concludes that the duty had devolved on him as umpire, by the terms of the submission, to decide all the cases. In this it seems to me he did not misconstrue the order of reference, or transcend his authority.

The award of the umpire is a simple judgment that the appellant should pay to the appellee so much money and the costs in each of the four actions of debt; and in the two actions of assumpsit, he decided that a recovery was barred by the statute of limitations, and therefore awarded that they should be dismissed with costs to the appellant. No explanation is given. None of the grounds, or principles, or calculations, on which the award rests, so far as it respects the cases in which the award was against the appellant, appear either upon the fact of the award, or on any paper annexed to it, or referred to by it, or from any certificate or statement of the umpire returned since. Nor has his deposition been taken in the case.

The principle has been so often adjudicated in this and other courts that an award cannot be set aside except for errors apparent on its face, misconduct in the arbitrators, some palpable mistake, or fraud in one of the parties, that it would be useless to refer to authorities to sustain the proposition. The rule as to palpable mistakes does not comprehend errors of judgment in its fair exercise upon the matter. For as was said by the chancellor in Knox v. Symmonds, 1 Ves. jr.'s R. 369, an award cannot be set aside for a mere error in judgment in the arbitrator; for they refer their disputes to his judgment, and that would be a ground for setting aside every award. In Dick v. Milligan, 2 Ves. jr.'s R. 23, the suits arose out of partnership transactions; and an order of reference was made which expressed that the arbitrators were to take an account of all the dealings in like manner as if the same had been 689 *referred to a master; and that they should be bound by the award. The court remarked there was a great difference between a report of the master and an award. An arbitrator is constituted judge of the facts without appeal; the master is to prepare the case for the court, the real judge, and the master is only the minister; whereas in the other case, the arbitrator is the judge and not the court.

The first error assigned is that the arbitrators admitted illegal evidence.

There is nothing on the face of the award or referred to by the umpire, to show on what evidence he acted. It appears from the evidence of the clerk of the court, that all the papers tied up in a bundle and delivered to one of the attorneys of the plaintiff in error, were returned to the officer, and delivered to him along with the award: and no evidence was given of any other delivery of the award: and all those papers are copied into the record. Amongst them is a brief record of the testimony, proved by the arbitrators to have been written down by one of them as it was given in before them, intended as a memorandum of the testimony, for the convenience of the arbitrators and umpire, instead of a separate memorandum by each. That exceptions were taken at the time to the admissibility of portions of the evidence, but the evidence was recorded, reserving the question of the legality or illegality of the testimony for decision when the arbitrators should come to consider and decide the controversy. The arbitrators were the counsel of the parties who had attended to the suits from the commencement of the litigation; the umpire, one of the most learned and distinguished ornaments of the profession. In Sharman v. Bell, 5 Maule & Sel. 504, it is said, where the merits in law and in fact are referred to an arbitrator of common knowledge, as we must presume a gentleman of the bar to be, 690 the court will *not open the award unless something can be alleged amounting to perverse misconstruction of the law, or misconduct in the arbitrator. Here nothing of that kind is alleged. The arbitrators could not say that the evidence was improper or incompetent until they knew what it was. They noted it down, reserving all legal objections; and the presumption is, in the absence of all evidence to the contrary, that, as both arbitrators and umpire were selected no doubt in part for their high legal attainments, all improper testimony would be discarded from their consideration, when they came to consider and decide the controversy.

The second error is, that upon the bond falling due on the 21st of March 1819, interest is allowed from the 21st of March 1819, instead of from the 21st of March 1820, upon the balance awarded, and a statement is referred to showing the mistake. The statement is no part of the award, but the mistake was palpable, being a mere error in adopting the time at which the bond fell due instead of the period at which the last credit was allowed, and it was remedied when judgment was entered, by the release of the interest for a year.

The third, fourth and fifth errors relate to the application of credits, the refusal to allow sundry payments claimed by the plaintiff in error appearing in a book referred to, and other items shown by documents and statements delivered by the umpire along with the award, to be proper credits. It is sufficient to say, in regard to the matters relied on in these assignments of error, that there is nothing on the face of the award,

or any paper made a part of it or referred to by it, which can be looked to on this enquiry. The exceptions, moreover, proceed apparently upon the idea that the court is to deal with the award as if it were the report of a master commissioner. It 691 is manifest these *exceptions involve most of the matters in dispute, and which were submitted to the judgment of the arbitrators; and, in the language of one of the judges in the case of Morgan v. Mather, 2 Ves. jr.'s R. 15, it would be a melancholy thing to set aside an award on matter of fact, because the court differed from the arbitrators in judgment.

If it were proper, therefore, to look behind the award, an error of judgment on the part of the umpire in regard to the facts could not be corrected by the court. The entries in the book referred to, if prima facie, were not conclusive evidence, and the weight to which they were entitled in connection with the other evidence, was a matter for the consideration of the umpire, and his judgment is conclusive.

The sixth assignment of error relates not to the conduct of the umpire, but of the arbitrators. That, if well founded, could not affect the validity of the umpire's award, provided they disagreed.

But there would seem to be no foundation for the exception. After the evidence closed, each arbitrator considered the matters submitted to them. They made out notes of the result of their examination, which were interchanged; and not agreeing, each made out his own report. Considering the character of the accounts submitted, this was, perhaps, the most satisfactory mode of comparing their views.

As to their failure to decide upon the admissibility of the testimony, that, so far as respects the umpire, has already been considered.

The last error assigned is, that the Circuit court erred in entering a judgment in favor of the defendant in error against the plaintiff in error for costs in the second suit. This, even if well founded, is too minute a matter to be entitled to any weight. The two suits were consolidated, and the court gave judgment for the costs incurred before the order of consolidation, 692 *excluding an attorney's fee and the tax on the writ. The costs recovered, therefore, are the clerk's and sheriff's fees. The motion to consolidate is addressed to the discretion of the court. There may be a good reason for bringing separate actions, though all might have been joined. And the amount of costs to be allowed, after an order of consolidation, is a subject for the consideration of the court directing the consolidation, and should be left to its discretion.

I think the judgments should be affirmed.

The other judges concurred in the opinion of Allen, J.

Judgment affirmed.

ARBITRATION AND AWARD.

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I. DEFINITION.

Arbitration and award is where the parties injuring and injured, submit all matters in dispute concerning any property, real or personal, or any wrong or injury, to the judgment of one or more persons called arbitrators, who are to decide the controversy, and if there are two or more of them it is usual to provide that in case they do not agree, another person shall be called in as umpire to whose sole judgment it is then referred. 4 Min. Inst. (3d Ed.) 176.

II. THE SUBMISSION.

1. RULES OF CONSTRUCTION.—The ancient principle, that agreements for the final settlement of disputes by arbitration were against the policy of the law and void because tending to oust the courts of their jurisdiction, is against the spirit of modern times, and courts now are very liberally inclined towards the submission of matters to arbitration, and place as liberal a construction upon the submission as the intention of the parties justify. The intention of the parties is the guiding star in construing the submission. Condon v. Southside R. Co., 14 Gratt. 302; Gas Co. v. Wheeling, 8 W. Va. 330.

In Gas Co. v. Wheeling, 8 W. Va. 330, the court said: "In construing a submission, regard is principally to be paid to the intention of the parties, and a fair and liberal construction is to be adopted without too great verbal accuracy. The court will reject insensible words and endeavor to uphold the submission according to the intention of the parties."

2. PARTIES TO THE SUBMISSION.

Infants.—An infant by reason of his general inability to make a valid contract, except for necessaries, does not possess the requisite legal capacity to make a valid submission to arbitration. The submission of an infant, however, is not absolutely void, but only voidable, and is capable of being ratified or disaffirmed by him upon attaining his majority. A submission by an infant, even though with an adult, is not binding on either party and it should not be sanctioned, even though

the submission is by rule of court, and the award in his favor. Britton v. Williams, 6 Munf. 453.

Attorneys.—An attorney at law as such, has no inherent authority, before or after the institution of a suit, to make an agreement *in pais*, to submit his clients' cause to arbitration, though if his clients are adults he may consent in open court to submit their cause to arbitration and they will be bound thereby. McGinnis v. Curry, 13 W. Va. 29.

Executors and Administrators.—Executors and administrators, or other fiduciaries, by virtue of their office, have authority to submit to arbitration any matter in controversy touching the estate of their intestate; and the award made in pursuance to such submission binds the estate. Wheatley v. Martin, 6 Leigh 62; Merrit v. Smith, 6 Leigh 486; Nelson v. Cornwell, 11 Gratt. 724; Wamsley v. Wamsley, 26 W. Va. 45.

But where an executor makes an improvident submission to arbitration and injustice results to the estate thereby, he is liable as for a *devastavit*. Wheatley v. Martin, 6 Leigh 62; Merrit v. Smith, 6 Leigh 486; Nelson v. Cornwell, 11 Gratt. 724.

Where an executor made an improvident submission to arbitration, as to part of his testator's property which had been specifically bequeathed, and the result of the submission being that the property was left in his hands as his own property he being compelled to pay for it, the legatee was held not precluded by the award from recovering the specific property. Nelson v. Cornwell, 11 Gratt. 724.

Where a submission is made by rule of court, and a party to the submission dies, the suit may be revived by the personal representative of the party, and the cause may be proceeded in without any new submission. Wheatley v. Martin, 6 Leigh 62.

Deputy Sheriff.—A deputy sheriff to whom the administration of a decedent's estate has been committed, has no authority to submit to arbitration a suit revived in the name of the sheriff as administrator, to which the deceased, in his lifetime, was a party. Thompson v. Thompson, 6 Munf. 514.

Overseers of the Poor.—The overseers of the poor are a body corporate capable of maintaining a suit, and a submission of a claim by them to arbitration is valid and binding. Chapline v. Overseers, 7 Leigh 231.

Municipal Corporations.—A submission to arbitration by a municipal corporation under authority of special legislation is valid. Gas Co. v. Wheeling, 8 W. Va. 320.

Partners.—One partner has no authority by virtue of the partnership relation, to bind his copartner by an agreement to submit claims or transactions growing out of the partnership business to arbitration, but the partner who makes such agreement is bound thereby, and the agreement is valid and binding between the parties thereto. Wood v. Shepherd, 2 P. & H. 442; Fletcher v. Pollard, 2 H. & M. 544.

Where a claim by a party against a firm was submitted to arbitration, and only one of the two members of the firm was a party to the submission, the fact that other partner was not a party to the submission was no objection to the award, as he was not bound by it, but only the party who agreed to the submission. Forrer v. Coffman, 23 Gratt. 871; Fletcher v. Pollard, 2 H. & M. 544.

Heirs and Distributees.—Where some of several heirs or distributees submit their interests to arbitration, the submission and award made in pursuance thereof are binding on them, so far as their interests are concerned. Smith v. Smith, 4 Rand. 95; Boyd v. Magruder, 2 Rob. 761.

Purchaser of Property.—Where a dispute arises between a purchaser of property and a third party as to the ownership of the property, the purchaser cannot submit the matter to arbitration without authority from the vendor to do so; and if he does make such submission without authority, he has no remedy against the vendor where the award is made against him. Dust v. Conrod, 5 Munf. 411.

Parties to Suit after Judgment by Default.—After judgment by default has gone against the defendant and a writ of inquiry of damages has been awarded, a submission to arbitration may be made by the parties to the action without setting aside the judgment by default, and the submission is valid. Sutton v. Dickinson, 9 Leigh 142.

3. EFFECT OF SUBMISSION.

No Bar to a Suit at Law or in Equity.—An agreement to submit a claim to arbitration, not consummated by an award, is universally held to be no bar to a suit at law or in equity. Corbin v. Adams, 76 Va. 61; Rison v. Moon, 91 Va. 384, 22 S. E. Rep. 165.

A provision in a contract that the differences arising under it shall be submitted to arbitrators thereafter to be chosen, will not prevent a party maintaining an action in the first instance in a court to enforce his rights under it. Kinney v. Baltimore & Ohio Employees' Association, 35 W. Va. 385, 14 S. E. Rep. 8.

Where the Award is to Be Made Decree of Court.—Though consent of parties cannot give jurisdiction to a court of equity; yet, after an injunction granted improperly, if the parties refer all matters in difference between them in that suit to certain arbitrators mutually chosen; consenting that their award may be made the decree of the court, such consent is binding; the whole case, including the question of law, being thereby transferred to the arbitrator. Brickhouse v. Hunter, 4 H. & M. 363.

Release of Errors.—The submission to arbitration of a pending suit, operates as a release of all errors up to the time the submission was made. Ligon v. Ford, 5 Munf. 10.

4. REVOKING THE SUBMISSION.

The General Rule as to Revocation.—In the absence of statute upon the subject, it is the well-established rule that either party may withdraw from an agreement to arbitrate a cause of action, at any time before the award is made, and the only remedy afforded the aggrieved party is an action at law for damages for breach of the agreement to submit. The agreement to submit is no foundation for a suit for specific performance. Rison v. Moon, 91 Va. 384, 22 S. E. Rep. 165; Corbin v. Adams, 76 Va. 61; Long v. Long, 5 Call 481.

After the arbitrators have acted and rendered an award the case is very different. Their decision is binding upon the parties, and can be successfully impeached, only upon grounds which would invalidate any other judgment. Corbin v. Adams, 76 Va. 61; Rison v. Moon, 91 Va. 384, 22 S. E. Rep. 165.

West Virginia Statutory Rule.—Where an order is made by consent in a justice's court, submitting the matter in controversy to arbitration, the submission is not revocable except by order of the justice, under the statute, and that submission is a bar to a second suit for the same cause. A plea of such submission to arbitration, filed in a subsequent action

in a circuit court on the same cause of action, must be in abatement, not in bar, and comes too late after pleas in bar have been filed. Riley v. Jarvis, 43 W. Va. 43, 26 S. E. Rep. 366.

Under ch. 108, Code of W. Va., an agreement to submit a controversy to arbitrators, which provides that the award shall be entered as the judgment of the court, cannot be revoked by a party without leave of such court. Stiringer v. Toy, 33 W. Va. 86, 10 S. E. Rep. 26.

Revocation of Submission under Rule of Court—Presumption.—Where a case has been submitted to arbitration under a rule of court, and the order is subsequently set aside on motion of one of the parties, and it appears on the face of the record that all of the parties were present and no objection was made, although not made by consent, the appellate court must presume that the order, so setting aside the submission, was properly made. Pendleton v. Bartons, 4 W. Va. 496.

III. THE ARBITRATOR.

1. WHO MAY BE AN ARBITRATOR.

Party Known to Be Partial before Appointment.—Parties who really intend to have their rights decided by impartial judges are entitled to insist that all of the arbitrators shall be impartial. But if they are content to submit questions in controversy to those who are known to have formed and expressed opinions upon the subject-matter, or who are known to have partialities and prejudices for or against the respective parties, an award made by such arbitrators is binding. Wheeling Gas Co. v. City of Wheeling, 5 W. Va. 448.

Partisans.—Partisanship in an arbitrator in favor of the party selecting him will be sufficient ground for disqualification, unless both parties select partisans. Wheeling Gas Co. v. City of Wheeling, 5 W. Va. 448.

Party Who Expressed Opinion before Appointment.—The fact that an arbitrator, before his appointment as arbitrator, expressed his opinion as to the merits of the controversy, is not sufficient to invalidate the award, where there is no evidence that the party selecting him knew that he had expressed such an opinion. Wheeling Gas Co. v. City of Wheeling, 5 W. Va. 448.

2. NATURE AND EXTENT OF AUTHORITY.

Coextensive with Submission.—Arbitrators have no power except those which are delegated to them in the submission. Their award must, therefore, be limited to such matters as are submitted to them, and if they exceed the limit of the submission, they act without authority, and in the assumption of powers not delegated. Shipman v. Fletcher, 82 Va. 601; Dunlap v. Campbell, 5 W. Va. 195; Providence Ins. Co. v. Board of Ed. (W. Va. 1901), 38 S. E. Rep. 679.

Authority Cannot Be Delegated.—The authority of an arbitrator cannot be delegated to an agent. Shipman v. Fletcher, 82 Va. 601. In this case the arbitrators appointed other persons to examine the accounts and vouchers in the case, and adopted their conclusions without examining the vouchers themselves. This was held sufficient ground for setting aside the award.

Rule of Decision.—When parties submit to arbitration their rights involved in law and facts, they are understood to submit the facts to the arbitrators, to be decided according to law; and if it appear upon the face of the award, that they grossly mistook the law, the award will be set aside. But where it appears, that the parties intended to submit the question of law alone, the decision of the arbitrators is binding though contrary to law. Smith v. Smith, 4 Rand. 101.

Excess of Authority.—Where arbitrators exceed the authority conferred upon them by the submission, their award is void, unless the excess can be separated from the part which is within the submission. Martin v. Martin, 12 Leigh 495; Moore v. Luckess, 23 Gratt. 160; Lynchburg, etc., Asylum v. Ford, 25 Gratt. 566; Swann v. Deem, 4 W. Va. 368; Dunlap v. Campbell, 5 W. Va. 195; Austin v. Clark, 8 W. Va. 286.

When Ex Parte Hearing Is Proper.—Where the parties have received notice of the time and place of the hearing of the case, and have not appeared, the arbitrators are the judges as to whether it is proper to proceed in their absence; and they may always do so unless there is some understanding express or implied, to the contrary. Boring v. Boring, 2 W. Va. 297.

Opening Case to Hear Evidence.—The opening of the case for further evidence at the instance of one of the parties, after it has been closed and the case submitted, is primarily a matter in the discretion of the arbitrators and not of strict legal right; and unless they plainly err in the exercise of that discretion and it clearly appears that injustice has been done thereby, the court should not set aside their award for that reason. Tennant v. Divine, 24 W. Va. 388.

Authority to Award Damages—Speculative Damages.—Upon a bond given by a deputy sheriff, to indemnify and save harmless the high sheriff, the arbitrators are justified in allowing all damages which the high sheriff has actually sustained which may be reduced to a money value, but they cannot allow mere speculative damages, such as for trouble, anxiety, etc. Holcomb v. Flournoy, 2 Call 433.

Substituted Arbitrator.—Where an order is entered in court with consent of parties, submitting all matters in difference to two arbitrators and their umpire, and at the trial of the case before the arbitrators there is indorsed on the order an agreement by all the parties to change the submission by adding the name of a third arbitrator, the decision of two to be final, and erasing the clause in regard to the umpire, and the case is heard before these three arbitrators and an award returned, the award is binding on the parties. State v. Rawson, 25 W. Va. 23.

If, pending a suit, the parties by an order of court submit the matter in controversy to arbitrators, whose award is to be made the judgment of the court, and afterwards, by an agreement under seal, appoint a substitute for one of them, agreeing that an award, to be made by the remaining referees and said substitute, shall be entered as the judgment of the court, the award may be so entered without any previous order of the court confirming the appointment of the substitute. Manlove v. Thrift, 5 Munf. 493.

Duration of Authority—Waiver of Objection.—The duration as well as the extent of the authority of the arbitrator is limited and controlled by the submission. Where there is a stipulation in the submission as to the time within which the award shall be made, it must be made within that time. But the parties to the submission may either expressly or impliedly extend the time of making the award. Consent to such extension is implied when the parties after the time has elapsed proceed with the

arbitration without objections. Mathews v. Miller, 25 W. Va. 817.

Termination of Authority.—As soon as the award is made the authority of the arbitrators is gone, and they are *functus officio*. They have no power to change an award after it is made and if they attempt to do so effect may be given to it in its original form. Rogers v. Corrothers, 26 W. Va. 238.

3. DUTIES.

Must Be Impartial.—Arbitrators are called upon to execute a joint trust and ought to look impartially at the true merits of the matter submitted to their judgment, without reference to the manner in which the charge has been placed upon them. In no case can they become an advocate, or act as agent, for the party appointing them. Wheeling Gas Co. v. City of Wheeling, 5 W. Va. 448.

It is not a conscientious intent to be honest, on the part of the arbitrator, nor his conviction that he is so, that can suffice. His external action will be subjected to scrutiny, and if these do not satisfactorily bear the test the award will be invalid. There may be ample misconduct in a legal sense to make the court set aside an award, even where there is no ground for imparting the slightest improper motives to the arbitrators. Wheeling Gas Co. v. City of Wheeling, 5 W. Va. 448.

Must Act Uprightly.—An award of arbitrators will be set aside on the ground of circumstances in their conduct, amounting to misbehavior though not to corruption, and resulting in injustice to one of the parties. Lee v. Patillo, 4 Leigh 436; Dawson v. Winslow, Wythe 114; Shipman v. Fletcher, 82 Va. 601.

Must Unite in the Award.—Unless the statute or submission, under which the arbitrators act and derive their authority, provide to a contrary effect, or unless a contrary intention of the parties can be clearly and unmistakably gathered from the submission and attendant facts, the rule is general and imperative that all the arbitrators must unite in the award in order to render it valid. A different rule, however, is allowed to prevail in matters of public concern. Gas Co. v. Wheeling, 8 W. Va. 320.

When a Majority Award Is Sufficient.—Where the submission expressly provides that an award made by a majority shall be valid, this, of course, will control, as it is competent for the parties to extend by the submission the authority ordinarily possessed by the arbitrators. Wheatley v. Martin, 6 Leigh 62; Coupland v. Anderson, 2 Call 106.

Where the authority of the majority to make a valid award can be implied from the nature of the submission the award by the majority is valid. Where a submission is made to two arbitrators and an umpire to be selected by them, an award signed by one of the arbitrators and the umpire is valid, as this mode of submission necessarily implies an authority to two to make the award. Stiringer v. Toy, 33 W. Va. 86, 10 S. E. Rep. 26; Doyle v. Patterson, 34 Va. 800, 6 S. E. Rep. 138.

As to Receiving Evidence.—Arbitrators should not admit improper evidence, and if they do their award is thereby invalidated, and this is true even though they say that their opinions were formed before such evidence was received. McAlister v. McAlister, 1 Wash. 198; Jenkins v. Liston, 13 Gratt. 535.

Receiving evidence of one party without the knowledge of the other is erroneous, and will invalidate the award. Tate v. Vance, 27 Gratt. 571; Jenkins v. Liston, 13 Gratt. 535.

Where arbitrators unreasonably refuse to hear competent witnesses offered by either party this will vitiate the award. Fluharty v. Beatty, 22 W. Va. 698.

Where evidence is offered, at the trial before arbitrators, impeaching the credit of witnesses who have been allowed to testify, the evidence should be received, and a failure to hear such evidence will vitiate the award. Ligon v. Ford, 5 Munf. 10.

Duty of Notifying the Parties.—It is a well-established rule that no judicial tribunal can adjudicate the rights of parties unless such parties are notified of the proceedings and have an opportunity to be present. This rule is as applicable to a proceeding before arbitrators as well as before any other forum. Shipman v. Fletcher, 82 Va. 601; Miller v. Kennedy, 3 Rand. 2; Boring v. Boring, 2 W. Va. 297; McCormick v. Blackford, 4 Gratt. 133; Dickinson v. Railroad Co., 7 W. Va. 390.

Where arbitrators decide the matters referred to them, in the absence of the parties in interest, or their agents or attorneys, or without having given them notice of the time and place of their proceedings, it is generally such misconduct as will warrant a court of equity in setting aside the award, at the instance of either party materially interested, who did not have notice, and was absent, unless such party has waived notice. Dickinson v. Railroad Co., 7 W. Va. 390.

Notice Where Submission Is by Act of Parties.—If notice of the time and place of making an award be necessary, the defendant in an action on the award, where the submission is by act of the parties, cannot avail himself of the want of it, nor can he avail himself of any other extrinsic circumstances whatever; his only relief in such case is in a court of equity. This rule does not apply where the submission is by order or rule of court. Miller v. Kennedy, 3 Rand. 2.

Notice in Case of Adjournment.—If arbitrators cannot complete the matters referred, on the day fixed by the submission, they may adjourn from day to day, until the hearing and award is complete; and if the parties in interest were notified of the original meeting and did not attend, it is not necessary to give notice of the continuance. Boring v. Boring, 2 W. Va. 297.

Must Not Decide in Absence of Parties.—Hearing and deciding the cause in the absence of the parties and without notice to them of the time of the hearing is such misconduct on the part of the arbitrators as will vitiate their award. Tate v. Vance, 27 Gratt. 571; McCormick v. Blackford, 4 Gratt. 133; Shipman v. Fletcher, 82 Va. 601.

4. UMPIRE OR THIRD ARBITRATOR.

Nature of His Duty.—An umpire is a person whom two or more arbitrators select under authority of the parties to the submission. His function is to decide the controversy which the arbitrators had been unable to decide. He is not to act in conjunction with them but as a substitute for them. He is, as it were, a sole arbitrator with the same duty of hearing the whole case *de novo*, that would have devolved upon him, had he been originally appointed alone. Rogers v. Corrothers, 26 W. Va. 245; Rison v. Berry, 4 Rand. 275; Bassett v. Cunningham, 9 Gratt. 684.

Time of Appointment of Umpire.—Where the submission contains no special provision as to time, the umpire may be chosen before the arbitrators enter upon the hearing. They need not wait until the time limited for the making of the award has expired. Rogers v. Corrothers, 26 W. Va. 238; Rison v. Berry, 4 Rand. 280.

Umpire Must Hear the Evidence De Novo.—Where an umpire is called in to act, upon the disagreement of the arbitrators, it is necessary to give notice of the appointment of the umpire to the parties in interest and give them an opportunity to produce evidence before the umpire or third arbitrator. It is not legal for the umpire to derive his knowledge from the arbitrators in absence of the parties in interest. The case must be reheard by the umpire. Coons v. Coons, 95 Va. 434, 28 S. E. Rep. 885.

Umpire May Differ from Both Arbitrators.—Where matters are referred to two arbitrators by order of court, and in case of their disagreement, to their umpire, and there is a disagreement between the arbitrators, and the whole matter is decided by the umpire, his decision is valid and conclusive though he differs from both arbitrators. Bassett v. Cunningham, 9 Gratt. 684.

Joint Award by Umpire and Arbitrators.—Where a submission is made of all matters in difference in a pending suit to two persons and such umpire as they shall choose, their award to be made the judgment of court, a joint award by the arbitrators and umpire is valid. Rison v. Berry, 4 Rand. 275.

Decision by Umpire before Time Appointed.—Where parties entered into an arbitration bond, referring a certain matter in dispute to arbitrators, who were to make their award by a certain day, and if they should not agree, to the umpire chosen by them; upon which the arbitrators finding that they could not agree, chose an umpire, who made his umpirage before the day appointed for the arbitrators to make their award, such umpirage was held to be good. Richards v. Brockenbrough, 1 Rand. 449.

Evidence to Show Signature to Be That of Umpire.—Although an award does not state that a third person who signed it has been chosen by the arbitrators as umpire, yet this fact may be proved by extrinsic evidence. If the third person who signed the award be a mere stranger, this would not vitiate the award. Rison v. Berry, 4 Rand. 275.

IV. THE AWARD.

1. REQUISITES OF AWARDS.

a. CONFORMITY WITH THE SUBMISSION.

General Rule as to Conformity.—It is a well-established rule that awards must conform to the submission to arbitration; and awards which do not conform to the submission are void. Taylor v. Nicolson, 1 H. & M. 66; Wood v. Shepherd, 2 P. & H. 442; Moore v. Luckess, 23 Gratt. 160; Dunlap v. Campbell, 5 W. Va. 195; Austin v. Clark, 8 W. Va. 236.

Presumption Favors Award.—Upon the question whether an award is within the terms of the submission, all fair presumptions shall be made in favor of the award; and if, on any fair presumption, the award may be brought within the submission, it should be sustained. Pollock v. Sutherlin, 25 Gratt. 78; Richards v. Brockenbrough, 1 Rand. 449; Coons v. Coons, 95 Va. 438, 28 S. E. Rep. 885; Armstrong v. Armstrongs, 1 Leigh 491.

An award which inaccurately requires the surety in the arbitration bond to pay money as well as the principal, will nevertheless be sustained; such clause will only be regarded as surplusage. Richards v. Brockenbrough, 1 Rand. 449; Taylor v. Nicolson, 1 H. & M. 66.

Although the bond of submission states that "divers disputes have arisen" and the arbitrators render an award for one matter only, yet the award will be good, unless it appears that something else was in dispute between the parties. Horrel v. McAlexander, 3 Rand. 94.

Where the Excess Is Separable.—Where an award settles matters which are, and other matters which are not, within the submission, the court may reject the excess, and render judgment on so much of the award as is within the submission if it can be separated. Martin v. Martin, 12 Leigh 496; Lynchburg, etc., Asylum v. Ford, 25 Gratt. 566; Moore v. Luckess, 23 Gratt. 160; Taylor v. Nicolson, 1 H. & M. 66.

Must Pass upon All Matters Submitted.—An award to be valid must adjudicate all matters submitted, and if it leave any such matters open for future controversy, it is invalid. Bean v. Bean, 25 W. Va. 604. In this case two suits were pending between the same parties and an order was made submitting both cases to arbitration, and an award was made in one case of the matters involved in that only without passing upon the other. The award was held invalid because not passing upon all the matters submitted.

Effect Where It Passes upon All Matters Submitted.—Where an award is in pursuance of the agreement to submit, decides all the questions referred, and responds to all the requirements of the submission to arbitration it cannot be void for uncertainty or want of mutuality. Wood v. Shepherd, 2 P. & H. 442.

Set-Off.—Where a pending action of assumpsit is submitted to arbitration, with no account of set-off filed with the plea, the arbitrators cannot allow the defendant to prove a set-off, because this is not within the submission; and if they do allow it the award is erroneous. Swann v. Deem, 4 W. Va. 368; Austin v. Clark, 8 W. Va. 236; Moore v. Luckess, 23 Gratt. 160.

Sealing Not Necessary Even Though Required by the Submission.—It is not fatal to an award otherwise good and in writing, that it is not under seal, when the submission requires that it be sealed. Mathews v. Miller, 25 W. Va. 817.

Where Submission Is Restrained by Prior Agreement.—In Clarke v. Reins, 12 Gratt. 98, an order of reference was made in a pending action of ejectment, by which all matters in difference between the parties were submitted to arbitration. But this order was made in pursuance of an agreement in writing under seal, between the same parties, to refer the single question of the value of the land in controversy; the defendants agreeing to give the plaintiffs for the land, the price fixed upon it by the arbitrators. It was held, that the order of reference was to be construed with regard to the agreement, and therefore, an award which only fixed the value of the land was in accordance with the submission and valid.

b. MUTUALITY AND FINALITY.

What Is Sufficient Compliance with This Rule.—The award must be mutual and final, but where it is within the submission and the arbitrators award a certain sum to be paid by one party to the other without requiring a release to be executed on the payment of the sum, it is mutual and final, because its legal effect is to discharge the party paying the money from all demands within the submission by the party who receives the money. Horrel v. McAlexander, 3 Rand. 94; Doolittle v. Malcom, 8 Leigh 608; Fluharty v. Beatty, 22 W. Va. 698.

Delivery Not Essential.—It is a well-established rule that where an award is in pursuance of the submission, final in its character, signed by the

arbitrators, and read to the parties as and for their award, it is complete and final and delivery is not essential to its finality. Pollard v. Lumpkin, 6 Gratt. 398; Byars v. Thompson, 12 Leigh 550. Delivery is not necessary unless the submission expressly provides for it. Byars v. Thompson. 12 Leigh 550.

Reservation of Right to Reconsider.—Where arbitrators reserve to themselves a right to reconsider a claim which they allow the party against whom they make their award, and then complete the award without reconsidering this claim, the award is good and final for the sum awarded, and the reservation to reconsider is void. Byars v. Thompson, 12 Leigh 550.

Old Doctrine of Mutuality.—The doctrine requiring awards to be mutual, in the sense in which it was formerly understood, is now exploded. Horrel v. McAlexander, 3 Rand. 94.

c. CERTAINTY.

Rule as to Certainty.—An award which is uncertain on its face, and does not refer to something else by which it may be made certain, is void. When an award is void for uncertainty, the parties may assert their demands in any mode or form of action which they could have maintained before entering into the bond of submission. Cauthorn v. Courtney, 6 Gratt. 381; Rogers v. Corrothers, 26 W. Va. 238; Dunlap v. Campbell, 5 W. Va. 195.

Capable of Being Made Certain.—An award which determines the boundary of a tract of land by making references to such objects that any competent surveyor could ascertain the boundary, is certain and definite, upon the principle that "that is certain which is capable of being made certain." Rogers v. Corrothers, 26 W. Va. 238.

An award is sufficiently final and certain though the arbitrators refer to a report previously made by a commissioner in chancery, and declare in general terms their concurrence therewith, instead of specifying the particulars or substance thereof in the award itself; and the fact that they further submit to the court the propriety of their award in point of law, and furnish the court with the grounds and reasons for their award does not invalidate it. Brickhouse v. Hunter, 4 H. & M. 368.

Specific Sum.—An award that one party shall pay a specific sum to the other, being written on the back of the submission bond, must be taken to settle all matters therein submitted, and is therefore sufficiently certain and final. Doolittle v. Malcom, 8 Leigh 608.

But an award that one of the parties should refund the sum which the other had paid for certain corn, without the amount or referring to anything to make it certain, was held void. Cauthorn v. Courtney, 6 Gratt. 381.

"Costs of Suit."—An award that the defendant should pay to the plaintiff a sum of money and the "costs of suit" was held good without ascertaining the amount of the costs, or in what court the suit was pending, and without directing a release to be executed or the suit to be dismissed. Macon v. Crump, 1 Call 575; Coupland v. Anderson, 2 Call 88.

2. VALIDITY.

a. FRAUD.

Fraud in Procurement.—An award procured through the fraud of one of the parties to the submission, will be set aside for that cause by a court of equity in a proper case. Dickinson v. Railroad Co., 7 W. Va. 390; Bierly v. Williams, 5 Leigh 700.

Fraud in Procuring Arbitration Bond.—Where the arbitration bond which contains the submission is procured by the fraud of one of the parties, this is sufficient ground on which to impeach the award, unless the fraud has been condoned. Fluharty v. Beatty, 22 W. Va. 698.

Fraud in Estimates by Engineer.—Where a railroad company and a contractor agree that the final estimate of a certain engineer shall be conclusive upon the parties to the contract, as to the price to be paid the contractor for work, this is a valid contract, and the award of the engineer is conclusive in the absence of fraud. Kidwell v. B. & O. R. Co., 11 Gratt. 676; Condon v. Southside R. Co., 14 Gratt. 302. But where the estimates of the engineer are so plainly in violation of the terms of the contract as to amount to a fraud, or a mistake which is so gross as to necessarily imply fraud, the contractor of course is not bound. Mills v. Norfolk, etc., R. Co., 90 Va. 523, 19 S. E. Rep. 171.

b. MISTAKE.

Must Appear from Award.—In an award made in pursuance of a general submission, the errors for which it is sought to set it aside must appear on the face of the award, and other parts of the record cannot be looked into to show that there is error of law or fact. But it is within the power of the court to look into the testimony, for the purpose of determining whether the errors were so gross and palpable as to constitute misbehavior in the arbitrators. Boring v. Boring, 2 W. Va. 297; Pleasants v. Ross, 1 Wash. 156; Scott v. Trents, 4 H. & M. 356. Or if the arbitrators will certify the principles on which they decided, the court will set aside the award if they appear to have acted under a mistake. Pleasants v. Ross, 1 Wash. 156.

The fact that one of the arbitrators, after the award, may think that the principles by which he was governed, should have led him to a different result, is not sufficient to set aside the award on the ground of mistake, such mistake not appearing on the face of the award, and being denied by the other arbitrator. Pollard v. Lumpkin, 6 Gratt. 398.

Mistake of Law in a Doubtful Case.—The court will not set aside an award on the ground of the arbitrators having mistaken the law in a doubtful case. Ross v. Overton, 8 Call 309; City of Portsmouth v. Norfolk County, 31 Gratt. 727.

Plain and Palpable Mistake of Law.—Where it appears from the inspection of the award, that the arbitrators have made a plain and palpable mistake of law, there can be no valid ground for refusing relief in such case. Moore v. Luckess, 23 Gratt. 160.

Where arbitrators mean to decide according to law, and they mistake the law in a palpable material point, the award will be set aside. But their decision, upon a doubtful point of law, or in a case where the question of law is designedly left to their judgment, will generally be held conclusive. It must appear that they grossly mistook the law; and the court will not interfere merely because it would have given a different decision in the particular case. City of Portsmouth v. Norfolk County, 31 Gratt. 727; Mathews v. Miller, 25 W. Va. 817.

Error of Law—Set-Off.—Where it appeared in the award of the arbitrators, that they took the institution of the action, instead of the filing of the plea of set-off, as the date from which the statute of limitations would cease to run against such set-off, the court corrected the error, it appearing that the arbitrators intended to decide according to law. Moore v. Luckess, 23 Gratt. 160.

Decision on a Question of Law Alone.—Where parties submit a question of law alone to arbitration, the award is binding though contrary to law. Smith v. Smith, 4 Rand. 95.

Mistake Must Be Palpable.—An award ought not to be set aside, either in a court of law or equity, on the ground of a mistake in the judgments of the arbitrators, unless that mistake is *very palpable*; a mere difference of opinion between the court and the arbitrators, in a doubtful case, is not sufficient to authorize such an interference. Morris v. Ross, 2 H. & M. 408.

Errors of Fact by Umpire.—An error of judgment on the part of the umpire in regard to the facts, is not ground for setting aside his award. Bassett v. Cunningham, 9 Gratt. 684.

Award Based on Correct and Erroneous Propositions of Law.—If an arbitrator, intending to decide the questions submitted to him according to law, states in his award two propositions of law, one of which is erroneous, and the other is correct upon the facts as he may consider them to be, a court in passing upon the validity of the award, will presume that his award is based upon the latter and the court cannot inquire whether he took a correct view of the facts. Willoughby v. Thomas, 24 Gratt. 521.

Greater Damages Awarded Than Claimed.—When a pending suit was submitted to arbitration and the arbitrators awarded the plaintiff greater damages than he claimed in his declaration, this was held not sufficient to invalidate the award. Sutton v. Dickinson, 9 Leigh 142.

Mistake of Date.—A mere mistake of a date from which interest on a particular debt is to run, obvious on the face of the award, is not ground for setting it aside, where the party in whose favor it is, consents that it shall be corrected in the judgment entered upon the award. Bassett v. Cunningham, 9 Gratt. 684; Byars v. Thompson, 12 Leigh 550.

But if an award made under an order of reference misrecite the date of the order the judgment entered upon the award is erroneous. Turner v. Moffett, 2 Wash. 70.

Mistake in Recital.—The circumstance that a submission to arbitration contains a recital that one of the parties has warranted the title to a tract of land, when in truth the writing signed by him has not that effect, is not a sufficient reason to disturb the award, no fraud or undue influence appearing. Kincaid v. Cuningham, 2 Munf. 1.

In Martin v. Martin, 12 Leigh 495, all matters in difference in three suits pending were referred to arbitrators under a rule of court. In the award the date of the submission was not given and the submission was recited as referring the two suits awarded. It was held, that neither the omission nor the incorrect recital was ground for objection to the award.

Clerical Errors May Be Corrected.—In Forrer v. Coffman, 23 Gratt. 871, the arbitrators were required by the submission, to return their award under their hands and seals by a certain day. They prepared their award and the day before they were required to return it handed it to the plaintiff's counsel. He, seeing that they had omitted the seals, returned it to them requesting that they would seal it, which they did and returned the award on the day limited in the submission. The award was held valid.

In Byars v. Thompson, 12 Leigh 550, the arbitrators made an award on November 21st which was on that day signed and sealed by them, and read, but not delivered to the parties, and one of the parties objecting to the award because interest to which he was entitled was not credited to him, the arbitrators reconsidered the award, and on the 22d of November allowed the interest, and signed, sealed and delivered the award as corrected. It was held, that the corrected award was the true award.

Recommittal for Clerical Errors.—The court may recommit an award for the correction of a clerical error, and the award as corrected is not a new award, but must be considered as simply a mere correction of the award originally returned. Henley v. Menefee, 10 W. Va. 771.

Exorbitant Valuation.—When the value of property in money is referred to arbitrators and they fairly execute the submission, generally, the award cannot be set aside or determined to be invalid upon the ground that the valuation is exorbitant. Dickinson v. Railroad Co., 7 W. Va. 390.

c. MISBEHAVIOR IN ARBITRATORS.

Misbehavior Resulting in Injustice.—An award of arbitrators will be set aside on the ground of circumstances in their conduct, amounting to misbehavior, though not to corruption, and resulting in injustice to one of the parties. Lee v. Patillo, 4 Leigh 436; Dawson v. Winslow, Wythe 114; Shipman v. Fletcher, 82 Va. 601; Head v. Muir, 3 Rand. 122; City of Portsmouth v. Norfolk County, 31 Gratt. 727.

When the merits in law, and in fact are referred to an arbitrator of competent knowledge, and there is not any question reserved by him, the court will not open the award unless something can be alleged amounting to a perverse misconstruction of the law, or misconduct on the part of the arbitrator. City of Portsmouth v. Norfolk County, 31 Gratt. 727.

Receiving Evidence Wrongfully.—Where arbitrators have received a paper in evidence without the knowledge or consent of one of the parties to the arbitration, and though they say that their opinions were formed before it was received, their award is void. Jenkins v. Liston, 13 Gratt. 535.

Admission of Improper Evidence.—If upon a reference by rule of court, the arbitrators admit improper evidence, such as testimony of one of the parties, or his wife, the other party ought to be permitted by the court to prove the fact; and being proved, the court ought to set aside the award, and direct a trial by jury. McAlister v. McAlister, 1 Wash. 198.

Where arbitrators are selected in part because of their high legal attainments, it will be presumed by the court that all improper testimony was discarded from their consideration in making their decisions. Bassett v. Cunningham, 9 Gratt. 684.

Refusing to Hear Proper Evidence.—Where arbitrators unreasonably refuse to hear competent witnesses offered by either party this will vitiate their award. Fluharty v. Beatty, 22 W. Va. 698; Ligon v. Ford, 5 Munf. 10.

Where evidence is offered at a trial before arbitrators, impeaching the credit of witnesses who have been allowed to testify, the evidence should be received. And if they refuse to hear the evidence this is such misbehavior as will render the award invalid. Ligon v. Ford, 5 Munf. 10.

Award on Ex Parte Evidence.—An award made on *ex parte* evidence is invalid. Graham v. Pence, 6 Rand. 529. In this case the defendant refused to submit his case or his evidence because the arbitrators had refused to act and had only been induced to act upon the request of the plaintiff. The arbitrators, however, rendered an award in the plain-

tiff's favor upon his *ex parte* evidence. This was held sufficient to invalidate the award.

Allowing a Party to Write the Award.—Though the simple fact that one of the parties to the submission wrote the award, in the absence of the other, who was not notified of the time and places of the arbitrators proceeding to make their award, may not, of itself, be sufficient to invalidate the award, still it may be considered unexplained, as affording just ground for suspicion and criticism. But where such party, in such case, wrote the award, and so wrote it that it is materially erroneous and deceptive, in his favor, and the arbitrators did sign it, as written, a court of equity may set aside the award. Dickinson v. R. Co., 7 W. Va. 392.

Proof of Misconduct.—The court can look into the testimony, which was before the arbitrators, for the purpose of determining from such evidence and other circumstances, whether the errors were so gross or palpable as to show fraud, corruption or gross misconduct in the arbitrators, and where these are shown the court will set aside the award. Fluharty v. Beatty, 22 W. Va. 698; Moore v. Luckess, 23 Gratt. 160.

Arbitrator Acting as "Adviser and Partisan" of a Party.—Where a charge in a bill to set aside an award, was that the arbitrator acted as the "adviser and partisan" of one of the parties, this is sufficient charge of partiality and misconduct to give a court of equity jurisdiction of the case to set aside the award, if the charge is true. Wheeling Gas Co. v. City of Wheeling, 5 W. Va. 448.

Partition of Land by Arbitrators in Absence of Parties.—Two parties buy land together, the title being taken in the name of one; afterwards the matter is submitted to three arbitrators to determine the amount to which each is entitled. The arbitrators decide the cause, and afterwards two of them in the absence of one of the parties in interest proceed to make a partition of the land in accordance with their award. *Held*, that though the proceedings do not strictly comply with Va. Code, ch. 143, yet they are binding. Miller v. Miller (Va. 1901), 37 S. E. Rep. 792.

Misbehavior Caused by a Party.—A party who has himself been the cause of misbehavior in the arbitrators, is estopped to complain of such misbehavior. Rogers v. Corrothers, 26 W. Va. 238.

Hearing in the Absence of Parties.—Where one of the parties to a submission induces the arbitrators to hear evidence and decide the case in the absence of the other party in interest, the award will not be allowed to stand, because of the misbehavior of the arbitrators. Tate v. Vance, 27 Gratt. 571, and *footnote*; McCormick v. Blackford, 4 Gratt. 133; Jenkins v. Liston, 13 Gratt. 535.

Excluding one of the parties from the trial and permitting the other to be present, or excluding both parties and allowing one of them to be represented at the trial by his agent is such misbehavior as will invalidate the award. Shipman v. Fletcher, 32 Va. 601.

Hearing and deciding in the absence of a party who has expressed a wish to be present at the trial and who has informed the arbitrators that he has papers which will throw light on the controversy, is such misconduct on the part of the arbitrators as will invalidate the award. McCormick v. Blackford, 4 Gratt. 133.

Where Submission Is by Rule of Court—Power of Court over Award.—Where there has been misbehavior on the part of the arbitrators in making an award which was to have been entered as judgment of the court, the court has jurisdiction to set it aside for such misbehavior although a submission under rule of court is not within our statute relating to awards. Graham v. Pence, 6 Rand. 529.

3. CONSTRUCTION OF AWARDS.

Language Required.—Technical precision and certainty are never necessary in an award. If it be expressed in such language, that plain men acquainted with the subject-matter can understand it, that is sufficient. Rogers v. Corrothers, 26 W. Va. 238.

Term "Heirs at Law" in an Award.—Awards are to be construed liberally; and therefore the term "heirs at law" in an award respecting personal property, may be construed to mean all testator's children living, or the child or children of them who died during his lifetime. Smith v. Smith, 4 Rand. 95.

Presumptions.—Presumptions are not to be raised for the purpose of overthrowing an award, but they are to be liberally construed so as to give effect and operation to the intention of the arbitrators, where it can be done, and every reasonable intendment is to be made in their support. Fluharty v. Beatty, 22 W. Va. 698; Smith v. Smith, 4 Rand. 95; Gas Co. v. Wheeling, 8 W. Va. 321; Armstrong v. Armstrongs, 1 Leigh 491.

Presumption as to Jurisdiction Where Award Is Entered as Judgment.—Where it does not appear whether the term of the court at which an award was entered as the judgment of the court, was a quarterly or monthly term, it will be presumed by the appellate court that it was the term at which the court had jurisdiction to enter the judgment. Forrer v. Coffman, 23 Gratt. 871.

What Amounts to an Award.—Where the vendor and vendee of land selected three persons to ascertain and fix the value of the land, and to certify such valuation; the certificate of valuation cannot be considered as more solemn, more conclusive, or binding upon the parties than an ordinary award. It is but an award, and the referees cannot, upon principle, be considered otherwise than as arbitrators. Dickinson v. Railroad Co., 7 W. Va. 390; Pleasants v. Ross, 1 Wash. 156.

In Duff v. Core, 27 W. Va. 232, an entry was made in two cases, one a common-law suit and the other a chancery cause, in these words: "This day by consent and agreement of the parties the two above causes are referred to a commissioner of this court, who is hereby directed to make, audit, settle and state and return to this court at the next term, an account between the plaintiff and the defendant, of all matters contained in said suits, and said commissioner is to hear the parties and any proper evidence offered, and to take the evidence in writing and to return the same with his report, and the said commissioner is directed to give the parties interested ten days' notice of the time and place of executing this order, and such report shall be entered up as the judgment of this court." On the report of the commissioner being returned to the court, it was held, that it was an award and should be so treated, and not as an ordinary report of a commissioner in chancery subject to such exceptions as would lie to such a report ordinarily.

4. EFFECT OF THE AWARD.

Conclusive on Rights Adjudicated.—The parties are bound to present every claim or matter embraced in their submission, to the arbitrators, unless it is expressly withdrawn before the hearing, and as to any claim or matter thus embraced and not so withdrawn, an award general in form is conclusive

against the party having such claim or matter in any future controversy. Tennant v. Divine, 24 W. Va. 387; Dandridge v. Lyon, Wythe 123; Canada v. Barksdale, 84 Va. 742, 6 S. E. Rep. 10.

Upon a suit being afterwards instituted by one of the parties against the other in relation to the subject-matter of the submission, the award of the arbitrators deciding the questions submitted to them is the law of the case. Lunsford v. Smith, 12 Gratt. 554.

Award Entered as Judgment.—Where the submission provides that the award shall be entered as the judgment or decree of court, when so entered it is the judgment in the cause and settles all matters involved in the action, and it is not necessary that the award on its face should dispose of the action. Forrer v. Coffman, 23 Gratt. 871.

So in Canada v. Barksdale, 84 Va. 742, 6 S. E. Rep. 10, all matters in litigation were submitted to arbitration, and an award being rendered in favor of the plaintiff, judgment was entered thereon and execution issued and returned unsatisfied. In a suit to subject the debtor's land this judgment was listed and reported as a lien. The debtor filed a bill in equity to enjoin the sale, the matters set up in the bill being the same that were embraced in the submission to arbitration. It was held, that these matters being *res judicata* the judgment could not be attacked.

Subsequent Judgment Enjoined.—In a controversy between a legatee and an heir at law concerning certain slaves, the question as to the ownership was submitted to arbitration, and the arbitrators rendered an award in favor of the legatee. The heir at law brought detinue to recover the slaves, and obtained a judgment for them. The legatee obtained an injunction to this judgment on the ground that the award was conclusive upon the parties and the judgment nullifying such award was invalid. Dandridge v. Lyon, Wythe 123.

Award Affirming a Prior Award.—Where a bill is filed to set aside an award, and the parties agree to submit the validity of the award to another set of arbitrators, the decision of the arbitrators as to the validity of the award is conclusive unless impeached on grounds which would ordinarily invalidate an award. And the fact that the second award goes on to state matters not embraced in the submission does not invalidate it as these are separable. Morris v. Morris, 9 Gratt. 687.

Establishing New Boundaries for Land.—Where a matter involving the division of land is submitted to arbitration, the award of the arbitrators is binding though the line established by the award is different from the line mentioned in the will. Hollingsworth v. Lupton, 4 Munf. 114.

Awarding a New Trial.—In Adams v. Hubbard, 25 Gratt. 129, an injunction to a judgment was obtained, and while it was pending, the matter in dispute was submitted to arbitrators, who made an award that the injunction be dissolved. On a motion to set aside the award on the ground of after-discovered evidence, it was held that though the evidence in the cause before the reference was made, might have warranted a new trial, yet the award was in fact a new trial and the party was not entitled to another trial on that evidence.

Award as Evidence.—In an action of replevin for rent in arrear, it was held admissible for the defendant to introduce an award of arbitrators made since the distress was taken, but respecting accounts subsisting between the parties prior thereto, in order to show that he did not owe anything to the avowant. Turberville v. Self, 4 Call 580.

Court Has No Power to Change.—The circuit court has no power over an award made in pursuance of ch. 108, Code of W. Va. 1868, except to enter it as the judgment or decree of court, or to object or refuse to so enter it, or possibly to recommit it. Where the court ordered a sale of real estate in a decree entering up the award as the decree of court, when the sale was not provided for or directed by the award, this was held error. Stevenson v. Walker, 5 W. Va. 427.

Presumption as to Conclusiveness.—A suit by an assignee of a bond against the obligor being referred to arbitration, the arbitrators found the debt to have been discharged by payments to and set-off against the assignor, and made an award in favor of the obligor, upon which judgment is entered. Whereupon an action was brought by the assignee against the assignor. It was held, that though the assignor was at liberty to controvert the facts found by the award, and show that the judgment was erroneous, yet, until the contrary be shown, the judgment was to be presumed to be right, and was therefore sufficient to establish the liability of the assignor, and support an assumpsit founded on such liability. Scates v. Wilson, 9 Leigh 473.

5. ENFORCING THE AWARD.

a. IN GENERAL.

Modes of Enforcing.—An award entered up as a judgment or decree of court, may be enforced by an action at law on the same, or in some cases by a bill in equity, and perhaps where the award is for the judgment of money, an execution might issue for the same. Stevenson v. Walker, 5 W. Va. 427. See Canada v. Barksdale, 84 Va. 742, 6 S. E. Rep. 10.

Assignee of Principal against Surety.—Where a principal has an award against his surety, he cannot collect it from the surety without giving him indemnity against his liability as surety; and the assignee of the award stands in the shoes of the principal in this respect. Mattingly v. Sutton, 19 W. Va. 19.

b. SPECIFIC PERFORMANCE.

Award Involving the Conveyance of Real Estate.—A court of equity has jurisdiction to enforce the specific execution of an award, which involves the conveyance of land, or to enforce the specific execution of an agreement for the sale of land, which involves incidentally the enforcement of an award for the payment of money. Wood v. Shepherd, 2 P. & H. 442; Boyd v. Magruder, 2 Rob. 761.

No Adequate Remedy at Law.—Equity has jurisdiction to decree specific performance of an award, where the remedy at law is inadequate. A bill in chancery, which makes out a case for specific execution of an award, but does not pray for general or special relief, is sufficient, if no objection be taken by the defendant, and he answers on the merits of the complaint, and submits himself to the decree of the court. Smith v. Smith, 4 Rand. 95.

Where Compensation in Damages Furnishes Complete Relief.—A court of equity will enforce specific performance of an award, where the thing ordered by the award to be done is such as a court of equity would enforce if it had been agreed upon by the parties themselves. A court of equity will not entertain jurisdiction for specific performance of an award respecting goods, chattels, stocks, choses in action, and other things of a merely personal nature, where compensation in damages furnishes a com-

plete and satisfactory remedy. Burke v. Parke, 5 W. Va. 122.

6. EQUITABLE RELIEF AGAINST AWARDS.

Inherent Jurisdiction of Courts of Equity.—The statute providing that no award made under its provision shall be set aside except for error appearing on the face of the award, or misbehavior in the arbitrator, does not interfere with the inherent jurisdiction of courts of equity, to grant relief against awards obtained through fraud, accident, partiality, or accident or mistake on the part of the arbitrators. Wheeling Gas Co. v. City of Wheeling, 5 W. Va. 448; Burke v. Parke, 5 W. Va. 122.

Jurisdiction of Courts of Law and Equity Concurrent.—And the power of the court of equity to revise awards is concurrent with that of the courts of common law; but if the court of law first get possession of the subject, its decision is binding on the court of equity, unless new circumstances be shown to authorize the interposition of the latter. Flournoy v. Halcomb, 2 Munf. 34.

Objections Available at Law.—But a court of equity will not set aside an award, for objections, which, if available at all, were available at law, but which the party did not avail himself of at law—there being no surprise proved, though it is alleged, and no fraud proved, or alleged. It is equally the rule of equity as of law, that the reasons for setting aside an award, must appear on its face, or there must be misbehavior in the arbitrators, or some palpable mistake. Wheatley v. Martin, 6 Leigh 62; Head v. Muir, 3 Rand. 122.

Illegal Award.—An award condemning a party to pay damages for refusing to ratify an illegal and fraudulent contract is not binding; and relief against a bond given in conformity with such award, is properly sought in equity. Excessive damages alone is ground for relief in equity, as proving the arbitrators to have acted in an unjustifiable manner. Beverley v. Rennolds, Wythe 121.

Insufficient Ground to Set Aside.—No calculations or grounds for an award, which are delivered to the arbitrators after the submission has been delivered to them, are to be regarded or received as reasons, or grounds, to avoid an award. Taylor v. Nicolson, 1 H. & M. 66.

When Suit to Set Aside an Award May Be Brought.—A statutory award must be regarded as complete when it is signed and published and ready to be returned to court; and the party against whom the award is, may then bring his chancery suit to set it aside. Mathews v. Miller, 25 W. Va. 817; Rogers v. Corrothers, 26 W. Va. 238.

After-Discovered Evidence as Ground to Set Aside.—The rules governing courts of equity in awarding new trials in actions at law, on the ground of after-discovered evidence, apply equally to motions to set aside an award on that ground. Adams v. Hubbard, 25 Gratt. 129.

Setting Aside an Award—Decision of Whole Controversy.—Where all the parties are before the court upon a bill to set aside an award upon grounds which unquestionably give a court of equity jurisdiction, the jurisdiction having once attached for the purpose of injunction, the court may decide the whole controversy, and render a final decree, though all the issues are legal in their nature, capable of being tried by a court of law; and the legal remedies therefor adequate. Coons v. Coons, 95 Va. 434, 28 S. E. Rep. 885.

Statute of Limitations.—Unless the fund is such a fund as a court of equity will pursue regardless of the statute of limitations, lapse of time is a good defence to a bill brought to impeach an award. Lesslie v. Brown, 1 P. & H. 216.

7. PLEADING AND PRACTICE.

Sufficiency of Declaration.—In an action on an insurance policy, it is sufficient under Va. Code, § 2415, if the declaration refers to the policy and alleges in general terms, the performance of all its conditions and the violations of none of its prohibitions; and it is not necessary that it should allege that there had been an award, although the policy provides that no suit shall be sustainable until after an award. Tilley v. Connecticut Fire Ins. Co., 86 Va. 811, 11 S. E. Rep. 120.

In an action of debt for the penalty of an arbitration bond, the declaration sets out the submission, and so much of the award as entitles the plaintiff to his action. This is sufficient and it is not necessary in such case, that the declaration should set out the whole award. Byars v. Thompson, 12 Leigh 550; Doolittle v. Malcom, 8 Leigh 608.

No Declaration Filed.—An award for tobacco, made upon a reference under a rule of court, in an action where no declaration was filed, but the damages laid in the writ were in money, was held to be good. Leftwitch v. Stovall, 1 Wash. 302.

Demurrer to Declaration on an Award.—If on the face of the submission it does not clearly appear that the award does not cover the whole matter submitted, a demurrer to a declaration on the award will not be sustained; but the defendant must show by proper pleadings that the award is deficient, in order that the plaintiff may have an opportunity to reply. Price v. Via, 8 Gratt. 79.

So where the parties have waived a decision on one branch of the matter submitted, and requested the arbitrators to decide the other matters, though this is not stated in the declaration, a demurrer will not be sustained; but the plaintiff will be allowed to reply the facts to the plea of "no award." Price v. Via, 8 Gratt. 79.

Fraud Shown under the General Issue.—In an action of assumpsit, upon an award founded on a parol submission, and plea of general issue, it is competent for the defendant to adduce proof at the trial under such plea, that his submission to arbitration, was procured by fraud. Bierly v. Williams, 5 Leigh 700.

Proving Set-Off under the General Issue.—A reference to arbitration in a pending suit submitted all matters of difference between the parties in that suit. The suit was an action of assumpsit in which the defendant had pleaded nonassumpsit and filed notice of set-off; but the ground on which the set-off was claimed, merely entitled the defendant to an action for unliquidated damages. It was held that as the set-off would not have availed upon trial of the issue in court, the arbitrator did right to refuse to allow it for that reason. Harrison v. Wortham, 8 Leigh 296; Moore v. Luckess, 23 Gratt. 160; Swann v. Deem, 4 W. Va. 368; Austin v. Clark, 8 W. Va. 296.

Plea of "No Award."—In an action on a bond for an award, a plea that the arbitrators had made no award, will defeat the action if the plea is sustained. Smallwood v. Mercer, 1 Wash. 230.

Plea of "Arbitrament and Award."—The plea of "arbitrament and award" (in so many words) is a mere nullity, and no evidence should be received to support it, notwithstanding the plaintiff replied generally. Harrison v. Brock, 1 Munf. 22.

Plea Impeaching Conduct of Arbitrators.—In an action for not performing an award, a plea impeaching the conduct of the arbitrators in making

up their award, presents no legal bar and should be rejected as the award is final until set aside. Doolittle v. Malcom, 8 Leigh 608.

Award Imperfectly Pleaded.—An award of arbitrators may be relied on as a bar to a suit, but before the defendant can rely on such defence, it must be properly pleaded. An award imperfectly pleaded is no defence. Martin v. Rexroad, 15 W. Va. 512.

Award Made Pendente Lite under Plea of Nonassumpsit.—An award made *pendente lite* cannot be given in evidence upon the plea of nonassumpsit. Harrison v. Brock, 1 Munf. 22.

Exceptions to an Award—Waiver.—An act of assembly having provided that awards should lie in court two terms before judgment, in order to enable the party to enter his exceptions to the award; it was held, that where he did enter his exceptions before the expiration of the two terms, that that was a waiver of the requirement. Mitchell v. Kelly, 1 Call 380. The above act relating to award was held not to include an order of reference made in a pending suit. Holcomb v. Flournoy, 2 Call 433.

Arrest of Judgment—Repleader.—In debt on bond, with condition to perform an award, the condition being made part of the record by oyer, and the defendant having pleaded "conditions performed," if the plaintiff reply generally judgment will be arrested and a repleader awarded. Green v. Bailey, 5 Munf. 246.

Arbitrators Made Parties—Demurrer.—If the arbitrators be made parties to a suit for setting aside their award, they may demur to the bill. Shermer v. Beale, 1 Wash. 11.

Immaterial Variance.—Variance between the date of the bond declared on, and that recited in the award, is not fatal. If they agree in every other particular; that is to say, if the bond declared on, have the month blank, and the award recites the month, it will not be fatal if the bonds agree in other respects. Ross v. Overton, 3 Call 309.

8. APPELLATE PROCEEDINGS.

Award Entered as Judgment—Writ of Error.—An order of the circuit court setting aside an award made by arbitrators upon a submission *in pais* of matters as to which there is no action pending but which provides that the award shall be made the judgment of the court, is such a final judgment that a writ of error will lie. Tennant v. Divine, 24 W. Va. 387.

Award Entered as Decree—Bill of Review.—Where two persons agree to submit the matter in controversy between them to arbitrators; the award of the arbitrators to be entered as the decree of court, and the award is entered as the decree of court, this is a final decree and can only be reversed, or altered by a bill of review. Davis v. Crews, 1 Gratt. 407.

Refusal by Court to Enter Judgment on an Award.—A court's refusal to enter a judgment according to an award, without determining the controversy, is not a judgment, from which an appeal can be taken. Manlove v. Thrift, 5 Munf. 493.

After-Discovered Evidence.—An appellate court will not undertake to interfere with the decision of the trial court, upon the ground of after-discovered evidence, unless it has before it all the evidence heard in the latter court; and this doctrine is applicable as well to awards as to verdicts. Adams v. Hubbard, 25 Gratt. 129.

Award Not Entered as a Judgment or Decree of Court.—There cannot be an appeal to the court of appeals, from the award of an arbitrator, unless it be made the judgment or decree of the court from which it is taken; and the mere copy of the award in the proceedings of the court, though they be signed by the judge, does not make it the judgment or decree of the court. Crane v. Crane, 21 Gratt. 579.

Cause Pending in Supreme Court—West Virginia.—A cause pending in the supreme court of appeals, may under the statutes (ch. 108, W. Va. Code) of this state, be submitted by a consent order to arbitration, and the judgment of the arbitrators may be entered up as the decree of court; or the parties to the suit may by an agreement *in pais* submit a cause, pending in the supreme court of appeals, to arbitration, and agree that their award may be entered up as the decree of the court; and it may be so entered. McGinnis v. Curry, 13 W. Va. 29.

Ex Parte Affidavit as Evidence on Appeal.—An affidavit taken without notice, if read without objection in the trial court in support of an award, will be considered as evidence in the appellate court; but it may not have the weight it might have had if regularly taken on notice. Adams v. Hubbard, 25 Gratt. 129; Tennant v. Divine, 24 W. Va. 392.

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693 *Commonwealth v. Yates' Adm'r.

January Term, 1853, Richmond.

(Absent LEE, J.)

1. **Revolution Officer—Claim for Half Pay—Failure—Effect.**—A claim for half pay for life as surgeon's mate to one of the regiments of the Virginia continental establishment during the revolutionary war, rejected: there not being satisfactory proof that he served to the end of the war.

2. **Same—Same—Statute—Effect.**—An officer becoming a supernumerary after the passage of the act of 1778, stands on the same footing as to his claim for commutation or half pay for life, as one becoming a supernumerary before the passage of that act.

This was an application by Daniel Ward, administrator de bonis non with the will annexed of Dr. George Yates deceased, in the alternative, either for commutation of five years' full pay, or of half pay for life, for the services of said Yates as surgeon's mate in the Virginia continental establishment during the revolutionary war. The auditor rejected the claim; but upon appeal to the Circuit court of Henrico, that court held that he was entitled to half pay for life, and directed the auditor to deliver to the administrator a warrant on the treasury of the commonwealth for the said half pay from the 22d of April 1783 until the death of Yates, which occurred in March 1788. From this judgment the attorney general applied to this court for a supersedeas, which was allowed.

This court did not consider that the evidence showed satisfactorily that Dr. Yates had served until the end of the war, though it showed that he served to the end of the year 1782.

The Attorney General, for the appellant.
John M. Patton, Jr., for the appellee.

694 *DANIEL, J., delivered the opinion of the court.

The court is of the opinion that the testimony in the cause is too vague and indefinite to establish the fact that George Yates, the testator of the appellee, served to the end of the war, and therefore that the claim for pay, so far as it rested on such pretensions, was properly rejected by the auditor. The court is also further of opinion that this effort to vindicate the claim on the score of the said Yates being a supernumerary, is met by the decisions of this court in the cases of Tatam's ex'or v. The Commonwealth, 9 Leigh 56; Slaughter's adm'r v. The Commonwealth, 2 Gratt. 391; and The Commonwealth v. Peyton's adm'r, Id. 393.

The court is therefore of opinion that the order and judgment of the Circuit court of the 18th of June 1849 is erroneous, and ought to be reversed, and that the decision of the auditor rejecting the claim should be affirmed.

Judgment reversed.

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695 *Thompson v. Govan.

January Term, 1853, Richmond.

(Absent LEE, J.)

Assignor and Assignee—Delay of Assignee to Sue Maker—Effect*—Case at Bar.—Assignee delays for two years to sue the maker of the note. In the absence of proof of the maker's insolvency at the time or shortly after the note fell due, he cannot recover against the assignor.

This was an action of assumpsit in the Circuit court of Hanover county by John Thompson assignee of the Bank of the United States against Archibald Govan. The declaration contains two special counts, and the general counts for money lent, laid out and expended, and an account stated. In the first special count the plaintiff declares as assignee of the Bank of the United States, who was assignee of Henry Curtis, who was assignee of the defendant; and then sets out a note made by Watt H. Tyler, on the 13th of May 1835, by which he promised to pay to John Tyler or order, sixty days after date, the sum of 800 dollars, negotiable and payable at the office of discount and deposit of the Bank of the United States at Richmond; the assignment for value by endorsement on the back thereof by John Tyler to John Minge; the like assignment for value by Minge to the defendant; and like assignments for value from the defendant to Curtis, from Curtis to the bank; which for value assigned it to the plaintiff. That on the 21st of July 1837, the plaintiff instituted an action against Watt H. Tyler upon the note which had been regularly protested, and notice of protest given to all the parties; and on the 7th of April 1838 recovered a judgment against said Tyler for 800 dollars, with interest, 2 dollars
696 95 cents charges *of protest and costs which amounted to 9 dollars 16 cents, upon which judgment and execution had been sued out, and had been returned "no effects." By reason whereof the defendant had become liable to pay the said several sums of money with interest on 800 dollars, and the additional sum of 3 dollars 25 cents, the cost of the record in that cause. And being so liable in consideration, &c., afterwards, promised, &c.

The second count only varies from the first in omitting the assignment to Curtis, charging the assignment to be by the defendant to the bank.

The issues were made up upon the plea of "nonassumpsit," and "the statute of limitations;" and on the trial the jury found a special verdict. The verdict found the note as described in the declaration endorsed by the parties mentioned in the first count, for the accommodation of the maker, the discount of the note at the office of the Bank of the United States at Richmond, and the payment of the proceeds to the maker, and the regular protest, and notice of nonpayment to the endorsers, and a payment upon the note by the defendant in September 1836; the assignment by deed bearing date the 22d of February 1837, by the Bank of the United States to the plaintiff of this and many other claims of the bank; the action by the plaintiff against Watt H. Tyler the maker, commenced on the 21st of July 1837, the judgment recovered in that action on the 7th of April 1838, and the issue of execution thereon, and return of "no effects." Upon this verdict the court rendered a judgment for the defendant. Whereupon the plaintiff applied to this court for a supersedeas, which was allowed.

Lyons, for the appellant.
R. T. Daniel, for the appellee.

SAMUELS, J. This is an action of
697 assumpsit brought *by John Thompson, jr., against Archibald Govan. There is a slight degree of confusion in the statement of the plaintiff's case as set forth in the first and second counts of his declaration: Facts are alleged therein, which are relevant only in a suit upon the assignment of paper not mercantile; yet the claim therein also set forth for the notarial charges of protest, and the averment of notice of dishonor could only be made in regard to mercantile paper. On the whole, however, the two counts should be regarded as asserting a cause of action growing out of an assignment of a promissory note not

*Assignor and Assignee—Delay of Assignee to Sue Maker—Effect.—In the principal case it is held, that the assignee of a note must use due diligence to collect the note from the maker, and unless he can show that he has, or that the maker is insolvent, an unreasonable delay (for instance as in the principal case two years), to sue, will bar his right of recourse against his assignor. Upon this question of the rights and duties of the assignee of a note, see the principal case cited in the following: Payne v. Huffman, 98 Va. 375, 36 S. E. Rep. 476; Tompkins v. Woodyard, 5 W. Va. 221; Gillilan v. Ludington, 6 W. Va. 133, 134; Atherton v. Hull, 12 W. Va. 180; Merchants' Nat. Bank v. Spates, 41 W. Va. 31, 23 S. E. Rep. 683; 2 Va. Law Reg. 561.

treated as negotiable. The first count alleges the making of the note by Watt H. Tyler to John Tyler, the assignments thereof by John Tyler to John Minge, by John Minge to Archibald Govan, by Archibald Govan to Henry Curtis, by Henry Curtis to the Bank of the United States, and by the bank to the plaintiff Thompson; which assignments are severally alleged to have been for value received by the several assignors. The second count alleges the making of a like note and the same succession of assignments thereof, except those to and by Curtis; it being alleged that John Minge assigned the note to the United States Bank; no consideration is averred for these assignments or any of them. Common counts are inserted for money laid out and expended, money lent and advanced and upon an account stated. The defendant pleaded non assumpsit and the statute of limitations; a special verdict was found by a jury, and on that verdict a judgment was rendered for the defendant, which is brought here for revision.

It is unnecessary for the proper disposition of this case to decide whether the charter of the United States Bank allowed it to acquire and transmit title to paper of this description, or whether the facts found by the jury constitute a consideration 698 sufficient *to subject the defendant to the demand in the terms in which it is asserted, or whether the case alleged is in other particulars sustained by the finding of the jury; because, if all these questions should be decided in favor of the plaintiff, yet the case must be decided in favor of the defendant for obvious reasons.

The assignees of this note, according to the facts found by the jury, respectively took it upon the implied terms of looking to no previous assignor thereof for the consideration received by such assignor, until due diligence had been used to collect the amount from the maker. This use of due diligence could only be dispensed with by showing that it would not have produced satisfaction. It is not alleged by the plaintiff nor proved by the jury that Watt H. Tyler, the maker, was insolvent at the time Govan made the assignment, or recently thereafter; nor is any other reason alleged by the plaintiff or found by the jury to excuse the omission to use the diligence prescribed to assignees. The case then stands upon the mere question whether due diligence has been used to recover of the maker. The note is alleged and found to have been made May 13, 1835, payable at sixty days; there is no allegation in the declaration as to the time of the assignments, or any of them. The jury, however, upon a fair construction of their verdict, may be said to have found that all the assignments, previous to that by the bank, were made before the maturity of the note; thus at the maturity of the paper the holder of it, whether Curtis or the bank, could hold the previous assignors liable only by using due diligence against Tyler the maker. As already stated, the note was dated May 13, 1835; without grace, it matured July 12th, 1835. Suit might have been brought against the maker immediately thereafter, yet it was not brought until July 21st, 1837; and judgment, by default, was rendered 699 at April term 1838. This is not *the diligence which the law prescribes. The principles governing this case are found in the decisions of this court. Lee v. Love, 1 Call 432; Brown v. Ross, 6 Munf. 391; Saunders v. Marshall, 4 Hen. & Munf. 455; Caton v. Lenox, 5 Rand. 31; Barksdale v. Fenwick, 4 Call 492; Goodall v. Stuart, 2 Hen. & Munf. 105; Drane v. Scholfield, 6 Leigh 386; McLaughlin v. Duffield, 5 Gratt. 133. Thus on the plea of nonassumpsit the case was clearly with the defendant. On the plea of the statute of limitations it is equally clear the law was for him, if the facts be as alleged by plaintiff's counsel in the argument here: Yet as I hold that no cause of action against defendant is shown to have ever existed at all, it would be idle to show why it must have been barred by the statute of limitations, if it had existed as plaintiff's counsel supposes.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

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700 *Almond & Wife v. Mason's Adm'r & als.

January Term, 1853, Richmond.

(Absent LEE, J.)

Executors and Administrators—Sale of Realty—Failure to Pay Over Proceeds—Liability of Sureties.*—Testator by his will gives certain property to his wife during her life; and directs that at her death his executors should sell it and divide the proceeds among his children. The executor does after the death of the widow, take possession of the property and sell it, but does not pay over the proceeds. HELD: His official sureties are responsible for his failure to pay it over.

This was a suit instituted in the Circuit court of Rappahannock county by Mrs. Almond before her marriage with her present husband, against Daniel Mason, as administrator de bonis non with the will annexed of William Porter deceased, and as administrator of Sarah Porter, the father and mother of the plaintiff, for an account and distribution of both estates. The sureties of Mason in both characters, and the legatees and distributees of both were made parties, and it was alleged that Mason was insolvent, of which there does not seem to have been any question.

William Porter died in 1815; and by his

*Executors and Administrators—Sale of Realty—Failure to Pay Over Proceeds—Liability of Sureties.—See monographic *note* on "Executors and Administrators." In addition, see principal case cited in Gibson v. Beckham, 16 Gratt. 383; Tabb v. Cabell, 17 Gratt. 175.

will, among other provisions, gave a part of his property, real and personal, to his wife during her life or widowhood. And he directed, that if she should not marry during her natural life, at her death his executors should proceed to sell the whole of his estate and divide the money as above directed. The previous directions as to his other estate was that it should be equally divided among his children.

Of the executors appointed in the will one died, and the powers of the other were 701 revoked in 1836, when *the unadministered estate was committed to Daniel Mason as administrator de bonis non with the will annexed. The bond he executed did not embrace land.

It appeared from the commissioner's report that the only assets which came to the hands of Mason as representative of William Porter deceased, was the personal property which had gone into the possession of the widow under her husband's will, and which, never having married again, she retained until her death in 1836.

The commissioner's report ascertained that there was due to the plaintiff from Mason as administrator, &c., of William Porter the sum of 694 dollars 33 cents, and as administrator of Sarah Porter the sum of 106 dollars 89 cents, both sums as of the date of the 31st of December 1839; and at the same date the plaintiff was debtor to Mason on private account a sum which, deducted from the amount due from him as administrator, left him debtor as of that date 246 dollars 49 cents.

The plaintiff having intermarried with William R. Almond, the suit was carried on in their joint names; and Mason having died, it was revived against his administrator; and came on to be finally heard in September 1845, when the court dismissed the bill as to the sureties of Mason as administrator, &c., with the will annexed of William Porter, with costs, being of opinion that they were not liable for any waste of the assets which had gone into the possession of Mrs. Porter for her life under the will of her husband, after the same had been taken into the possession of the administrator, upon her death. And the court decreed that the administrator of Mason should, out of the assets of his intestate in his hands to be administered, pay to the plaintiffs the said sum of 246 dollars 49 cents, with interest thereon at the rate of six per cent. per annum from the 31st of December 1839 until paid, and their 702 *costs. From this decree the plaintiffs applied to this court for an appeal, which was allowed.

Morson, for the appellants.

There was no counsel for the appellees.

ALLEN, J., delivered the opinion of the court.

It appearing that the father of the female appellant by his last will and testament, duly executed and admitted to probat, did, amongst other things, bequeath certain personal property therein described to his wife during her natural life or widowhood; that two of the executors named in the will took upon themselves the execution of said office; that one of said executors departed this life, and the surviving executor was removed from his office, and administration de bonis non with the will annexed was committed to Daniel Mason, who executed bond with the security and qualified as such administrator according to law; and it furthermore appearing by the report of the master commissioner, made out in pursuance of the interlocutory decree, that the whole of the personal estate of William Porter, the said testator, which came to the hands of said administrator de bonis non with the will annexed, was property held and enjoyed during her life by Sarah Porter, the widow of said William Porter, in virtue of the bequest aforesaid; and it also appearing that the testator by his will after the bequest to his wife as aforesaid, furthermore declared that in case she should not marry during her natural life, it was his will and desire that at her decease his executors should proceed to sell the whole of his estate, and divide the money arising therefrom as in the will directed; this court is of opinion that the assent of the executors to the legacy to the widow during her natural life or widowhood, and her enjoyment thereof under said bequest during her natural life, was not a full administration 703 *of the personal estate in this case. The will made no disposition of the specific property in favor of any third person after the death or marriage of the widow, but on the contrary required the executors at her decease to sell the property, describing it as part of his estate; thus making it the duty of the personal representative, in execution of the will, to take and sell the said personal estate when the life estate terminated, as part of the assets of the estate. The court is therefore of opinion that when after the death of the widow the administrator de bonis non with the will annexed took possession of and sold the personal property bequeathed to her during her natural life or widowhood, he was acting in virtue of his office and in performance of the duty imposed upon him by his office and the will of the testator; and that the sureties in his official bond were liable for his faithful administration thereof: It being the duty of the administrator to pay over the proceeds arising from the sale of such property amongst the residuary legatees in the mode prescribed in the will; and by the condition of their bond, they bound themselves that he should pay and deliver all the legacies contained and specified in the will as far as the goods, chattels and credits would extend. The court is therefore of opinion that the said decree is erroneous. It is therefore adjudged and ordered that the same be reversed with costs. And this cause is remanded to be further proceded in according to the principles above declared in order to a final decree.

704 *Boyce's Adm'r &c. v. Smith.*

January Term, 1858, Richmond.

[60 Am. Dec. 313.]

(Absent LEE, J.)

1. **Contract—Monomania—Effect.**†—Monomania, in no way connected with the subject of a contract, will not invalidate it.

2. **Appellate Practice—Decrees—Correction.**‡—Decree corrected upon an admission in the bill, and affirmed.

Robert I. Smith in 1842 instituted a suit in the Superior court of chancery for the county of Henrico and city of Richmond against the committee of John Boyce, a lunatic, which upon the death of Boyce was revived against his administrator and heirs. In his bill he charged that John and Joseph Boyce, being merchants and partners, as such became indebted to George Willig of Philadelphia; and in 1821, upon a settlement of their accounts, John Boyce executed to Willig his bond for 237 dollars 75 cents. That this bond was transferred by Willig to the plaintiff on the 2d of September 1833; and that in the November following Boyce paid him upon it 100 dollars. That previous to the 1st of January 1836 Boyce frequently promised to pay off the bond, but failed to do so. That on the day last mentioned the plaintiff, at the instance of Boyce, took his bond for 333 dollars 34 cents, the amount then due on the bond of 1821, payable in ten years, with interest payable semi-annually from its date; and to secure the payment of it Boyce executed a deed of the same date, which was duly admitted to record in the proper office, by which he conveyed to a trustee certain real estate, upon trust that upon the failure to pay 705 the principal or interest as *required by the terms of the bond, the trustee should sell the lands and pay off the debt. That with the exception of 7 dollars 22 cents, paid the 1st of February 1836, no part of the money had been paid: That since the execution of the bond and deed of trust Boyce had been declared a lunatic, and that the trustee was dead. And making the committee of the lunatic and the heirs of the trustee parties, he asked that the land conveyed in the deed of trust might be sold and the plaintiff's debt paid; and for general relief. The bond and deed of trust were filed with the bill.

Boyce having died, his administrator answered the bill. He called for proof of everything necessary to enable the plaintiff to recover. He alleged that at the time the bond and deed of trust were executed Boyce was a lunatic, and not competent to make any valid contract, and that very shortly after the execution of the deed he was declared a lunatic by the regular judicial proceeding. And he alleged that no assets had come to his hands, and he knew of no property except a small tract of land in the county of Henrico.

The plaintiff examined Willig as a witness, who proved the dealings between himself and John and Joseph Boyce, and the execution of the bond in 1821 by John Boyce, for the balance then due him on their account, and that he in 1833 assigned this bond for value to the plaintiff. This evidence was excepted to because the witness was the assignor of the bond. The plaintiff proved by another witness, who lived with him as a clerk at the time, that on the 27th of November 1833 Boyce paid to the plaintiff 100 dollars on account of a bond assigned by Willig to plaintiff; and that the bond was over 400 dollars, principal and interest.

It appears from the evidence that Boyce was the first teller in the Farmers 706 Bank for many years, and *resigned the office in March 1834. The first indications of lunacy were noticed in 1832. It then and until 1834 when he quit the bank, was limited to the subject of religion, though his aberration of mind increased. After he left the bank his derangement, according to the expression of one witness, became more general. In the latter part of 1835 and for a part of January 1836, he was employed in the office of the Virginia towing company in posting up their books. During this period he dined at one of the hotels in the city, and provided his own lodging and went where he pleased, except that he was under a strict promise to his sister, who lived about a mile from the city, that he would attend no religious meetings. He went to his sister's house every Saturday evening, and usually came into the city on Monday morning. He seems to have been employed in the office of the towing company principally for the purpose of benefiting him and whilst engaged there was under the immediate care of a nephew who was a clerk in the office, who states that any conversation in the office on any subject excited him so that he would remain but a short time and leave abruptly, when no persuasion could induce him to return.

When the cause came on to be heard in June 1847 the court decreed a sale of the trust subject for the satisfaction of the plaintiff's debt: And thereupon the defendants applied to this court for an appeal, which was allowed.

Lyons, for the appellants.
Gratton, for the appellee.

SAMUELS, J. The evidence not excepted to shows with sufficient clearness, that previous to the 1st of January 1836, John Boyce was indebted by bond to Robert I. Smith in the amount mentioned in the bond 707 *and deed of trust of that date. Question, however, is made by the appel-

*The principal case was followed in Marks v. Hill, 15 Gratt. 422, in decreeing costs of the appeal to the appellee. See also, Williamson v. Goodwin, 9 Gratt. 503; monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

†See monographic *note* on "Insanity" appended to Boswell v. Com., 20 Gratt. 860.

‡See monographic *note* on "Appeals."

lants whether John Boyce was of sufficiently sound mind at that time to execute the bond and deed. The evidence clearly proves that the grantor at that time and before was laboring under monomania, but upon a subject in nowise connected with affairs of this nature; that he was competent to transact other business, and was engaged therein; that general mania did not supervene until some time after. Partial insanity of this nature and degree could not invalidate the bond and deed. Shelford on Lunacy 260. If the evidence had established the incompetency alleged, the appellee would have been remitted to his rights and remedies on the bond previously existing by virtue of the act of March 17th, 1842, Sess. Acts, ch. 98. The appellants here are not materially concerned in the question whether the property shall be held liable under the deed of trust, or under the bond and the statute. When the original bill was filed, the complainant's demand for more than the interest then due might possibly have been resisted on the principles of the case of Mayo v. Judah, 5 Munf. 495. At the time of the decree, however, the principal and interest had all become payable, and were properly decreed to the appellee. The decree omits to allow a credit for 7 dollars 22 cents, admitted in the bill to have been paid February 1st, 1836; correcting the decree in this particular, I am of opinion to affirm it in all other respects, with costs to the appellee.

The other judges concurred in the opinion of Samuels, J.

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708 *Jincey & als. v. Winfield's Adm'r & als.

Jones v. Jincey & als.

January Term, 1858, Richmond.

(Absent LEE, J.)

1. **Emancipated Slaves—Subjection to Payment of Decedent's Debts*—Case at Bar.**—Slaves emancipated by will, though sold under executions issued upon judgments against the administrator with the will annexed, may maintain a suit in equity to recover their freedom. And if there is other estate of their testatrix subject to pay her debts sufficient for that purpose, or if this and the hires and profits of all the emancipated slaves are sufficient to pay the debts in a reasonable time, the sale will be set aside.
2. **Same—Same—Same.**—Some of the emancipated slaves are to be sold for the payment of debts; but all should be hired out, or sold for a time, in order to raise a sufficient fund for the purpose.
3. **Same—Same—Same—Rights of Purchasers.**—The purchasers of the emancipated slaves under executions, being *bona fide* purchasers, are entitled to recover back from the estate of the testatrix the amount paid by them, with interest, and the expense of keeping the chargeable negroes; they accounting for the profits of the negroes purchased by them.
4. **Legacies—Services Performed with a View to—Right of Action.**—Though services performed with a view to a legacy, and not in expectation of a reward in the nature of a debt, will not generally be the ground of an action, yet if performed at the request of the testator, or if he has promised to pay for the services either before or after they were performed, an action is maintainable.
5. **Same—Same—Statute of Limitations.**†—In such a case an action was commenced in the lifetime of the testatrix, and was pending at her death; and the plaintiff qualified as her administrator with the will annexed. The statute of limitations will bar so much of his claim as was for services rendered more than five years before the suing out the writ in the action commenced by him.

This was a suit in equity in the Circuit court of Sussex county by Jincey and others against Patrick H. Jones administrator with the will annexed of Mary Winfield deceased, George Field and John D. Ragland, to assert their right to freedom. 709 The plaintiffs had *been the slaves of Mary Winfield in her lifetime, and were emancipated by her will. The will was duly admitted to probat in the County court of Sussex in March 1847, when the executor named therein refused to qualify, and administration with the will annexed was granted to Patrick H. Jones. But there was an appeal from this order to the Circuit court, where it was affirmed at the next October term.

At the October term of the Circuit court for 1847, the administrator confessed judgments to creditors of his testatrix, amounting to near 2000 dollars. On these judgments executions were sued out and were levied on Jincey and her six children and Scilla and her five children; and they were sold by the sheriff under these executions at the next January term of the County court of Sussex. At this sale the defendant Field purchased Jincey and her children at the price of 1060 dollars, and the defendant Ragland purchased Scilla and her children at 1150 dollars. Scilla died during the progress of the suit.

The defendants Field and Ragland insisted that they were fair purchasers at the sale by the sheriff, without having heard of any doubt as to the propriety of the sale, and had paid the purchase money; and therefore that they were entitled to hold the slaves they had purchased. But if the sale was to be set aside, that they were entitled to the return of their money with interest, and to compensation for the expense of supporting the young negroes. The administrator Jones insisted that the debts of the estate could not be paid in any reasonable time from the hires of the negroes; and he claimed to be a creditor himself to a large amount.

It appears that the testatrix was an unmarried lady owning an unproductive farm with some thirty slaves, one of which was

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*Emancipated Slaves—Subjection to Payment of Decedent's Debts.—See principal case cited in Wood v. Humphreys, 12 Gratt. 340; Reid v. Blackstone, 14 Gratt. 366.

†Statute of Limitations.—See principal case cited in Cann v. Cann, 40 W. Va. 157, 20 S. E. Rep. 916.

a shoemaker and two or more were blacksmiths; and that she carried on a
710 shoemaker and *two blacksmith shops.

Her slaves were permitted to work very much as they pleased, and she would not permit them to be controlled by any one. Her whole annual income was estimated at about 400 dollars. On the death of her brother, who was also unmarried and had lived with her, she wrote to the administrator who was a young man and her nephew, then in the employment of the Wilmington railroad company at a salary of 480 dollars, requesting him to come and live with her. He came and remained with her until his marriage; after which he lived at his own house about a mile from his aunt. There does not seem to have been any contract between them for compensation for his services, but she frequently said she would do better for him than he was doing on the railroad; both of them however, seemed to look to a provision by her will. Before the death of Miss Winfield, her nephew ascertained that she had made a will emancipating her slaves, and not making any provision for him, and he brought an action against her to recover compensation for his services. This action was pending at her death.

In April 1849 the cause came on to be heard, when the court without deciding any other question in the cause, made a decree directing Jones to render before a commissioner of the court an account of his administration, including a statement of all hires of the plaintiffs or any of them, and also of their number and value, and all expenses paid on their account; and also a statement of all debts or claims due to or by the estate of the testatrix, including the alleged claim due to himself: And directing Field and Ragland to render before the same commissioner a statement of the hires of the plaintiffs held by them, also of their number and value, and all expenses paid on their account; and also a statement of any increase of the female plaintiffs, and of any deaths which may have occurred since their purchase.

711 *The commissioner returned his report in August 1849, from which it appeared that there was in the hands of the administrator including hires, on the 1st of August, 1006 dollars and 22 cents, of which 954 dollars and 74 cents was principal money. The number of slaves in the hands of the administrator was twenty; there were in the hands of Field seven valued at 1470 dollars, and in the hands of Ragland six valued by himself at 1400 dollars, and by a witness at 1585 dollars. The debts due to the estate amount to 160 dollars and 31 cents. The only claim against the estate reported, was that of the administrator Jones. The commissioner allowed him whilst he lived with his aunt from December 1839 to January 1842, at the rate of 480 dollars a year, that being the compensation he received from the railroad company, except that when in the service of the company he paid his own board. After he left his aunt he was allowed at the rate of 350 dollars a year; but the commissioner did not extend the account back beyond five years before the emanation of the writ in the action he brought against her. The amount allowed by the commissioner, principal and interest, on the 19th of January 1847, was 3692 dollars and 22 cents.

The plaintiffs excepted to the report on the ground: first, that the whole of the allowance was extravagant. Second, because the statute of limitations should bar all over five years before the institution of this suit. Third, to the whole amount allowed to him for the time since he ceased to live with the testatrix.

The defendant Jones excepted to the report because the allowance to him after he left the testatrix was reduced to 350 dollars a year.

The evidence as to the value of Jones' services to the testatrix, varies from 50 to 500 dollars a year. It is stated in the opinion of Moncure, J.

712 *The cause came on again to be heard in October 1850, when the court overruled the defendant Jones' exception to the commissioner's report, and sustained those of the plaintiffs, but confirmed the report in all other respects. And the administrator was directed to render an account of his transactions since the last statement, before a commissioner of the court, who was directed to state them and also to make a statement of all outstanding claims due by the estate of the testatrix, including that of P. H. Jones; in stating which he was to allow Jones for his services from December 1841 to the time of his marriage in January 1842, at the rate of 408 dollars per annum, abating from 480 dollars, the sum the court thought he ought to be allowed, 72 dollars for his board previous to his marriage; and that since his marriage he should be allowed 100 dollars a year; and to report what was the fair market value of Scilla previous to her death. And the injunction awarded the plaintiffs against the defendants Field and Ragland was dissolved, and the bill as to the plaintiffs Jincey and her children and the children of Scilla was dismissed. Whereupon these plaintiffs applied to this court for an appeal, which was allowed. Jones also applied for and obtained an appeal from so much of the decree as affected his claim upon the estate of the testatrix.

Spooner and Collier, for the paupers.
Stanard and Bouldin, for Field.
May and Wallace, for Field, Ragland and Jones.

MONCURE, J. I will first consider the case of Jincey & als. paupers v. Winfield's adm'r & als.

Since 1782 an owner of slaves has been authorized to emancipate them in either of two modes prescribed by law, one of which is by last will and testament. This right of the owner is subordinate to that
713 *of his creditors to subject his estate to the payment of his debts; and by express provision of the act of 1792, slaves

so emancipated are "liable to be taken by execution to satisfy any debt contracted by the person emancipating them, before such emancipation is made." When slaves are emancipated by will they should not be sold for the payment of the testator's debts, until all his other estate liable thereto has been applied to the purpose; and then should be sold only for such period as may be sufficient to raise an adequate fund to meet the deficiency; for "all are equally entitled to their freedom, and they should have it partially, if they cannot receive it absolutely. Patty v. Colin, 1 Hen. & Munf. 519. "No court would permit the executor to manumit some and make slaves of others, but the burden of servitude should be equally distributed." Nicholas v. Burruss, 4 Leigh 294. A court of chancery has jurisdiction to adjust the rights of the creditors and of the freed men. It will enjoin the creditor's execution, even after it is levied on the freed men, until it can ascertain, by proper enquiries, whether there be any other property which should be applied to their exoneration; and will not utterly reject their claim "until it is found that no possibility exists of effectuating their emancipation." That such is the law, and such the mode of its administration, will plainly appear by reference to the cases of Woodley v. Abby, 5 Call 336; Patty v. Colin, 1 Hen. & Munf. 519; Dunn v. Amy, 1 Leigh 465; Elder v. Elder's ex'or, 4 Leigh 252; Nicholas v. Burruss, Id. 289; Parks v. Hewlett, 9 Leigh 511; Ruddle's ex'or v. Ben, 10 Leigh 467.

There can be no doubt therefore but that the appellants in this case would have been entitled to the relief claimed in their bill, if they had filed it before they were sold under the executions. For in any view that can be taken of the case it is 714 obvious that after *applying the other estate of the testatrix to the payment of her debts, it would be only necessary to sell them for a comparatively short period, to raise an adequate fund to meet the deficiency: And if the debt due the administrator be set down at the amount at which it is fixed by the decree of the court, it is not improbable that, including the hires which have accrued since 1848, (the last year for which hires are credited to the estate in the administration account,) there may be already a sufficient fund in the hands or power of the administrator to pay all the debts, including the amount of the satisfied executions.

The only question then is, whether the sale under the execution vested the purchaser with such indefeasible rights in the negroes sold as to deprive the latter of the relief to which they would have been otherwise certainly entitled? I do not think that it did. Generally, if not universally, a bona fide purchaser of the subject of a specific legacy from an executor, or under an execution against the goods and chattels of the testator, would acquire a good title against the legatee, notwithstanding it might be a breach of duty in the executor to make the sale, or suffer it to be made. The law invests him with the personal estate of his testator, and makes it his duty to apply the same, first of all, to the payment of the testator's debts. Strangers cannot know the situation of the estate, and should, therefore, be generally protected in their bona fide purchases from the executor. Specific legatees, who are injured by an improper sale of their legacies, may generally obtain indemnity out of the remaining estate or from the executor. But the right conferred by emancipation stands on different ground, and requires the application of different rules and principles from those which govern the case of a specific legacy. In the language of Tucker, P., in which all the other judges concurred, 9 Leigh 521, 715 *"Emancipation is not strictly a gift of property: It is the exoneration of a human being from the bonds which our institutions have fastened upon him, and which the beneficence of our times has authorized the master to remove." It can make no difference that the executor has never assented to the emancipation of the slaves. They derive their right of emancipation from the will of their owner, and not the assent of his executor. Without such assent they may not be entitled to sue at law for their freedom, but may sue for it in equity, and will recover on showing that the debts are paid, or that there is other estate liable and sufficient for their payment, and having it applied to that purpose. The power of the executor to withhold his assent is given him that he may keep them together, to be ready, if necessary, to answer the claims of creditors; and in the mean time, of course, he may hire them out for that purpose. With or without such assent they are answerable for those claims, but answerable sub modo only, and upon condition that there is no other estate liable and sufficient for their payment. Subject to that liability they are free from the date or recordation of the will. They may be taken in execution if necessary, but should not be if there is other property liable thereto and sufficient for its satisfaction. They should not be sold absolutely, if a sale for a term would produce satisfaction; nor should some be sold while others are left free, but the burden of servitude should be equally distributed. These, I think, are the relative rights of the freed men and the creditors; and if the former be sold in contravention of their rights, the sale may be set aside; at least upon the terms of refunding the purchase money and interest, and any expenses incurred on account of the freed men, after deducting hires and profits. The rule of caveat emptor applies to a purchaser of emancipated slaves, 716 whether from the *executor or under an execution against the goods and chattels of the testator. The purchaser knows, or is presumed to know, that slaves may be emancipated by will; and if so emancipated, cannot be sold absolutely unless required for the payment of the testator's debts. It is his buisness to enquire whether or not the slaves so purchased are

emancipated. He is a purchaser of the slaves with express or implied notice of their rights, which may be enforced against him, as against the executor or the execution creditor. If this were not so, the slaves, without their default, and without being required for the payment of debts, might lose forever the freedom intended to be bestowed upon them by their owner; and, unlike a specific legatee whose legacy is improperly sold, could obtain no indemnity; and the price of the slaves would enure to the benefit of the executor or the estate of the testator, contrary to his will that they should be free. On the other hand, the application of the rule of caveat emptor to the purchaser would do him no damage which due caution on his part might not avoid, and would rarely do him any damage at all; for he would be entitled to indemnity out of the estate of the testator or against the executor.

But the case of Patty v. Colin, 1 Hen. & Munf. 519, is, I think, an express authority for affording relief against a purchaser, and seems to be decisive of the question under consideration. There, the slaves who claimed their freedom, belonged to John Timberlake at his death, and were bound for his debts, if his remaining estate was insufficient for their payment. They were sold under execution against his goods and chattels; and the purchaser at the sale sold them to Colin, a subsequent bona fide purchaser for valuable consideration; who, being a purchaser in the second decree, was a fortiori entitled to protection, if the purchaser under the execution was so entitled. The *slaves claimed to have been emancipated, not by John Timberlake, but by his widow and residuary legatee; and their rights depended upon the contingency that there was sufficient other estate of each to pay their respective debts; or that there was sufficient other estate of the widow to pay her debts, including the debt to her husband's estate for these slaves, which she pretended to have purchased from his executor, but had not paid for. The court directed the proper accounts to be settled, and enquiries made, for the purpose of ascertaining whether there was any estate to be applied to the redemption of the paupers; and, if there should be, directed it to be so applied; but if not, confirmed the title of the purchaser. In that case, nothing was said about the assent of the executor to the emancipation of the slaves; and I think it is plain that no importance was attached to any such assent, if it existed; nor to any assent of the executors of John Timberlake to the legacy to his widow, so far as to give it any effect in impairing the rights of the purchaser.

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There might possibly be such laches or other circumstances in a case as to render it inequitable to disturb the rights of a purchaser; though a court of equity would be slow in imputing laches to persons of such ignorance and imbecility. In this case there is no ground whatever for doing so; nor are there any other circumstances unfavorable to the claimants. They were sold just ten months after the will emancipating them was admitted to record, under executions issued upon judgments confessed by the administrator. The slaves were probably ignorant of the sale until about the time it was made. It had been advertised only at the court-house door, and but one month before the sale; and no person appears to have seen the advertisement, but one who was requested by the sheriff to read it. J. H. Fitzhugh testified that he was present at the sale, and heard several persons ask where the *negroes were advertised; had seen no advertisement himself; heard two others say they had seen none; and heard a good many people say it was not right to sell a portion of them to free the others. Of the thirteen negroes that were sold, eleven were infants, and most of them of tender years. They were sold for 845 dollars less than they were then worth; though they produced 239 dollars 61 cents more than the amount of all the executions. The bill was filed just a week, and the affidavit annexed thereto bears date but two days, after the sale. All the diligence that could be expected in such a case has been used by the plaintiffs in this; and the purchasers have no cause to complain of them on that score. They do not pretend that they did not in fact know that the negroes purchased by them had been emancipated; though they no doubt supposed that the sale was valid.

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I will now consider the case of Jones v. Jincey, &c. I think there is no error in the decree of the Circuit court in overruling the exception of the appellant, and sustaining the exception of the appellees to the commissioner's report, and in instructing the commissioner to allow the appellant for his services from December 1841 to the time of his marriage in January 1842, at the rate of 408 dollars per annum; and for his services from the date of his marriage to January 1847, 100 dollars per annum; nor in the opinion therein expressed, that so much of his claim as was anterior to December 1841, was barred by the act of limitations.

The evidence in this case shows that the services for which compensation is claimed by the appellant were performed with a view to a legacy, and not in expectation of a reward in the nature of a debt. Fitzhugh proved that the appellant assigned as a reason for suing his aunt the testatrix, that she had made a will and set all her negroes free; said that he had left a good situation on the railroad to come and attend to *her business, and she could not expect him to attend to it for nothing, when she had left him nothing by her will; and that she had promised if he would come and live with her and attend to her business, she would do as well or better for him than he was then doing. John Winfield proved that while the appellant was living with the testatrix, he expressed a doubt whether she ever would make a will, and if she did not, he thought it probable he would not get paid for his services. The witness

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and another went to see her, and proposed to her to make some provision for the appellant. Her reply was, that she would do as well for him as he would do for her, and she refused to do anything at that time. Adkins proved that he was at her house a short time before the appellant went there to live. She told him she had written to her nephew the appellant, to come to live with her. Witness replied that he thought it would be a pity to take him away from the employment he was then in. She stated that she thought he would lose nothing by it; that all she had was for him and his sister at her death. R. E. Jones proved that he was on a visit to his aunt the testatrix, in January 1842, when she told him that after the death of her brother (who had lived with her) she wrote for the appellant to come and live with her, and take charge of her matters; that she would do as well or better for him than he had been doing on the Wilmington railroad; and that he had complied with her request, and was then engaged in doing her business. It was proved that the appellant, when he left the service of the railroad company, was receiving an annual salary of 480 dollars, and paid his own board, which was 72 dollars. The last two of the above named witnesses were introduced by the appellant. The foregoing is all the testimony tending to show a contract for compensation, except that of Nancy Winfield, another wit-
720 ness for the appellant, *who stated that she was at the residence of the testatrix in 1839, a few days after the death of her brother; while there the appellant arrived. In a conversation with testatrix witness expressed a hope that testatrix would do very well by Patrick, he having said that he was getting 500 dollars on the railroad. Testatrix said she would give him more than that, and more than he could get anywhere else, as an inducement for him to leave the railroad and attend to her affairs. This testimony was given in 1849, ten years after the conversation occurred to which it refers; and it cannot be expected that the recollection of the witness should be very accurate as to the particular words used. A slight verbal variation might have an important influence on the terms of the contract, if there was any, or in making a contract for the parties if there was none. But admitting the conversation to have occurred precisely as related, it is consistent with all the other testimony, which shows that there was in fact no contract, but a mutual expectation that the appellant would receive his reward in the shape of a provision for him in the will of his aunt.

But though it has been held that an action cannot be maintained for services performed with a view to a legacy, and not in expectation of a reward in the nature of a debt, Chitty on Contracts 542 and cases cited, yet it has been also held that if performed at the request of the testator, or if he has promised to pay for the services, either before or after they were performed, an action is maintainable. Id. 543, cases cited in note. The services were performed in this case at the request of the testatrix, and as she did not compensate them in the mode expected by both parties, it is right that he should receive reasonable compensation as a creditor of her estate. What compensation would be reasonable, under all the circumstances of the case, is the question to be decided. The court below referred the
721 question as *to the appellant's claim to a commissioner, who allowed 480 dollars per annum before, and 350 dollars per annum after, the appellant ceased to live with the testatrix. Both parties having excepted, the court, after applying the bar of the statute of limitations to the claim, and thus excluding so much of it as had accrued more than five years before the date of the appellant's writ against the testatrix, allowed the same rate of compensation which had been allowed by the commissioner for so much of the period during which the appellant lived with the testatrix, as was not excluded by the bar of the statute, deducting, however, for board, at the rate of 72 dollars per annum; but allowed only 100 dollars per annum afterwards. I think the allowance made by the court was reasonable, and fully as much as the evidence sustains. There can be no doubt of the propriety of the application of the bar of the statute of limitations; and that the date of the appellant's writ was properly fixed as the period when it ceased to run. The court, I think, was also right in fixing on the salary which the appellant was receiving from the railroad company when he came to live with the testatrix, (after making the proper deduction for board,) as the standard for measuring his compensation while he continued to live with her. For although it was much more than a reasonable compensation, looking either to the nature and amount of the services or their value to the testatrix; yet it was, perhaps, not unreasonable, looking to the facts that he gave up his situation in the employment of the railroad company to live with his aunt at her request; that she had repeatedly said he should lose nothing by doing so; and that she desired his society, perhaps more than his services. But none of these facts apply to so much of the claim as is for services rendered after he ceased to live with her. The evidence shows that after the death of her brother she was left alone, and
722 wanted the society of one of her *relations, as well as his assistance in the management of her business. She accordingly selected the appellant. It will be observed in referring to the testimony on both sides, that all her promises and declarations in regard to what she intended to do for him were in consideration of his coming to live with her: And John Winfield testified that the appellant left her alone, which she very much disliked; and she said to the witness that she desired the services of her nephew, the appellant, more to stay with her at night than any other time. He lived with her about two years, until January 1842, when he married, and ceased to live

with her from that time till her death, in February 1847. Had he continued to live with her until her death, she would probably have made a satisfactory provision for him in her will, and we might never have heard of this suit. Having thus early ceased to live with her, there is no longer any reason for looking to any higher standard of value of his services afterwards rendered, than a quantum meruit.

What then was the value of his services after he ceased to live with her? The witnesses differed very much among themselves in opinion on this subject, varying in their estimates of a reasonable yearly compensation from 50 dollars to 500 dollars. Most of the witnesses who placed a high estimate on the value of the services of the appellant, seem to have considered that he ought to be allowed at least as much as he had been receiving from the railroad company, without reference to the actual value of his services as an agent, of which some of them seemed to know nothing. It would be impossible, from these opinions, to come to any correct conclusion on the subject; and the better way of doing so is to ascertain the nature and extent of the services. The evidence shows that he had little or nothing to do with the management of her slaves or farming operations. She
723 had two blacksmiths' *shops and a boot and shoemakers' shop, and was in the habit of hiring out one, and sometimes two slaves; the income of all which and her farm was about 400 dollars per annum. She was the only white member of her family, and was extremely frugal; but was an indulgent mistress, and a bad manager of slaves; and her income seems not to have exceeded, if it did not fall short of, her expenses. The appellant's business chiefly was to keep the shop accounts, receive her income, and apply it to the payment of her expenses. It occupied a comparatively small portion of his time. He acquired by his marriage about twenty slaves, and a tract of land on which he afterwards resided, adjoining that of the testatrix. He attended to his own business as well as hers after his marriage; devoting but little time to hers, as one of the witnesses testified. The same witness thought he had the privilege of having his work done at her blacksmith and shoe shops free of charge. On the foregoing statement, I think that the allowance of 100 dollars per annum for his services after his marriage was ample. But this is not all. The appellant was the general receiving and paying agent of his aunt, and does not appear to have ever rendered her any account. In fact, she does not appear to have ever required any of him; at least until after he sued her, and was no doubt willing that he should retain what he might owe on such account, as compensation for his services. If anything had been due to him thereon, it would probably have been charged as part of his claim against the estate exhibited before the commissioner. That claim is exclusively for his services, and is credited by nothing. The testatrix, when she was sued by the appellant, said she owed him nothing, and relied on what she claimed would be due her on a settlement of his agency transactions, as a sufficient setoff against any claim he might have against her for his
724 services: *and she was preparing to make her defence to the suit when she died. Besides the money received on account of her shops, hires, &c., he received in 1845 the price of a negro sold by her for 400 dollars. Though her income was equal, or nearly so to her expenses, a large portion of the latter, during the whole period of his agency, remained unpaid at her death; and was the consideration of bonds given by him as her agent, on which judgments were confessed by him as her administrator; being the judgments (or greater part in number and amount of them) for the satisfaction of which, thirteen of the emancipated slaves were sold under execution. It is probable, therefore, that a correct settlement of his accounts as agent would exhibit a balance against him to be applied to the credit of his claim for services; and if such a settlement could now be made, it would be proper to order it. But under the circumstances of the case, it cannot be expected, and the attempt to have it made would be attended with expense and delay, and probably be abortive. The fact however, that the appellant alone, if any person, can render an account of his agency; that he has rendered no such account; and that he would probably be found to be indebted thereon, could a correct settlement be made, serves further to show that he certainly has no cause to complain of the allowance made for his services by the court below.

Upon the whole, I am for reversing so much of the decree as dissolved the injunction awarded against the appellees Field and Ragland, and dismissed the bill as to the appellants Jincey and her children, and the children of Scilla, and as directed the commissioner to enquire into and report the fair market value of Scilla previous to her death, and affirming the residue thereof; and remanding the cause for further proceedings, according to the terms of the decree, which has been agreed upon in conference.

725 *The other judges concurred in the opinion of Moncure, J.

The following is the decree of the court:

The court is of opinion that the appellants in the first of the above named cases are entitled to freedom; subject only to a charge for the balance which may remain unpaid of the debts of the testatrix Mary Winfield, after applying to their payment all her other estate, including the hires of the appellant since her death: that if such other estate be insufficient for the payment of said debts, the appellants should be sold for such term of years as may be sufficient to raise an adequate fund to pay the deficiency, so as to distribute the burden of servitude as equally as possible among them: that the sales of the appellants Jincey and her children to the appellee George Field,

and of Scilla and her children to the appellee, John D. Ragland, are valid only in the contingency that all the estate, including the emancipated slaves, shall be required for the payment of said debts, and are invalid in any other event; in which latter case the only effect of said sales is to satisfy the said executions, and make the said purchasers creditors of the estate of the said testatrix by the amount of the purchase money paid by them respectively, with interest thereon from the time of such payment and of the expenses incurred, after deducting hires and profits received by them respectively on account of said negroes since the sale: that all proper accounts should be taken to effectuate the purposes aforesaid: that so much of the said decree of the Circuit court as directs the commissioner to enquire into and report the fair market value of the plaintiff Scilla previous to her death, and as dissolved the injunction awarded against the said Field and Ragland, and dismissed the bill as to the said Jincey and her children and the children of Scilla, is erroneous, and that
726 there is no error in the *residue of the said decree. Therefore so much of the said decree as is above declared to be erroneous is reversed, and the residue thereof affirmed, with costs to the appellants in the first and the appellees in the last of the above mentioned cases. And the causes are remanded for further proceedings on the principles above indicated.

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727 . *Dowdy v. Commonwealth.

July Term, 1852, Lewisburg.

1. **Indictments—Counts for Larceny and Receiving Stolen Goods—Election of Prosecution—Case at Bar.***—An indictment contains several counts, one for larceny, others for receiving stolen goods knowing them to have been stolen, and others for aiding another person to conceal stolen goods knowing them to have been stolen. The charges in all the counts, however, relate to the same goods, which in different counts are laid to be the goods of different persons, or of a person unknown. HELD: It is not a case in which the court should quash some of the counts, or compel the prosecution to elect on which count the prisoner shall be tried.
2. **Jurors—Not a Freeholder—Objection.**—It is a good objection to a juror in a case of felony that he is not a freeholder.
3. **Objection to Juror—Improperly Overruled—Not Cured by Being Stricken Off by Prisoner.**—If a prisoner's objection to a juror is improperly overruled, the error is not cured by the juror's name being stricken off from the panel by the prisoner, or his not being drawn as one of the twelve who are to try the prisoner.

The case is fully stated by Moncure, J., in his opinion.

Irving and Johnson, for the prisoner.
Grattan, for the commonwealth.

MONCURE, J. This is a writ of error to a judgment of the Circuit court of Cumberland, rendered in April last, convicting the prisoner William H. Dowdy of grand larceny, and sentencing him to imprisonment in the penitentiary for one year. The indictment contains ten counts, in each of which the subject of the larceny is stated to be "eleven hundred and forty pounds of tobacco, of the value of one hundred dollars," but each of which is different from the others in some incidental circumstance. The first is a common count for larceny, stating the owner of the property to be a person to the jurors unknown. The next
728 six *are for receiving stolen tobacco, knowing it to have been stolen. And the last three are for aiding John Bailey, a free man of color, in concealing stolen tobacco, knowing it to have been stolen. In all of the last nine, the property is stated to have been stolen by a person to the jurors unknown. In three of them it is stated as the property of Nathaniel M. Osborne, in the other three as the property of George McGlasson, and in the other three as the property of a person to the jurors unknown. In three of the six counts for receiving, the property is stated to have been received of John Bailey, a free man of color; and in the other three of a person to the jurors unknown. All of the counts except the first are upon the 19th section, chap. 192, p. 729 of the Code, which is in these words: "If any free person buy or receive from another person, or aid in concealing, any stolen goods or other things, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted." On the arraignment of the prisoner, and when the indictment was read to him, and before he had pleaded thereto, he moved the court to quash each count of the indictment; which motion the court over-

*Indictments—Counts for Larceny and Receiving Stolen Goods—Election of Prosecution.—The first headnote of the principal case is to this effect, an indictment contains several counts, one for larceny, others for receiving stolen goods knowing them to have been stolen, and others for aiding another person to conceal stolen goods knowing them to have been stolen. The charges in all these counts, however, relate to the same goods, which in different counts are laid to be the goods of different persons, or of persons unknown; and it was held, that this was not a case in which the court should quash some of the counts, or compel the prosecution to elect on which count the prisoner should be tried. For this proposition, see the principal case cited and approved in the following cases: Anable v. Com., 24 Gratt. 566; Dull v. Com., 25 Gratt. 982; Hausenfluck v. Com., 85 Va. 709, 711, 8 S. E. Rep. 668; Anthony v. Com., 88 Va. 850, 14 S. E. Rep. 834; Benton v. Com., 91 Va. 792, 21 S. E. Rep. 495; Pitsnogle v. Com., 91 Va. 808, 22 S. E. Rep. 851; Mitchell v. Com., 93 Va. 777, 20 S. E. Rep. 892; State v. Halida, 28 W. Va. 503. See principal case cited in *foot-notes* to Scott v. Com., 14 Gratt. 687; Leftwich v. Com., 20 Gratt. 716; Shinn v. Com., 32 Gratt. 899; Smith v. Com., 21 Gratt. 809. See generally, monographic *note* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

ruled. He then moved the court to quash the whole indictment; which motion the court also overruled. And to the opinions of the court overruling said motions, the prisoner severally excepted. He then demurred generally to the indictment and each count thereof; but the court overruled the demurrer, and he then pleaded not guilty. The prisoner was tried and found guilty; and exceptions were taken to sundry opinions given by the court on the trial; but as the verdict was set aside and a new trial granted, it is unnecessary to take any notice of these exceptions.

On the second trial of the cause, 729 four bills of exceptions *to opinions of the court given on the said trial, were made part of the record. The first states, that on the trial of the case, before the jury were sworn, and before they were charged, the prisoner moved the court to compel the attorney for the commonwealth to elect under which count or counts of the indictment he would prosecute the prisoner; but the court overruled the motion, and permitted the said attorney to prosecute under the whole indictment. The second is in regard to a motion of the prisoner to strike the name of John M. Hamontree from the panel of twenty-four jurors; which was overruled by the court, but which it is unnecessary to notice any further. The third states, that after the persons summoned under the first venire facias had been examined, the court failing to make up the panel of twenty-four out of the persons so summoned, directed the sheriff to call the bystanders; among whom Robert H. Amos was called, sworn and examined by the court, and upon such examination stated that he was a freeholder in a county adjoining Cumberland, but was a resident, though not a freeholder in Cumberland: and the prisoner excepted to the said Amos because he was not a freeholder in the county of Cumberland, and not qualified according to law; but the court overruled the exception, decided that he was a juror free from exception, and placed him on the panel of twenty-four. The fourth states, that after the persons summoned under the first venire facias had been examined, the court failing to make up the panel of twenty-four out of the persons so summoned, directed a second venire to summon sixty persons from the body of the county; on which second venire John M. Shepherd was summoned, and being sworn and examined by the court, he stated that he was not a freeholder; and the prisoner challenged the said Shepherd because he was not a freeholder and qualified as a juror according to law; but the 730 court *overruled the said challenge, decided that he was a juror free from exception, and placed him on the said panel of twenty-four. The prisoner was afterwards tried and again found guilty; and moved the court for a new trial, because the verdict was contrary to the law and the evidence. But the court overruled the motion, and the prisoner excepted, and his bill of exceptions was made a part of the record; but it is unnecessary to notice it any further.

I think there is no error in the several opinions of the Circuit court overruling the demurrer; and overruling the motions of the prisoner to quash the indictment, and each count thereof; and to compel the attorney for the commonwealth to elect under which count or counts he would prosecute the prisoner. The law on this subject is thus laid down by Buller, J., in the case, cited in the argument, of Young v. The King, 3 T. R. 106: "In misdemeanors, the case in Burrow shows that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration; but even in such cases it is no objection in this stage of the prosecution. On the face of an indictment every count imports to be for a different offence, and is charged as at different times; and it does not appear on the record whether the offences are not distinct. But if it appear before the defendant has pleaded or the jury are charged, that is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his 731 election on which charge he *will proceed."—"But if the case has gone to the length of a verdict, it is no objection in arrest of judgment. If it were it would overturn every indictment which contains several counts." In the case of Kane v. The People, in the Court of errors of New York, 8 Wend. R. 211, the law is thus stated by the chancellor: "In cases of felony, where two or more distinct and separate offences are contained in the same indictment, the court, in its discretion, may quash the indictment or compel the prosecutor to elect upon which charge he will proceed; but in point of law, it is no objection that two or more offences of the same nature and upon which the same or a similar judgment may be given, are contained in different counts of the same indictment. It therefore forms no ground of a motion in arrest of judgment; neither can it be objected by way of demurrer, or on a writ of error. It is every day's practice to charge a felony in different ways in several counts, for the purpose of meeting the evidence as it may come out upon the trial; each of the counts on the face of the indictment purports to be for a distinct and separate offence, and the jury very frequently find a general verdict on all the counts, although only one offence is proved; but no one ever supposed that formed a ground for arresting the judgment. If the different counts are inserted in good faith, for the purpose of meeting a single charge, the court will not even compel the prosecutor to

elect; and in the case of mere misdemeanors which are only punishable by fine or imprisonment, the prosecutor is permitted to join and try several distinct offences in the same indictment." To the same effect is the opinion of the Supreme court of Pennsylvania in The Commonwealth v. Gillispie, 7 Serg. & Rawle 479. See also 1 Chitty's Crim. Law 249, cited by the counsel for the prisoner; and the opinion of Fry, J., in Mowbray's case, 11 Leigh 649. Each count in the indictment in this case is a 732 *good count; and each being for felony, there is no misjoinder; and the demurrer, therefore, was rightly overruled. Whether the court should have quashed the indictment, or compelled the prosecutor to elect on which count or counts he would proceed, depends upon whether the charges in the different counts "are actually distinct," in the language cited by the counsel from Chitty, "and may confound the prisoner or distract the attention of the jury." There are some cases of felony in which, even though the charges are distinct, the prisoner would not be confounded or the attention of the jury distracted; and in which, therefore, the charges may properly be included in the same indictment and tried together: As, for example, the case of forging and uttering the same instrument, which are distinct offences, and yet are often charged in different counts of the same indictment. The People v. Rynders, 12 Wend. R. 425; The People v. Gates, 13 Wend. R. 311; 2 Va. Cas. 337; Huffman's case, 6 Rand. 685; Page's case, 9 Leigh 683; Mowbray's case, 11 Leigh 643. In the case first cited the court said, "That there would be an incongruity in incorporating in the same indictment offences of a different character, such, for instance, as forgery and perjury, cannot be denied; and that in such case a court would refuse to hear a trial upon both, there can be no doubt; but when offences of the same character, differing only in degree, are united in the same indictment, the prisoner may and ought to be tried on both charges at the same time. Such is this case. The prisoner was indicted for forging the check, and also for publishing it as true knowing it to be false. These are different offences, and punished with different degrees of severity, but were properly united both in the indictment and trial."

But though there are cases of felony in which several charges, though distinct, may properly be included in 733 *the same indictment, I know of no case in which the several counts of an indictment were all for the same offence, and were in themselves good counts, where the indictment or any of the counts has been quashed, or the prosecutor compelled to elect on which of them he would proceed. In the prosecution of offences against property, or otherwise particularly effecting individuals, it is generally necessary to state in the indictment, and prove on the trial, the name of the owner of the property, or of the persons affected; or that he is a person to the jurors unknown, if that be the fact. But the doubts in regard to the ownership of property and names of persons, is often so great as to render it difficult or impossible for the prosecutor to know before hand how the matter will appear on the trial; and to prevent a variance on that merely incidental though necessary part of his case, he is allowed to vary the statement of the name in different counts. And the same may be said of other incidental circumstances not affecting the essence of the crime or changing its nature. In Mabry's case, 2 Va. Cas. 396, the prisoner had been examined before the examining court for stealing three bags of cotton of the goods and chattels of Nathaniel Land; and was indicted in two counts for stealing the goods and chattels, first of Nathaniel Land, and secondly of a person unknown. The prisoner on his arraignment, moved the court to strike out the second count, because he had not been examined for the offence therein charged. The court overruled the motion, and the prisoner was found guilty of the larceny mentioned in the second, and not guilty of that mentioned in the first count. Parker, J., in delivering the unanimous opinion of the General court denying a writ of error, said: "The offence charged against the prisoner had, we think, been enquired into by the examining court. That offence was the larceny of three bags of cotton of a certain value. For this 734 *criminal offence he had been sent on to be tried in the Superior court. The property of the goods was merely an incident, and did not enter into the essence of the crime," &c. In the case under consideration the counts of the indictment are all for the same offence, to wit, the larceny of "eleven hundred and forty pounds of tobacco of the value of 100 dollars;" and they differ from each other only in the statement of names and other incidental circumstances. The statute under which all of them but the first was framed, declares that a person knowingly receiving, or aiding in concealing stolen goods, shall be deemed guilty of the larceny thereof. Code, 729, § 19. The common counts for larceny would alone have been sufficient in this case; and by relying solely on them, the great length of the indictment would have been avoided. It would then have contained but three instead of ten counts: That is, for the larceny of the goods and chattels, 1st, of Nathaniel M. Osborne, 2d, of George McGlasson, and 3dly, of a person unknown. But while that would have been the preferable course, there can be no legal objection to the one which was pursued. Indeed the prisoner's counsel do not seem to object to the indictment, because it contains special counts for larceny in receiving and aiding in concealing stolen goods. Their objection goes to the difficulty arising from the ownership of the property as charged in the different counts of the indictment. "One-half of the jury," they say, "may have believed the prisoner guilty of receiving, &c., the goods of Osborne; whilst the other half may have believed him entirely innocent of that charge, but guilty of receiving, &c.,

the goods of McGlasson; and yet they unite in a general verdict of guilty." Now it is obvious that the same objection might be made to every indictment for larceny containing several counts, stating the ownership of the property as in different persons. It might have been made to the indict-
735 ment *in Mabry's case. In that case one-half of the jury might have believed the prisoner guilty of stealing three bags of cotton of Nathaniel Land, and the other half might have believed him guilty of stealing the property of a person unknown. But the possibility of such a state of things as that does not render the joinder of such counts improper, or make it proper to compel the prosecutor to elect. Of course the jury would not be authorized to find the prisoner guilty in such a case, without being all satisfied that at least one of the counts is sustained by the evidence; and the court ought so to instruct them, if required.

But I think the Circuit court erred in overruling the prisoner's challenge of John M. Shepherd because he was not a freeholder and qualified as a juror according to law. The 1st section of chap. 163 of the Code, p. 628, declares that "no person shall be qualified to serve upon a petit jury in any proceeding, civil or criminal, unless he is 21 years of age, and owns property, real or personal, of the value of 100 dollars." If that had been the only law on the subject of the qualification of petit jurors, the prisoner's challenge of Shepherd would have been properly overruled. But there is another law, which, I think, superadds the freehold qualification in cases of felony. That law is to be found in chap. 208, p. 774 and 775 of the Code. Section 4 provides that, "In a case of felony, in which a writ of venire facias is necessary, the writ shall command the officer charged with its execution to summon twenty-four persons, freeholders of his county or corporation, residing remote from the place where the offence is charged to have been committed, and qualified in other respects to serve as jurors, to attend the court," &c. The twenty-four persons to be summoned under the venire are thus required to have the qualification of a freehold, besides being "qualified in other respects." Section 9 provides
736 that *when any jurors summoned under a writ of venire facias fail to attend, or are challenged for cause, or if the whole array be challenged, the court shall cause the other jurors to be summoned in the county or corporation, until a panel of twenty-four jurors, free from exception, be completed," &c. Section 10 provides that, "In a criminal case in a Superior court, if qualified jurors not exempt from serving, cannot be conveniently found in the county or corporation in which the trial is to be, the court may cause so many as may be necessary of such jurors to be summoned from any other county or corporation," &c. It seems obvious to have been intended by the legislature that all the persons composing the panel of twenty-four jurors, whether summoned under the 4th, 9th or 10th sections aforesaid, should be freeholders, as well as qualified in other respects. Those summoned under the 4th section are, as before stated, expressly required to be freeholders. Why should not the rest be so too? Could it have been intended that part should be freeholders while the other part might not be so? The panel of twenty-four is rarely ever composed entirely of persons summoned under the original venire. So that if the freehold qualification was, as it seems to have been, considered important by the legislature, it would hardly in any case be more than partially secured by confining its requisition to the persons summoned under the original venire. But relative terms are used in the 9th and 10th sections, which plainly refer to the freehold qualification prescribed by the 4th, and imply that the jurors to be summoned under the former shall have that qualification as well as those summoned under the latter. Under the 9th section other jurors are required to be summoned in the county, &c., until the panel of jurors, free from exception, be completed; thus placing all the jurors on the panel on the same foot-
737 ing in regard to qualification. *And under the 10th section jurors are to be summoned from another county, &c., only in case qualified jurors, &c., cannot be conveniently found in the county, &c., in which the trial is to be; thus showing that all the jurors, whether summoned in or out of the county of the trial, are to be qualified in all respects, and therefore freeholders. John M. Shepherd was not a freeholder, and therefore was not a qualified juror; and the prisoner's challenge of him should have been sustained. He appears not to have been one of the twelve jurors that tried the prisoner, and must therefore have been one of the eight stricken from the panel by the prisoner, or was one of those not selected by lot. But this does not alter the case: The prisoner may have stricken him from the panel because the challenge was overruled. The case in this respect is somewhat like, though stronger than, Lithgow's case, 2 Va. Cases 297, in which it was held that if the court erroneously overruled a prisoner's challenge to a juror for favor, and then the prisoner peremptorily challenge the juror, the error of the court is not cured by the subsequent exclusion of the juror, although the prisoner had not exhausted his peremptory challenges even to the last. See also Sprouce's case, Id. 375.

It is unnecessary to consider whether the court erred in overruling the prisoner's motion to strike the name of John M. Hammontree from the panel of twenty-four jurors, or his challenge of Robert H. Amos, or his motion for a new trial. And without deciding those questions, I am for reversing the judgment, setting aside the verdict, and remanding the case for a new trial to be had therein.

The other judges concurred in the opinion of Moncure, J.

Judgment reversed.

738 *Rand v. Commonwealth.

October Term, 1852, Richmond.

1. **Criminal Law—Statute As to Additional Punishment for Second Offence—Application.**—The act, Code of 1849, ch. 199, § 25, p. 752, applies to the case of a prisoner on trial who had been convicted and sentenced previous to the passage of this act.*

2. **Same—Same—Same—Constitutional.**—The act as applicable to such a case, is not *ex post facto* and unconstitutional.

3. **Same—Same—Same.**—The act does not apply to the case of a conviction for an offence committed after commission of that for which the prisoner is on trial.

4. **Same—Same—Indictment†—Allegations.**—The indictment must set out the time and place of the first conviction, and must show that the previous conviction was for an offence committed before the commission of that for which the prisoner is on trial.

5. **Same—Indictment†—Faulty Counts—Disregard of.**—The act, Code of 1849, ch. 208, § 34, p. 778, authorizes a prisoner who is tried on an indictment containing several counts, some of which are faulty, to move the court to instruct the jury to disregard the faulty counts. A motion to exclude evidence which could only be applicable to the faulty count, is in effect a motion to disregard that count.

6. **Same—Evidence of Former Conviction Improperly Admitted—Effect.**—Evidence having been improperly admitted to prove a former conviction, the whole judgment must be reversed, and a new trial awarded.

7. **Same—Indictment†—Counts.**—QUÆRE: Whether each count of the indictment must set out the former conviction, or whether one allegation of that fact may be made, applicable to all the counts.

8. **Same—Former Conviction.**—QUÆRE: When the evidence of a former conviction should be submitted to the jury.

John W. Rand was indicted for burglary and larceny in the Circuit court of Norfolk county. The indictment contained four counts: And at the conclusion of the second count there was the following: "And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said
739 John W. Rand, late *of the commonwealth of Massachusetts, one of the United States, hath been convicted of a felony by him committed in the said commonwealth of Massachusetts, one of the United States, and therefor sentenced to confinement in the penitentiary of the commonwealth of Massachusetts, one of the United States."

On the trial of the prisoner, after the prosecution had introduced evidence for the purpose of sustaining the charge of burglary and larceny, a witness was introduced and sworn, and two records of a conviction for felony in Massachusetts were exhibited to him, and he was asked if the prisoner was the same person named in the said records, and he replied that he was: And then the prosecution proposed to read the said records in evidence to the jury; whereupon the prisoner by his counsel, moved the court to exclude the said evidence and records; but the court overruled the motion and admitted the evidence, and the prisoner excepted.

The jury found the prisoner guilty and fixed the term of his imprisonment in the penitentiary at five years; and they found further that he had been before convicted of a felony, and sentenced to confinement in the penitentiary in Massachusetts. And the court sentenced the prisoner to be imprisoned in the penitentiary of this commonwealth for the term of five years as fixed by the jury; and to an additional term of five years. And the judge certified that the court stated to the jury that the record from the state of Massachusetts, referred to in the indictment, was admitted and to be received as evidence by the jury for the sole purpose of showing that the prisoner had been before convicted of an offence and sentenced to confinement therefor in the penitentiary to a like punishment in the state of Massachusetts, as alleged in the said indictment. The prisoner thereupon applied to this court for a writ of error.

740 *R. G. Scott, for the prisoner.

The Attorney General, for the commonwealth.

DANIEL, J., delivered the opinion of the court.

In addition to the four regular counts in the indictment for burglary and larceny, there is also the further charge or allegation that the prisoner "hath been convicted of a felony by him committed in the commonwealth of Massachusetts, one of the United States, and therefor sentenced to confinement in the penitentiary of the said commonwealth of Massachusetts, one of the United States."

On the trial, the prisoner having been regularly arraigned, and having pleaded not guilty, the prosecution, after it had introduced evidence for the purpose of sustaining the allegations contained in the indictment, then exhibited two records, one of which showed that John W. Rand had, at the November term of the Municipal court of the city of Boston in 1843, been convicted of larceny, and sentenced therefor to confinement in the penitentiary of the state of Massachusetts for the space of four years; and the other, that on an appeal before the Supreme judicial court, the said conviction and sentence had been regularly affirmed in the year 1844; and also introduced a witness, by whom it offered to prove that the prisoner was the same person named in the said records. To the introduction of this evidence the prisoner objected; but the court

*See the opinion of JUDGE DANIEL for the law.

Indictment—One Good Count—General Demurrer.—It is a well-settled principle of law, that a general demurrer is bad, if the indictment contains one good count. State v. Cartright, 20 W. Va. 37, citing the principal case. See also, principal case cited in Shiflet's Case, 14 Gratt. 672; Prior's Case (Va.), 26 S. E. Rep. 865.

†See monographic *note* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

overruled the objection, and permitted the said records and proof of the identity of the prisoner to go to the jury; and the prisoner excepted.

The questions to be decided here all turn on the propriety or impropriety of permitting the introduction of this evidence.

From an early period in the history of our penal code, indeed from the date of the establishment of the penitentiary, it has been the policy of our law to visit
741 *with increased punishment offenders who shall be convicted and sentenced for felonies committed, after having been once or oftener convicted and sentenced for like offences. Previously, however, to the revision of the criminal laws in 1848, the provisions for increased or additional punishment for second offences or convictions, only reached those cases where the accused had been before sentenced by some court in this state. In 1848 the law in this respect was changed, and the additional punishment prescribed for the second conviction made to extend to cases where the first conviction had been made in a court of any other of the United States. The law of 1848, with some slight change in its phraseology, is embodied in the code of 1849, and is to be found in the 25th section of chapter 199. It declares that "when any person is convicted of an offence, and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to a like punishment, he shall be sentenced to be confined five years, in addition to the time to which he is or would be otherwise sentenced." The exhibition of the charge, that the prisoner had been before convicted and sentenced in Massachusetts, and the offer to sustain the charge by proof, were doubtless designed on the part of the prosecution to be in pursuance of this law.

The effort on the part of the prisoner's counsel to sustain his exception to the course of the court in regard to this portion of the prosecution, is placed mainly on three grounds:

First. That it is only by construction that the law can be made to reach a case like this; and that to give to it such construction would be to give to it a retrospective operation, which is inadmissible.

Secondly. That if the law, in plain
742 and unequivocal *terms embraced the case, it would be an ex post facto law, inasmuch as it appears that the first conviction was had in Massachusetts in the year 1843, and the law under which it is sought to visit the prisoner with the additional punishment, was not passed till the year 1848; and therefore that in either of these aspects the testimony offered would be illegal, even though the charge were formally made in compliance with the construction above mentioned, or in accordance with the plain and obvious requirements of the law.

Thirdly. That the allegation was in no aspect well made, but was altogether defective and faulty, and that the court, on the motion of the prisoner to reject the evidence, should have excluded it, and instructed the jury wholly to disregard said allegation.

As to the first ground, no resort to construction is necessary to show that the terms of the law embrace all cases of a second conviction, whether the first conviction had been had since, or before, the passage of the law. Violence would have to be done to the plain and obvious import of the words employed, in order to restrict the operation of the law to the cases where the first conviction had taken place since its enactment. If a reasonable doubt arose out of the language used in the statute, whether the law contemplated the cases in which the first conviction was had before its passage, the charitable rules which prevail in the construction of such laws would perhaps require us to restrict its operation to those cases alone where the first conviction had taken place since the passage of the law.

But no such doubt arises. To give the law the restricted operation contended for by the prisoner's counsel, would therefore be, not to construe the statute, but to deny its authority and set at naught its plain requirements. This it is not competent for us to do, unless satisfied that the sec-
743 ond ground of objection *taken is tenable, to wit, that the statute, so far as it is applicable to the case before us, is unconstitutional as being an ex post facto law.

Is it obnoxious to such objection? The first conviction, as has been before stated, was had in 1843, and the second offence is alleged and found to have been committed in 1852; whilst the law under consideration was passed in 1848 and re-enacted in 1849. In the increased punishment prescribed by the statute and to which the prisoner has been sentenced, one which, in legal contemplation, is to be regarded as attached to the first or to the second offence? If to the latter, there is nothing in the statute on which to base the imputation of its being of an ex post facto character in its design or operation. The constitution withholds from the legislature the power to convert, by statute, into a crime, an act, which, at the time it was done, offended against no law; or to visit a criminal act even with penalties more severe than those which were attached to it by the law, when it was committed. No constitutional or other obstacle however, seems to stand in the way of the legislature's passing an act declaring that persons thereafter convicted of certain offences committed after the passage of the act, may, if shown to have committed like offences before, be subjected to greater punishment than that prescribed for those whose previous course in life does not indicate so great a degree of moral depravity. One convicted under such a statute cannot justly complain that his former transgressions have been brought up in judgment against him. He knew or is presumed to have known, before the commission of the second

offence, all the penalties denounced against it; and if in some sense the additional punishment may be said to be a consequence of the first offence, (inasmuch as there could be no sentence for such punishment in the absence of proof of the first conviction,) still it is not a *necessary consequence; but one which could only arise on the conviction for the second offence, and one therefore, which being fully apprised of in advance, the offender was left free to brave or avoid.

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In Ross' case, 2 Pick. R. 165, a like question arose before the Supreme court of Massachusetts in construing a statute similar in its features to the one now under consideration. The statute alluded to was passed in 1817, and provided in substance that where a person had been convicted of a crime punishable by confinement to hard labor, he should, upon conviction of another offence punishable in like manner, be sentenced to a punishment in addition to the one prescribed by the law for such last offence. The second offence for which Ross was convicted, was committed after the passage of the act of 1817, and he had been convicted of a like offence in 1816, before the passage of the act; and the question raised in the Supreme court of Massachusetts was, whether the provision in relation to the additional punishment was not, in that case, ex post facto and retrospective in its operation. It was argued, in behalf of the prisoner, that it was. The statute, it was said, incorporated a conviction of a crime committed before the passing of it, with a conviction after, and subjected the offender to additional punishment. This, it was argued, was retrospective; for, when the crime was committed before the passing of the statute, the offender could not be apprised of the vengeance in store for him when it should be united with another crime. The court, however, were of opinion that there was nothing objectionable in the law. Parker, C. J., who delivered the opinion of the court, said, that if it could be truly said that the party was punished under the statute for the first offence, the statute would be ex post facto; that a party ought to know, at the time of committing the offence, the whole extent of the punishment: *But he proceeded to show that the punishment was for the last offence committed, and was rendered more severe in consequence of the situation into which the party had previously brought himself; that the punishment was enhanced from the character of the culprit. In the more recent case of Plumbly v. Commonwealth, 2 Metc. R. 413, decided by the same court, Ross' case is cited with approbation. The court said that in the last mentioned case it was properly held that the law did not impose a second punishment for the first offence; but imposed a higher punishment on one a second time convicted, because the former punishment had proved inefficacious in doing the work of reform for which it was designed. These views are, we think, correct, and applying them to the case under consideration, we are of opinion that the second ground taken by the prisoner's counsel cannot avail him.

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The third ground remains to be considered.

The allegation in regard to the first conviction does not state when it was had, but charges simply that "the prisoner hath been convicted of a felony by him committed in the commonwealth of Massachusetts," &c. It might happen that a person who had committed a first and second offence should be tried and convicted of the second offence before he was tried for the first. If this allegation therefore is properly made, proof of such conviction of the second offence might serve as evidence to justify the infliction of the increased or additional punishment on the offender for his first offence; for the term in which the charge is made would be fully satisfied by proof of any conviction of a felony before the exhibition of the indictment, without regard to the time when such felony was committed. The attorney general insists, that if such should be adjudged to be the true meaning and effect of the charge, it would in that respect, be still *properly made, and in conformity with the true intent and object of the statute; that the statute is designed to impose increased punishment on those who by a second conviction are proved to be habitual offenders, no matter what may be the order of time in which these offences may have been committed. If this were the first statute of the kind enacted by our legislature, and we were to be restricted in construing it to a strict and literal interpretation of its language, these views would be entitled to great weight. Many laws of a like nature have however, (as has been already stated,) been previously passed by our legislature; and on looking at them, we find that in most, if not in all of them, it is required that the offence to be visited with the additional punishment shall have been committed after a conviction for another felony. Thus in the law of 1796, (ch. 200, Code 1803, p. 355,) entitled "an act to amend the penal laws of the commonwealth," providing amongst other things, for the establishment of the penitentiary, the punishment of death (except for murder in the first degree,) is abolished in the first section; and in the 24th section it is declared, that "If any person convicted of any crime, which now is capital, or a felony of death without benefit of clergy, shall commit any such offence a second time, and shall be thereof legally convicted, he shall be sentenced to undergo an imprisonment in said penitentiary-house, at hard labor during life," &c. So again, in the 13th section of ch. 171, 1 Rev. Code 619, it is provided, that "If any person guilty of an offence punishable by confinement in the penitentiary, shall have been convicted thereof, &c., and shall afterwards commit any other offence, which by law, if there had been no such previous conviction, would have been punishable with confinement in the penitentiary for a period not

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less than five years; every such offender being thereof lawfully convicted, shall be punished by confinement in said penitentiary for life."

747 *Similar language is employed in the 14th and 15th sections of the said last mentioned act. These provisions have been in some respects modified by subsequent enactments; but in none of them passed prior to the act under consideration, is there any such change in the language, in reference to the first and second offences, remembered, as would denote a purpose on the part of the legislature to alter or dispense with the requirement that a conviction for felony should precede the commission of the offence which is to be visited with the increased punishment.

The decision and reasoning of the Supreme court of New York in the case of The People v. Butler, 3 Cow. R. 347, applies with full force to the case before us. The statute under which the prosecution in that case was had, provides "that every person who shall hereafter be a second time or oftener convicted of petit larceny, shall be adjudged by the court who may give judgment thereon, to imprisonment in the state prison for any time not exceeding three years;" and it was contended on the part of the prosecution, that there was nothing in the phraseology of the statute which required the second crime to have been committed after the first conviction; and that the scheme of the law was to enhance the punishment for a series of offences, betraying a hardiness and depravity in guilt, whether the conviction was for the first or the second offence. On the part of the prisoner it was argued in that case, that the statute intended that a conviction should precede the second offence; that the mischief was a want of reformation by the first punishment, and that the previous conviction was required as evidence that the mild correction for one offence had failed of its effect: that the legislature intended that the culprit should first hear the monitory voice of the law before the heavier doom should be announced; and that the statute was based on the sound maxim,

748 *that if gentle means would not avail, the more severe punishment should be applied.

The court held that the true construction was that contended for on behalf of the prisoner. Savage, C. J., in delivering the opinion of the court, after stating that there had been various laws on the subject, said: "The statutes providing for the punishment of second offences are worded differently, some of them declaring that every person who shall be a second time duly convicted or attained of any of the said felonies committed after the said first conviction," and sometimes, "shall be a second time or oftener duly convicted or attainted." He then proceeded to express the opinion of the court, that "the difference of phraseology in the several statutes was accidental; that the legislature meant the same thing in all, which was, that a conviction should precede the second offence; and in support of the opinion cites Hawkins, P. C., ch. 40, § 3, where the rule is laid down that "where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first; for the gentler method shall first be tried which may perhaps prove effectual."

The departure in the present law from the language heretofore generally adopted in former laws has not, we think, originated in any design to change this rule. On the contrary, we think it obvious that the present provisions are designed to carry out the policy hitherto apparent in our legislation, and to modify the law in this respect only so far as to make it embrace also the cases where the first convictions are had in other states.

With these views of the law, we think that the allegation or charge in question is not only defective in failing to set out the time and place of the first conviction, but is also faulty in this, that, under it as it now stands, a case which is not contemplated by the provisions of the law would satisfy the terms of the charge.

749 *Is this defect cured by the verdict? In Kirk's case, 9 Leigh 627, decided by the General court in 1838, it was held that the defect in some of the counts of the indictment did not affect the validity of the rest; and that if any count was good, judgment might be given against the accused. The court said, (I use the language of Judge Allen, who delivered the opinion,) that every separate count was in the nature of a distinct indictment; and though in civil actions before the law was changed by statute, when the declaration contained several counts, some of which were good and others defective, and the jury gave entire damages, judgment could not be given, this rule did not apply to criminal cases. "The defect of some of the counts (he said) did not affect the validity of the rest, and if any count was good judgment might be given. The prisoner is not subjected to any inconvenience or liable to be taken by surprise by the operation of the rule. He is apprised by the indictment of the charges against him, and should be prepared to meet them; and if upon the trial he supposes that the evidence does not justify a conviction upon any of the counts, he can save the point by spreading the facts proved upon the record, and moving in arrest of judgment or for a new trial."

In Mowbray's case, 11 Leigh 643, decided in 1841, the same question was again before the General court, and a majority held that the rule of practice in criminal cases, that if an indictment contains several counts, some good and others faulty, and a general verdict of guilty be found, the bad counts will not affect the good, and judgment will be given on the latter, does not apply in Virginia to cases of penitentiary crimes; inasmuch as the jury is required not only to pass on the guilt of the accused, but also

to ascertain the amount of the punishment; and the evidence on the bad counts may aggravate the punishment imposed
750 by the *verdict. This case was followed by that of Clerk, 3 Gratt. 615, decided in 1846, in which it was held by the whole court that the common law rule that a good count in the indictment where there are other counts which are bad, will support a general verdict of guilty, is overruled in Virginia, as to offences which are punishable by confinement in the penitentiary. In this state of the law the act to reduce into one the several acts concerning crimes and punishments and proceedings in criminal cases, was passed March 14th, 1848. The 43d section of chapter 21 declares, that "a general verdict of guilty upon an indictment or information containing several counts, one or more of which is faulty, shall be good, and judgment shall be entered thereupon accordingly. But the accused on the trial may apply to the court to instruct the jury to disregard the faulty counts; and it shall be the duty of the court to give such instruction." This provision, with some slight changes in the phraseology, which it is not deemed necessary to notice, as they are not supposed to change the meaning of the law, is carried into the Code of 1849, and forms the 34th section of chap. 208, p. 778. We do not deem it necessary to express any opinion as to how far the question decided in the cases just mentioned are affected by this provision, farther than to say that one of its manifest designs is to furnish a prisoner arraigned on an indictment containing various counts, some of which are faulty, a means of protecting himself against any prejudice or injury that might arise from such faulty counts, to wit, by a motion, on his trial, to the court, to instruct the jury to disregard them; and that if the court should refuse, to the prejudice of the prisoner, to give such instruction, it would be an error which he would have a right to have redressed by an appeal.

Has such a motion been made by the prisoner and overruled by the court in
751 this case? It is insisted by *his counsel that there has been; that the motion by the prisoner to exclude the record of the conviction in Massachusetts and the testimony of the witness as to the prisoner's identity, was, though not in terms, in substance and effect, a motion to the court to instruct the jury to disregard that portion of the indictment alleging such conviction. And in this position we think he is correct. In a case like this, when it is manifest that the only purpose for which such evidence could be introduced was to sustain the charge in relation to the former conviction, and the proofs offered constituted all the items of evidence essential to establish the charge, to wit, the record of the conviction and proof of the identity of the prisoner, the exclusion of the evidence would have been equivalent to striking out the charge, or instructing the jury wholly to disregard it. We have a similar law applicable to the proceedings in civil cases, and in the case of Cooke v. Thornton, 6 Rand. 8, it was held by a majority of the court, that a defendant going to trial on a declaration containing several counts, some good and others bad, might avail himself of the course pursued by the prisoner here. Judge Green said: "This court, in Roe v. Crutchfield, 1 Hen. & Munf. 361, adopted the rule laid down in the Duke of Bedford v. Alcocke, and declared that the defendant might still avail himself of the objection to the bad counts by moving the court to instruct the jury to disregard them, or by demurring to the evidence, or objecting to the evidence applicable only to the faulty counts, and taking an exception if it be admitted, so as to show that the evidence was only applicable to the bad counts. Such a motion to exclude the evidence would be in effect a motion to declare the counts to be bad and to be disregarded by the jury; for in any other view, to exclude evidence proper to support the matter put in issue by the pleadings, would be utterly inadmissible."

The reasoning as applicable to the
752 case before us, *does not seem to admit of answer, and we think that the judge of the Circuit court ought to have excluded this evidence and instructed the jury to disregard the allegation or charge in question. Some discussion was had at the bar as to whether this allegation ought properly to be regarded as a part of the third count or as a distinct charge attached to no one count more than another. We do not regard the decision of this question as material. The allegation is so made that it might have been disregarded or stricken out of the indictment without affecting the other portions. The four counts in which the acts of burglary and larceny are charged would still have remained regular, formal counts.

What is to be the effect of this error of the court? On the one hand it is argued by the attorney general, that it should only affect so much of the judgment as relates to the additional punishment; and on the other hand it is insisted by the prisoner's counsel, that it is cause for reversing the whole judgment, and remanding the case for a new trial. We can hardly say that the introduction of the evidence objected to was not calculated to prejudice the prisoner on the trial of the felony for which he was arraigned. In England they have statutes very similar to ours, prescribing additional punishment for second offences; and a practice prevailed, though not without the earnest opposition of some of the judges, of giving the evidence of the former conviction to the jury before they had passed on the guilt of the accused on the charge for the felony for which he was arraigned. In the case of Rex v. William Jones, 25 Eng. C. L. R. 453, Park, Judge, said: "That his custom had been never to allow the jury to know anything of the previous conviction till they had given their opinion on the charge upon which the prisoner was to be tried; because he thought that if the
753 jury were aware of the *previous con-

viction it was (to use a common expression) like trying a man with a rope about his neck. He proceeded to say, however, that the judges had had a meeting at which thirteen of them were present, and they held that his practice and that of another learned judge was wrong; and that the opinion of the judges was the previous conviction must be proved before the prisoner is called on for his defence. Archbold, in his Criminal Pleadings 823, says that in practice it was found that a prejudice was created in the minds of the jurors by a knowledge of the previous conviction, and that to remedy this the statute 6 and 7 Wm. 4, ch. 111, was passed. And that in pursuance of its provisions the practice now prevailing requires that the prisoner must be arraigned and the jury must be charged and the evidence proceed as if the indictment did not contain the averment of a previous conviction; and that this allegation must not be opened to the jury, or their verdict taken upon it, until after they have found the prisoner guilty of the subsequent felony; and then the prosecution must prove the previous conviction and identity of the defendant, and upon it likewise the jury must deliver their verdict. If, however, the defendant call witnesses to character, the previous conviction may be proved in reply, and the compound question will in that case be left to the jury in the first instance.

It was said by the attorney general that we have no such statute here as that just alluded to, and that it is the practice in our courts for the jurors to hear and pass upon the evidence in relation to the former conviction at the same time with that offered to prove the felony of which the prisoner is arraigned; and therefore, that the prisoner has been subjected to nothing which would not have been regular, if the allegation of the former conviction had been properly made. We do not think that the arguments of the prisoner,
754 *founded on the supposed probable injuries done to him by the course pursued, can be met by the answer that if the proceedings had been regular such injury would have been sanctioned by the law and rendered irremediable. The statute and the practice under it cannot be made to legalize such injury, when the requirements necessary to be pursued in order to silence the complaints of the prisoner and constrain his submission, have not been observed.

In the case of The Commonwealth v. Briggs, 7 Pick. R. 177, the accused was charged with crime, and in the same indictment it was alleged that he had before been convicted of the like offence. The record of the first conviction was laid before the jury, who, without any proof of identity, found a general verdict, upon which judgment was rendered by the court below. In the Supreme court, notwithstanding the attorney general on motion entered a nolle prosequi of so much of the indictment as related to the former conviction, so that the sentence of punishment might be the same as if that allegation had been omitted by the grand jury, the judgment was reversed and verdict set aside, and a new trial awarded. The court said it was true that because of the nolle prosequi the prisoner could not be punished more than if the charge respecting the former offence had been left out of the indictment; yet that the jury, assuming it as a fact that he had been before convicted, might and probably did consider that as tending to prove or render it more probable that he had committed the new offence; that a jury in such a case might suppose, from the way in which the record was laid before them, that it was plenary evidence of the former conviction of the defendant, though it was in fact deficient in an essential particular; and that having a convict on trial for an offence of a like nature, they might be satisfied with less evidence on the principal charge than they would require in the absence of proof of previous guilt.

755 *Having decided that the Circuit court erred in refusing to exclude the evidence objected to, a new trial seems to us to follow as the proper consequence. What influence the evidence may have had in deciding the question of the guilt or innocence of the prisoner of the charges of burglary and larceny, for which he was on his trial, no one can say. But it is not difficult to believe that, in a case of doubtful or conflicting evidence, such proofs might exert an influence on the minds of his triers prejudicial to the cause of the prisoner. And we think the error in permitting the evidence to go to the jury cannot be regarded as cured by the statement which it appears was made by the judge to the jury, that the records were admitted and were to be received for the sole purpose of showing that the prisoner had been previously convicted of a felony. Such a caution, though highly proper and calculated to guard the jury against yielding to any improper bias, could not wholly remove the unfavorable impressions which the introduction of the evidence must, most probably, have made on their minds. The allegation of the first conviction being faulty, the prisoner had the right to stand before his triers in the same plight as if such allegation had never been made. And if, upon his trial on an indictment containing no such charge, evidence such as that objected to had been introduced, there can be no doubt that its introduction would have been an error entitling the prisoner to a new trial. We think he is not the less entitled to it in the case as it stands.

Judgment reversed.

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1. The mode in which an exception to an answer shall point out the omission excepted to, is a matter of practice discretionary with the court, and not a subject of appeal.
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2. If otherwise, the exception being sustained, and the defendant having filed another answer, there the subject of the exception properly ended. Idem, 131

3. There may be an appeal from a decree directing an issue, where the decree impliedly involves a settlement of the principles of the cause.
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1. A suit to set aside an award, the validity of which is put directly in issue, is referred to arbitration by an order in the cause. The award of the arbitrator affirming the validity of the first award is conclusive.
Morris *v.* Morris, 637

2. Six causes are referred by order of court to D and L, for arbitrament and award, and in case of disagreement between them, then to T, as the umpire to decide such difference, which when made by them or their umpire, and duly certified by them, is to be entered as the judgment of the court. Upon the disagreement of D and L, the whole matter is to be adjudged by T, and his decision is conclusive, though he differs from both the arbitrators.
Bassett's adm'r *v.* Cunningham's adm'r, 684

3. The arbitrators and umpire sit together, and hear the evidence, of which a note is taken by one for the convenience of all. Upon the disagreement of the arbitrators, the umpire makes his award, in which he does not refer to any of the evidence, or state the principles or facts upon which it is based; but in sending his award to the clerk of the court in which the causes are pending, he sends with it, all the papers and the note of the evidence taken before the arbitrators. These papers and evidence are not a part of the award or connected with it, so that they may be considered on a motion to set aside the award.
Idem, 684

4. The arbitrators differing in opinion, each makes out his own report of his opinion upon the different questions arising in the case. In this there is no error. Though if it was error in them, it would not affect the validity of the award made by the umpire. Idem, 684

5. The arbitrators and umpire being all of them eminent counsel, they will be presumed to have discarded any improper evidence which was objected to before them, though the evidence was heard and the question reserved. Idem, 684

6. A mere mistake in a date from which interest was to be charged on a particular item, obvious on the face of the award, is not ground for setting it aside; the party in whose favor it is, consenting that it shall be corrected in the judgment entered on the award. Idem, 684

7. An error of judgment on the part of the umpire in regard to the facts, is not ground for setting aside an award. Idem, 684

ASSIGNOR AND ASSIGNEE.

1. R, the obligee in a bond, endorses his name on the back thereof, for the purpose of enabling K to buy goods on the faith of his endorsement; and H sells goods to K on the faith of the same; and before the time for payment for the goods arrives the obligor is insolvent. H may maintain assumpsit against R either as assignor or guarantor.
Hopkins, Brother & Co. *v.* Richardson, 485

2. This is not an undertaking for the debt of another to which the statute of frauds and perjuries applies. Idem, 485

3. Judgment is recovered by the assignee of a bond given for the purchase money of land, the contract for which is rescinded. The debtor is not entitled to enjoin the judgment as against the assignee.
Drake *v.* Lyons, 54

4. In such a case the debtor should not be permitted to enforce payment to himself by the assignor, until he had paid the judgment, or released the assignor from his liability as such. Idem, 54

5. An endorsement of his name by the sheriff on a prison bounds bond, before action brought upon it, is a sufficient assignment thereof. And the action may be maintained by the creditor as assignee without writing out the assignment; or the assignment may be written out in the progress of the trial after the jury is sworn.
McGuire & als. *v.* Pierce, assignee, &c., 167

6. Bonds assigned being for the purchase money of a part of a tract of land, and the vendor selling the other part to a third person, the assignees being defeated in the recovery of the money from the vendee whose bonds they held, have no lien on the purchase money of the other part of the tract.
Ragsdale *v.* Hagy & others, 409

7. Assignee delays two years to sue the maker of the note. In the absence of proof of the maker's insolvency at the time or shortly after the note fell due, he cannot recover against the assignor.
Thompson *v.* Govan, 695

ASSUMPSIT.

1. A general indebitatus assumpsit may be joined with a count in assumpsit upon a special contract of bailment setting out the promise and undertaking of the defendants, the consideration on which it was founded, the breach of that promise by the defendants, and their neglect and 760 *carelessness, and the loss to the plaintiff occasioned thereby.
Kennaird &c. *v.* Jones, 183

2. Upon a contract for the sale of a raft of logs, the balance of the price was to be paid when an act was done by the vendees. In an action by the vendor to recover the price, he must aver that the act had been done, or that the vendees had unduly neglected, failed and delayed to do it. Idem, 183

3. The payment of money to a surveyor of a county for which he is to furnish a warrant and enter and survey a specific piece of land, is not a sufficient consideration for a promise by his successor to do these things, to sustain an action of assumpsit.
Hale *v.* Crow & wife, 263

4. An assignor without consideration, of a bond, states in writing to a holder of it for value, that he is aware of no offset or objection to said bond, nor of anything to affect his liability as assignor thereof, so that the holder does not return it to the assignee as he was authorized to do. This is not sufficient to support an action of assumpsit by the holder against the assignor.
Hopkins, Brother & Co. *v.* Richardson, 485

5. R the obligee in a bond endorses his name on the back thereof, for the purpose of enabling K to buy goods on the faith of his endorsement, and H sells goods to K on the faith of the same; and before the time for payment for the goods arrives the obligor becomes insolvent. H may maintain assumpsit against R either as assignor or guarantor. Idem, 485

6. This is not an undertaking for the debt of another to which the statute of frauds and perjuries applies. Idem, 485

7. Though services rendered with a view to a legacy, and not in expectation of a reward in the nature of debt, will not generally be the ground of an action, yet if performed upon request of the party served, or if he has promised to pay for the services either before or after they were performed, an action is maintainable.
Jones *v.* Jincey & als., 708

BAIL.

Upon a scire facias against special bail, he surrenders his principal, and gives notice thereof to the attorney of the plaintiff; the plaintiff not living in the county. But there is an office judgment against the bail, and he not defending it, it is confirmed. Equity will not relieve him.
Allen, Walton & Co. *v.* Hamilton, 255

BILLS OF EXCHANGE.

See Promissory Notes and Bills of Exchange.

BILL OF REVIEW.

1. A justice of the peace having failed to forward a deposition taken by him, to the clerk of the court in which the cause is pending, and the cause having been heard and decided without it, is no ground for a bill of review.
Niday *v.* Harvey & Co. & als., 454

2. A bill of review will not lie for error in a commissioner's report, to which there was no exception, and the correctness of which might be affected by extraneous proof.
Mosby's adm'r & als. *v.* Mosby's adm'r, 584

BONDS.

1. Bill of injunction dismissed at rules; action may be brought on the injunction bond before the order dismissing the bill is confirmed by the court.
Roach *v.* Gardner, 89

2. All the obligees in a joint bond must join in action upon it, or some sufficient excuse for not joining them, must be stated in the declaration.
Strange *v.* Floyd, 474

3. An endorsement on a bond, though made after its execution, is to be considered as a part of it.
Price *v.* Kyle, 247

4. There is a joint judgment against two who have been arrested and committed to prison. They may jointly execute a prison bounds bond.
McGuire & als. *v.* Pierce, assignee, &c., 167

5. What is not a good defence to an action on a prison bounds bond. See Prison Bounds, No. 2, and Idem, 167

6. An endorsement of the name of the sheriff upon a prison bounds bond, is a sufficient assignment. Idem, 167

7. The measure of damages in an action upon a prison bounds bond, is the debt, interest and costs. Idem, 167

8. A bond of deputy sheriff and his sureties to the high sheriff for the faithful discharge of his duties, omits both in the penalty and condition, to designate the deputy, so that the condition reads as if all were deputies. The obligors having sealed and delivered the bond in its present shape, they are estopped from denying that they are deputies.
Cox & others *v.* Thomas' adm'x, 312

9. Each obligor named in the penalty of the bond must in such case, be re-
761 garded *as principal, so far as his acts are concerned, and the others as his sureties. Idem, 312

10. Though some of the persons named in the penalty did not sign the bond, the parties who did sign it, are to be considered as the obligors who are bound, and are recited to be admitted as deputies.
Idem, 312

11. A party signing the bond, whose name is not in the penalty, does not vitiate the bond, and he is bound as an obligor.
Idem, 312

12. The bond stating that T was high sheriff and the party proceeded against as deputy, was such, it estops the obligors from denying these facts. Idem, 312

13. When an assignment of a breach in the condition of a constable's bond sufficiently stated. See Pleadings, No. 1, and Governor for Davis *v.* Roach & als., 13

14. When no variance in declaring on an appeal bond. See Pleadings, No. 2, and Friend *v.* Woods, 37

15. Bond by deputy and sureties, to indemnify high sheriff against all loss and damage he may sustain in consequence of any failure or misconduct on the part of the deputy or any other person whom he may employ to assist him in the office. The high sheriff being liable for rents of land which came to the hands of the deputy, and one of his assistants, the sureties are liable to the high sheriff, though the rents came to the hands of the deputy after the high sheriff's term expired, and came to the hands of the assistant deputy after the death of the principal deputy.
Miller *v.* Jones & als., 584

16. Monomania no way connected with the subject of a contract, will not invalidate a bond and deed of trust given in execution of the contract.
Boyce's adm'r & als. *v.* Smith, 704

CAVEATS.

1. In a case of caveat the caveator must show the better right to the land in controversy to be in him. He cannot recover on the weakness of his adversary's title.
Walton *v.* Hale, 194
Harper & Weston *v.* Baugh & Seguine, 508

2. Quære: If a tenant in common of an undivided interest in land, may not maintain a caveat against the issuing of a grant to a third person, upon a survey of part of the land embraced within the limits of the grant in which he holds an undivided interest.
Walton *v.* Hale, 194

3. The caveator must state in his caveat the grounds on which he claims the better right to the land in controversy: And he will not be permitted to abandon on the trial the right which he has set out in his caveat, as that under which he claims, and prove a different right.
Harper & Weston *v.* Baugh & Seguine, 508

4. In a caveat the court cannot enter into questions of notice or fraud between the parties. Idem, 508

CONDITIONS.

1. A condition subsequent annexed to the emancipation of a slave, is void.
Forward's adm'r *v.* Thamer, 537

2. For a dependent condition, see Covenants, and
Roach *v.* Dickinsons, 154

CONSIDERATION.

1. What not a sufficient consideration to support assumpsit. See Assumpsit, No. 3, 4, and
Hale *v.* Crow & wife, 263
Hopkins, Brother & Co. *v.* Richardson, 485
2. What a sufficient consideration to support assumpsit. See Assumpsit, No. 5, and
Hopkins, Brother & Co. *v.* Richardson, 485

CONSTABLES.

In an action on a constable's official bond, what is a sufficient assignment of the breach of the condition. See Pleadings, No. 1, and
Governor for Davis *v.* Roach & als., 13

CONTRACTS.

1. What not such a contract as will entitle the creditors of the contracting party to subject the profits to satisfy their debts.
Carroll & als. *v.* Tiffany, 269
2. An endorsement on a marriage contract, of the same date, is to be considered a part of it.
Eidson *v.* Fontaine, adm'r &c. & als., 286
3. Monomania no way connected with the subject of a contract, does not invalidate it.
Boyce's adm'r & als. *v.* Smith, 704
4. For the principles regulating contracts by subscriptions, see Subscriptions, and
Galt's ex'or & als. *v.* Swain, 633

762 *CONVEYANCES—FRAUDULENT.

See Frauds, Statute of, No. 3, 4, 5, 6, and
Williamson's ex'or *v.* Goodwin & als., 503
Fones *v.* Rice & als., 568

CORPORATIONS.

1. A plaintiff in equity claims to be a corporation. The defendant in his answer, denies that the corporation has been regularly organized, and calls for proof. The plaintiff failing to prove the legal organization of the company, the bill should be dismissed.
Bowyer's adm'r & als. *v.* The Giles, Fayette and Kanawha Turnpike Company, 109
2. The act incorporating the Northwestern Bank of Virginia is a public act, of which the courts will judicially take notice.
Hays *v.* Northwestern Bank of Virginia, 127

COSTS.

1. In a suit against an administrator for distribution, though the plaintiff has a decree, yet if the administrator has been in no default, he shall have his costs.
Eidson *v.* Fontaine, adm'r &c. & als., 286
2. A creditor who with knowledge that there has been a decree for an account in another creditor's suit, brings a separate suit for his own claim, will be compelled to pay costs.
Stephenson *v.* Taverners, 398
3. In a suit to enjoin the collection of purchase money on account of incumbrances and defect of title, though the incumbrance is removed and the title made good, so that the injunction is dissolved, yet plaintiff is entitled to his costs.
Young's adm'r & Bowyer *v.* McClung & als., 336
4. But if there was another suit pending, in which the plaintiff might have had the relief he sought, by petition or supplemental bill, he shall not have his costs.
Idem, 336

COUNTY LEVY.

1. A County court having laid the county levy, and directed the sheriff to pay certain claims upon the county out of it, and the sheriff having received the commissioner's books and proceeded to collect the levy, as far as it could be collected, and returned a list of insolvents, upon a motion by one of the creditors of the county, whose claim was directed to be paid out of the levy, against the sheriff and his sureties to recover the amount, it is not competent for the defendant to object that the County court was not legally constituted to be authorized to lay the levy when it was done; nor can they object that the commissioner's book was irregularly made out, and not properly authenticated.
Cook, sheriff, & als. *v.* Hays, 142
2. The amount collected by the sheriff not being sufficient to pay all the claims directed to be paid out of it, in the absence of proof that the sheriff has paid the claims other than that of the plaintiff, the law will not presume he has paid them. Idem, 142
3. In such a case a demand upon the sheriff is necessary to sustain a motion against him and his sureties. But no objection for want of a demand having been made in the court below, and the notice averring the demand, and the judgment giving a credit for a part of the debt as paid on the day it was demandable, this is sufficient proof of the demand, in the appellate court. Idem, 142

COURTS.

1. The Circuit court is a court of general jurisdiction in all actions at law between individuals, and its judgment in such case is conclusive of its jurisdiction, and cannot be questioned but by appeal.
Cox & als. *v.* Thomas' adm'x, 323
2. Unless it clearly appears on the face of the record that the Circuit court had not jurisdiction, the appellate court will pre-

sume the proceedings were such as to give it jurisdiction. Idem, 323

3. When sheriff and his sureties will not be allowed to question whether the County court was properly constituted to lay a county levy. See County Levy, No. 1, and
Cook, sheriff, & als. *v.* Hays, 142

COVENANTS.

In a covenant for the sale of land, possession is to be delivered on a day certain. The last payment is to be made on another certain day subsequent; and on the completion of said payments the vendor is to convey. The two last are dependent covenants, and in an action by the vendor to recover the money, he must aver, either that he had executed or that he had tendered the deed. The averment that he was ready and willing to convey, is not sufficient.
Roach *v.* Dickinsons, 145

763 *CREDITORS.

1. What is not such a completed contract as will entitle the creditors of one of the parties to subject the profits to satisfy their debts.
Carroll & als. *v.* Tiffany, 269

2. As to creditors' suits against executors. See Executors and Administrators, No. 10, 11, 12, 13, 14, and
Stephenson *v.* Taverners, 398

CRIMES AND PUNISHMENTS.

1. The act, Code of 1849, ch. 199, § 25, p. 729, which inflicts the additional punishment of five years' imprisonment on a second conviction for felony, applies to the case of a prisoner who had been convicted and sentenced previous to the passage of the act.
Rand *v.* Commonwealth, 738

2. The act as applicable to such a case, is not ex post facto and unconstitutional. Idem, 738

3. The act does not apply to the case of a conviction for an offence committed after the commission of that for which the prisoner is on trial. Idem, 738

4. Quære: When the evidence of a former conviction should be submitted to the jury. Idem, 738

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. An indictment contains several counts, one for simple larceny, others for receiving stolen goods knowing them to be stolen, and others for aiding another person to conceal stolen goods knowing them to be stolen. The charges in all the counts, however, relate to the same goods, which in different counts, are laid to be the goods of different persons or of a person unknown. It is not a case in which the court should quash some of the counts, or compel the prosecution to elect on which count the prisoner shall be tried.
Dowdy *v.* Commonwealth, 727

2. If a prisoner's objection to a juror is improperly overruled, the error is not cured by the juror's name being struck from the panel by the prisoner, or his not being drawn as one of the twelve who are to try the prisoner. Idem, 727

3. The act, Code of 1849, ch. 208, § 34, p. 778, authorizes a prisoner who is tried on an indictment containing several counts, some of which are faulty, to move the court to instruct the jury to disregard the faulty counts. A motion to exclude evidence, which could only be applicable to a faulty count, is in effect a motion to disregard that count.
Rand *v.* Commonwealth, 738

4. In a prosecution under the act, Code ch. 199, § 25, p. 752, to subject the prisoner to the additional imprisonment on a second conviction for a felony, the indictment in that respect being defective, and evidence having been improperly admitted to prove a former conviction, the whole judgment must be reversed, and a new trial awarded. Idem, 738

5. What the indictment must set out in such a case. See Indictments, No. 1, and Idem, 738

6. Quære: When the evidence of a former conviction should be submitted to the jury. Idem, 738

DAMAGES.

1. The measure of damages in an action on a prison bounds bond, is the debt, interest and costs.
McGuire & als. *v.* Pierce, assignee, &c., 167

2. A petition for an appeal having been presented to the court before the 1st of July 1850, though an appeal was not allowed until after that date, no damages are to be allowed upon affirming the appeal.
Price *v.* Kyle, 247

3. A bill of exchange having fallen due and been protested before the act allowing three per cent. damages, and interest upon the costs of protest, went into operation, such damages and interest are not recoverable thereon.
Friend *v.* Wilkinson & Hunt, 31

4. When damages not allowed upon the dissolution of an injunction by vendee against vendor. See Vendor & Purchaser, No. 7, and
Young's adm'r & Bowyer *v.* McClung & als., 336

DECLARATION.

1. See Pleadings.

2. When the appellate court will send the cause back with leave to amend the declaration. See Appellate Court, No. 5, and
Strange *v.* Floyd, 474

DECREES.

1. A claim is made in the defendant's answer, but has no connection with the relief sought in the bill, and is not necessary to be decided in deciding upon the case

made in the bill. Though the court in its decree expresses an opinion in favor of the defendant, this decree does not conclude *the question when it is afterwards set up by the defendant by a cross bill in the cause.
764
Niday *v.* Harvey & Co. & als., 454

2. It is error to make a joint decree in favor of several persons who have been wards of the defendant's testator, when one of them is an infant, though the decree is made by consent of the next friend of the infant.

Armstrong's heirs *v.* Walkup & others, 372

3. Decree corrected on an admission in the bill and affirmed.

Boyce's adm'r & als. *v.* Smith, 704

DEEDS.

1. Under the act of October 1785 regulating conveyances, a deed made by a citizen of Virginia, and acknowledged in New York before the mayor, his certificate thereof is a sufficient authentication to authorize its admission to record.

Hasler's lessee *v.* King, 115

2. Though the certificate of acknowledgment bears date a short time before the act of October 1785 went into operation, yet having been intended to be made under that act, the authentication is sufficient to authorize its admission to record.

Idem, 115

3. Though not admitted to record within the time prescribed by the act of 1785, it was properly admitted in 1833, under the act of 1819. Idem, 115

4. The original deed having been authenticated for record, in the manner prescribed by law, is admissible as evidence without further proof of its execution, though not recorded. Idem, 115

5. In a suit for partition, both parties derive title under a deed recorded in H, but not in the county where the land lies; the subsequent conveyances through which the defendant's claim, refer to the deed as recorded in the county of H. They cannot object to its validity for want of registry in the county where the land lies.

Hannon & als. *v.* Hannah, 146

6. The recitals in the deed of a commissioner of delinquent lands, is not evidence against a party claiming adversely to the deed.

Walton *v.* Hale, 194

7. What deed of a commissioner of delinquent lands is void. See Delinquent Lands, No. 2, and Idem, 194

8. A deed conveying lands, mills thereon, and appurtenances, which includes the acre of land on the opposite side of the stream condemned for an abutment, and reserves the right to build a saw mill on the opposite side of the river, or at the further end of the dam. The reservation is too uncertain to withdraw any part of the land from the operation of the deed; and ejectment cannot be maintained for it.

Butcher *v.* Creel's heirs, 201

9. Deeds made by an old man shortly before his death, by which he conveys the whole of his property which he had not before disposed of, to one of his sons. The principle which has been applied to wills in respect to the degree of capacity sufficient to make a valid devise or disposition of his property, is equally applicable to these deeds.

Greer *v.* Greers, 330

10. The grantor not laboring under a total or temporary deprivation of reason, he is of legal capacity to make a valid disposition of his property, if he is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the objects of his bounty.

Idem, 330

11. Although a grantor or testator may labor under no legal incapacity to do a valid act, or make a contract, yet if the whole transaction taken together with all the facts, mental weakness being one of them, shows that the particular act was not attended with the consent of his will and understanding, it is void. Idem, 330

12. Monomania no way connected with the subject of a contract, will not invalidate a bond and deed made in execution of the contract.

Boyce's adm'r & als. *v.* Smith, 704

DELINQUENT LANDS.

1. The recitals in the deed of a commissioner of delinquent lands, are not evidence against a party claiming adverse to the deed.

Walton *v.* Hale, 194

2. A commissioner for the sale of delinquent lands conveys under a power, and a deed executed by him to other persons than those reported by him as the purchasers, can avail nothing where his authority to make it does not appear, unless long acquiescence and possession raises a presumption in its favor. Idem, 194

DEMURRER.

1. When a party waives his demurrer. See Practice at Common Law, No. 5, and

Roach *v.* Gardner, 89

2. See Pleadings.

3. In an action upon a protested negotiable note against the makers and endorser, *the accidental omission of the sum for which the note was given in the description of it in the declaration, where it appears from other parts of the same count, is not ground of demurrer.
765
Archer *v.* Ward, 622

DEPOSITIONS.

1. A commissioner appointed by the Circuit court to take depositions, had authority under the act, Sup. Rev. Code, p. 165, § 80,

and 1830 Sess. Acts, p. 75, ch. 62, § 2, to take depositions in a common law cause.
McGuire & als. *v.* Pierce, assignee, &c., 167

2. When an affidavit, as ground to take a deposition, will be presumed to have been made and lost.
Perkins' adm'r *v.* Hawkins' adm'x, 649

3. Deposition having been read without objection in a suit between same parties, in which there was a nonsuit, in a second suit for same cause, after great delay and death of witness, objection for want of affidavit overruled. Idem, 649

DEVISEES.

Testator charges his whole estate with the payment of his debts. Devisees must contribute ratably with legatees to pay debts.
Elliott *v.* Carter & als., 541

DISTRIBUTEES.

1. In general one distributee cannot maintain a suit to recover his distributable share of the estate, without making the other distributees parties.
Sillings & als. *v.* Bumgardner, guardian, 273

2. One distributee who is guardian of another, sues in his own name as guardian to recover his ward's interest, and obtains a decree. Appellate court will reverse the decree because he cannot thus sue, but will send the cause back that the bill may be amended and proper parties made.
Idem, 273

EJECTMENT.

When ejectment cannot be maintained under a reservation in a deed. See Deeds, No. 8, and
Butcher *v.* Creel's heirs, 201

EMANCIPATION.

A subsequent condition annexed to a provision for emancipation, is void.
Forward's adm'r *v.* Thamer, 537

ENDORSEMENTS.

1. An endorsement on a bond, though made at a subsequent day, is to be considered as a part of the bond.
Price *v.* Kyle, 247

2. An endorsement on a marriage contract of the same date, is to be considered as a part of the contract.
Eidson *v.* Fontaine, adm'r &c. & als., 286

3. An endorsement on a marriage contract, made by the husband after the marriage, cannot have any effect upon the wife's rights. Idem, 286

ENTRY.

1. A party can only make an entry of so much land as will be covered by the warrants under which it is made; and if the entry is made by specified boundaries, and these boundaries contain so much more land than his warrants authorize him to enter, that the quantity he is authorized to enter may be laid off on different lines of the entry, so that they will not embrace any part of the same land, the entry is void for uncertainty.
Harper & Weston *v.* Baugh & Seguine, 508

2. If another person makes an entry calling for the same boundaries as the first entry, and entering all the lands embraced in these boundaries not covered by the first entry, as the first entry is void for uncertainty, so also is the second entry void for uncertainty. Idem, 508

3. The party making the first entry having procured other warrants sufficient to cover all the lands within the boundaries specified in the first entry, not covered by the warrants under which the first entry was made, makes a second entry of all these lands not covered by the first entry. The first entry being void for uncertainty, the second entry is also void for the same cause. Idem, 508

4. The two entries of the first locator being in fact distinct entries, they cannot be treated as one entry covering the whole land, and thus avoid the objection for uncertainty in the entry. Idem, 508

EQUITABLE JURISDICTION AND RELIEF.

1. A judgment creditor comes into equity to set aside a deed of trust as usurious. He fails to set aside the deed, but the court having possession of the cause, will decree the sale of the land, and the 766 *application of the proceeds according to the priorities of the parties.
Martin *v.* Hall & als., 8

2. When a court of equity will not relieve against a judgment at law. See Judgments, No. 1, 2, 3, and
Slack *v.* Wood, 40
Allen, Walton & Co. *v.* Hamilton, 255
Hudson *v.* Kline, 379

3. When court will not decree specific execution of a contract for opening a lane. See Specific Execution, No. 4, and
McCue *v.* Ralston, 430

4. Upon what terms judgment debtor entitled to relief against assignor. See Practice in Chancery, No. 4, and
Drake *v.* Lyons, 54

ESTOPPEL.

1. In an action upon a bond given by deputy sheriff and his sureties, in which they are all recited to be deputies: They are estopped from denying the fact.
Cox & others *v.* Thomas' adm'x, 312

2. The bond reciting that the plaintiff was high sheriff and one of the defendants was deputy, the obligors are estopped from denying these facts. Idem, 312

3. When sheriff estopped from objecting that the County court was not properly constituted when the county levy was laid. See County Levy, No. 1, and
Cook, sheriff, & als. *v.* Hays, 142

EVIDENCE.

1. Upon a motion to exclude evidence, the party making the motion, should specify the evidence to which he objects. And where the motion is to exclude a mass of evidence, some of which is proper to be received, the motion may be properly overruled on account of its generality.
Friend *v.* Wilkinson & Hunt, 31

2. When the question is, whether a promissory note is signed as principal or agent, and that is doubtful on its face, parol evidence is admissible to prove the note was intended to be signed as principal.
Early *v.* Wilkinson & Hunt, 68

3. If a note upon its face appears to be signed as principal, the admission of parol evidence to prove it was so signed, is not error for which the judgment will be reversed; though such evidence is improper.
Idem, 68

4. Proof of the declarations of the maker of the note, as to another note executed in the same way, except as to brackets around the second name on the note, is admissible to confirm the evidence arising from the face of the note. Idem, 68

5. An original deed having been authenticated for record in the manner prescribed by law at the time of its execution, is admissible as evidence, without further proof of its execution, though it has not been duly recorded.
Hasler's lessee *v.* King, 115

6. In a suit for partition both parties derive title under a deed recorded in the county of H, but not in the county where the lands lie: The recitals in the subsequent conveyances direct attention to that deed. These recitals are evidence against parties and privies in blood, in estate and in law; and an office copy of the said deed from the place described as the place of record, is competent evidence in controversies with them.
Hannon & als. *v.* Hannah, 146

7. The recitals in a deed of a commissioner of delinquent lands, are not evidence against a party claiming adversely to the deed.
Walton *v.* Hale, 194

8. What evidence tenant will not be allowed to introduce in a controversy with his landlord. See Landlord and Tenant, No. 7, and
Emerick *v.* Tavener, &c., 220

9. On a motion by administratrix of high sheriff against deputy and his sureties, for failure to pay over money made on execution, the whole record of the cause on the motion against her, is not necessary, but the judgment is sufficient; that and its recitals being prima facie evidence against the deputy and his sureties.
Cox & als. *v.* Thomas' adm'x, 233

10. R assigns the bond of G to K, to enable K to purchase goods on the credit of the assignment, and K purchases goods of H upon the credit thereof. In an action by H against R upon the assignment, the statements of K to H in relation to said assignment, pending the negotiation for the goods and the transfer of the bond of G, are competent evidence against R: But not so the statements of K made subsequently.
Hopkins, Brother & Co. *v.* Richardson, 485

11. Declarations made by R during the consultations and conversations in relation to the assignment of the bond of G to K, though made a day or two before the bond was assigned, are competent evidence for R, as a part of the res gestæ, to show that he did not make the assignment under such circumstances, or with such intent, as would render him liable upon the assignment to the holder of the bond.
Idem, 485

767 *12. In an action upon a promissory note purporting to be made in the name of a partnership, unless the defendants file an affidavit under the statute, they will not be allowed to prove that the partnership was dissolved by the death of one of the partners before the note was made.
Phaup, &c. *v.* Stratton, 615

13. In such action the defendant will not be allowed to question the genuineness of the note, or to show that it had been altered after it was endorsed by him, without the affidavit.
Archer *v.* Ward, 622

14. What is competent evidence to corroborate other evidence of an agency.
Perkins' adm'r *v.* Hawkins' adm'x, 649

15. What competent evidence to sustain presumption of payment from lapse of time and other circumstances. Idem, 649

16. Proof being offered tending to prove an agency, a paper signed by such person, showing he had settled the price of certain hogsheads of tobacco with defendant's intestate, for plaintiff's intestate, is competent evidence of setoff. Idem, 649

17. A paper consisting of figures, with a receipt attached to it, accompanied by evidence explaining what was meant by the figures, is competent evidence.
Idem, 649

EXCEPTIONS.

1. When a bill of exceptions may be looked to in considering the question made in another bill of exceptions.
Perkins' adm'r *v.* Hawkins' adm'x, 649

2. When exceptions to a commissioner's report properly overruled, without considering their merits. See Practice in Chancery, No. 27, and
Miller *v.* Holcombe's ex'or & als., 665

EXECUTIONS.

A sheriff is entitled to commissions on a ca. sa. executed on the defendant, who, after the taking the benefit of the prison bounds, pays the amount of the execution to the plaintiff, by whom he is thereupon

discharged from custody before the return day of the execution.
Gardner *v.* Neal, 85

EXECUTORS AND ADMINISTRATORS.

1. What will constitute a devise to sell land, a power coupled with an interest. See Powers, No. 2, and
Mosby's adm'r & als. *v.* Mosby's adm'r, 584

2. Sheriff administrator with the will annexed, may execute the power.
Idem, 584

3. Upon a sale of land by executors, immediately after the property is cried out, and before anything is done, the executors accept another person as purchaser, both being men of property and credit. They will not be liable if the latter fails before the purchase money is paid.
Elliott *v.* Carter & als., 541

4. For the principles upon which the responsibility of executors will be adjudged.
Idem, 541

5. A case in which, under the circumstances, an administrator was not charged with interest on a balance in his hands, from 1826, when his account was settled, until 1846, when the family ceased to live together; and was charged with interest from the last date on the whole balance, principal and interest.
Peale *v.* Hickle & others, 437

6. In a suit for distribution, though there is a decree for the plaintiff, yet if the administrator has been in no default he shall have costs.
Eidson *v.* Fontaine, adm'r, &c. & als., 286

7. Vendor retaining title, and vendee being insolvent, a court of equity will not enforce a contract between a subsequent purchaser and one of three executors of the vendor, for the release of the lien.
Stuart's ex'ors *v.* Abbott & al., 252

8. When a surety may file a bill against the executor of his principal to have the assets marshaled and debt paid. See Sureties, No. 1, and
Stephenson *v.* Taverners, 398

9. When an account will be recommitted. See Practice in Chancery, No. 25, and
Thomas *v.* Dawson & wife, 531

10. A bill to marshal assets, or for their administration, should be on behalf of the plaintiff and all other creditors; and the heirs and devisees should be parties. But if the proper parties are not made, the bill should not be dismissed, but the plaintiff should have leave to amend and make the proper parties, unless a decree for an account has been made in another suit having the same object.
Stephenson *v.* Taverners, 398

11. If several suits are pending by different creditors, the court will order the proceedings in all but one to be stayed, and will require the several parties to come in under the decree in said suit, so that only one account of the estate may be necessary.
Idem, 398

12. A creditor who with a knowledge
768 *that there has been a decree for an account in another creditor's suit, brings a separate suit for his own claim, will be compelled to pay costs.
Idem, 398

13. A decree in one creditor's suit for an account, operates a suspension of all other pending suits of creditors; and they must come in under the decree. Idem, 398

14. When several creditors' suits are pending, the decree may be made in the cause first ready for hearing, though that is not the first suit brought. Idem, 398

15. Testator gives certain property to his wife for life, and directs that at her death his executors shall sell it and divide it among his children. After the widow's death the executor sells the property. His sureties are liable for his devastavit.
Almond & wife *v.* Mason's adm'r & als., 700

FERRIES.

When a mill owner will be compelled to keep up a ferry. See Mills, No. 8, and
Mairs *v.* Gallahue, 94

FRAUDS—Statute of.

1. Upon a contract for the exchange of land, a deed executed by one of the parties conveying his land to the other, though not delivered, is a sufficient memorandum in writing to bind the grantor, under the statute of frauds.
Parrill *v.* McKinley, 1

2. The obligee in a bond endorses his name on the back thereof for the purpose of enabling his son in law to buy goods on the faith of his endorsement; and the goods are bought. This is not an undertaking for the debt of another, to which the statute applies.
Hopkins, Brother & Co. *v.* Richardson, 485

3. A fraudulent sale of slaves is made at under value, and the price is paid to the creditors of the vendor. The purchaser is liable to the creditors of the vendor for the whole value of the slaves.
Williamson's ex'or *v.* Goodwin & als., 503

4. A deed conveying lands void as to creditors, though in lieu of slaves given by parol by grantor to grantees, they never having taken and retained possession of the slaves: And this especially, as the grantor was largely indebted at the time of the gift of the slaves.
Fones *v.* Rice & als., 568

5. In such a case the grantees being females and having married, the deed will be void as to the husbands, unless they show that the marriage took place before the creditors recovered their judgments.
Idem, 568

6. But the deed being valid between the parties, any other land of the grantor shall be first applied to pay his debts.
Idem, 568

GUARDIAN AND WARD.

1. A guardian is not authorized to file a bill in his own name to obtain possession of his ward's estate. He must file it in the name of the ward by his next friend.
Sillings & als. v. Bumgardner, guardian, 273

2. A guardian of infants is entitled to compensation for their support, though he may have promised their friends that he would not make any charge for it, and has kept no account against them.
Armstrong's heirs v. Walkup & others, 372

3. A payment made to the husband of one of three who had been wards, and who is the guardian of another of them, though intended to be a payment to all, is not to be credited against the third ward, who is then an adult, she not having authorized him to receive it; but is to be credited against the husband and wife, and his ward. Idem, 372

4. The accounts of the three wards should be stated separately, from the commencement, or at least from the time when their expenses differed in amount.
Idem, 372

5. One of the wards being still an infant, there should not be a joint decree in their favor, though made with the consent of the next friend of the infant. Idem, 372

HABEAS CORPUS.

1. The petition for a writ of habeas corpus to obtain possession of a child, may be in the name of the infant by his next friend, or in the name of the person claiming possession; and where it is the mother of the child who is claiming possession, and she is a married woman, it may be in the name of the husband and wife.
Armstrong v. Stone & wife, 102

2. The proper office of a writ of habeas corpus is to release from illegal restraint; and where the party is of years of discretion and sui juris, nothing more is done than to discharge him. But if he be not of an age to determine for himself, the court or judge must decide for him, and make an 769 order for his being *placed in the proper custody: and to do so must determine to whom the right to the custody belongs. Idem, 102

3. See Parent and Child, No. 1, and
Idem, 102

HUSBAND AND WIFE.

1. Widow renouncing her husband's will, is entitled to occupy and cultivate the farm on which the husband had lived without rent, until dower is assigned her, and she may permit another to do it for her.
McReynolds v. Counts & als., 242

2. When petition for a writ of habeas corpus may be in the name of husband and wife. See Parent and Child, No. 1, and
Armstrong v. Stone & wife, 102

3. That marriage may protect a voluntary conveyance against creditors, the marriage must take place before the creditor obtains a judgment.
Fones v. Rice & als., 568

INDICTMENTS.

1. In a prosecution under the act, Code, ch. 199, § 25, p. 729, to subject a prisoner to the additional imprisonment prescribed upon a second conviction for a felony, the indictment must set out the time and place of the first conviction, and must show that the previous conviction was for an offence committed before the commission of that for which the prisoner is on trial.
Rand v. Commonwealth, 738

2. Quære: Whether each count in the indictment must set out the former conviction, or whether one statement of that fact may be made, applicable to all the counts.
Idem, 738

INFANTS.

See Habeas Corpus, and Parent and Child.

INJUNCTIONS.

1. An injunction to a judgment at law not showing equity on its face, dissolved without answer, as improvidently granted.
Slack v. Wood, 40

2. When judgment at law will not be enjoined, to give defendant an opportunity to establish offsets against it. See Judgments, No. 3, and
Hudson v. Kline, 379

3. Pending a bill for an injunction to a judgment, and for a rescission of a contract for the purchase of land, on the ground of an incumbrance and defect of title, the vendor removes the incumbrance and procures the title. The injunction is properly dissolved, but without damages, and with costs to the plaintiff.
Young's adm'r & Bowyer v. McClung & als., 336

4. But if vendee might have obtained relief by supplemental bill or petition in another pending suit, he shall not have costs. Idem, 336

INQUISITION.

1. Upon an application to build a mill, where, upon a fair and reasonable construction of the inquisition, it is substantially responsive to the requirements of the statute, that is sufficient.
Mairs v. Gallahue, 94

2. If the petition or order of the court directing the writ of ad quod damnum, does not specify the height of the dam proposed to be erected, it is proper for the jury to specify it in the inquisition. Idem, 94

INSANITY.

See Contracts, No. 4, and
Boyce's adm'r & als. *v.* Smith, 704

ISSUE.

1. In a suit in equity, if there is no conflict in the evidence, no ambiguity or uncertainty in it, but simply a failure to prove material facts, it is improper to direct an issue.
Reed *v.* Cline's heirs, 136
Wise *v.* Lamb, 294

2. In a case of usury, if an issue is directed in the absence of proof, and there is a verdict finding the usury, still the injunction should be dissolved and the bill dismissed.
Wise *v.* Lamb, 294

3. There may be an appeal from a decree directing an issue, where the decree impliedly involves a settlement of the principles of the cause.
Reed *v.* Cline's heirs, 136

INSTRUCTIONS.

If there is any evidence before a jury tending to prove a case supposed in an instruction asked for, and the instruction propounds the law correctly, it should be given.
Hopkins, Brother & Co. *v.* Richardson, 485

JUDGMENTS.

1. An injunction to a judgment at 770 law, *dissolved as improvidently granted, without answer, though the bill charges that the judgment was recovered without appearance or defence, for money which the plaintiff in the judgment alleged he had paid as surety; though he had not in fact paid one cent of the money, but the same had been paid by another surety, against whom there was a joint judgment with the plaintiff at law; and that of this the plaintiff in the bill had no knowledge until after the judgment, and could not therefore make his defence at law.
Slack *v.* Wood, 40

2. Upon a scire facias against bail, he surrenders his principal, and gives notice thereof to the attorney of the plaintiff, the plaintiff not living in the county. But there is an office judgment against the bail, and he not defending it, it is confirmed. Equity will not relieve him.
Allen, Walton & Co. *v.* Hamilton, 255

3. In an action at law, the defendant is prevented by unavoidable accident, from making defence, and setting up offsets which he held against the plaintiff, these offsets being in no way connected with the debts sued upon; he has, however, a plain remedy at law, or in equity for the recovery of his claims. He is not entitled to enjoin the judgment, and set up his offsets against it; but must pursue his remedy for their recovery.
Hudson *v.* Kline, 379

4. A judgment is recovered by the assignee of a bond given for the purchase money of land, the contract for which is rescinded after the assignment. The debtor is not entitled to enjoin the judgment as against the assignor.
Drake *v.* Lyons, 54

5. The judgment of the Circuit court against a high sheriff is conclusive of its jurisdiction, unless reversed on appeal; and his deputy and sureties cannot question it on the motion of the administratrix of the high sheriff against them.
Cox & als. *v.* Thomas' adm'x, 323

6. When judgments of Circuit court conclusive of its jurisdiction. See Courts, No. 1, 2, and Idem, 323

7. A judgment is a lien upon land in the hands of a purchaser, though at the time of the conveyance, execution upon the judgment was suspended by an injunction. And the lien exists though the judgment was not docketed, the purchaser having had notice thereof.
Craig *v.* Sebrell, 131

JUDICIAL SALES.

See Vendor & Purchaser, No. 8, 9, 10, and
Young's adm'r & Bowyer *v.* McClung & als., 336
Bowyer *v.* Hughart, 336

JURORS.

1. It is a good objection to a juror in a case of felony that he is not a freeholder.
Dowdy *v.* Commonwealth, 727

2. If the prisoner's objection to a juror is improperly overruled, the error is not cured by the juror's name being struck from the panel by the prisoner, or his not being drawn as one of the twelve who are to try the prisoner. Idem, 727

LANDLORD AND TENANT.

T leases land to E by deed which is executed by E, and he thereby acknowledges that he is in possession under the lease, and covenants to return the possession at the end of the term. E holds over after the term expires, for seven years; and whilst in possession executes a deed by which he conveys a part of the leased premises to A in fee simple, with a covenant of general warranty, and puts A in possession; and disclaims to hold under T, who then institutes a proceeding of unlawful detainer against E and A: *held*:

1st. That E is responsible to T for the whole of the leased premises, though at the time of the institution of the proceeding, A was in possession of a part of the land.
Emerick, &c. *v.* Tavener, 220

2d. That T's recovery is not to be confined to the land in the actual occupancy of E and A, but he is entitled to recover all the land demised; and he may show by parol evidence, what constitutes the demised premises. Idem, 220

3d. That E and A were properly joined in this proceeding, though they did not

hold the land jointly, but each held a part of the land in severalty; and if only one of them held a part of the land, T is entitled to a judgment against him, though there should be a judgment for the other. Idem, 220

4th. Though if A was in actual possession of no part of the land claimed by the warrant, at the time it was issued, he would be entitled to a verdict in his favor, yet E the lessee, would be responsible to T, and there should be a judgment against him; though at the time of the issue of the warrant, he was not in the actual possession and occupancy of any part of the land. Idem, 220

5th. A having entered on the land
71 *claiming in fee under the conveyance from E, was not entitled to six months' notice to quit from T, though he had not expressly disclaimed to hold under the lease from T to E: And if he held expressly as under tenant of E, he would not be entitled to notice. When T had determined the tenancy of E by six months' notice to quit, or E had disclaimed to hold as tenant, and thereby deprived himself of the right to notice, it was competent to T to proceed at once to oust both E and A. Idem, 220

6th. The lease being for a certain quantity of land situate as therein described, and E having executed it under his hand and seal, and thereby recognized the description and boundaries therein specified, and that he then held the same in possession; and the warrant being for the precise tenement described in the lease, neither E nor A claiming under him, can be entertained to deny that the tenement had its boundaries, or that they were within them. Idem, 220

7th. E and A will not be permitted to introduce evidence of title to the land embraced in the lease, either in themselves or others; nor will they be permitted to introduce their title papers for the purpose of showing that they had not possession of the land claimed by T. Idem, 220

8th. T, if entitled to recover, may recover according to the description of the land in the warrant or in the lease; and he must at his peril, point out to the sheriff the premises of which he is to give possession: And if he takes more than he has recovered in the action, the court will interfere in a summary way, and compel him to make restitution. Idem, 220

9th. E having entered under the lease, and held over after the term expired, if T did any act recognizing him still as his tenant, E became thereby tenant from year to year, upon the conditions of the original lease. If T did not recognize the continued tenancy, E was a tenant at sufferance, and not entitled to notice to quit. Idem, 220

10th. E being in as tenant after the term has expired, he continues to hold as such as long as he remains in possession, unless he disclaims to hold as such, and asserts a right adverse to T; and such disclaimer and assertion of adverse right are brought home to the knowledge of T by a full notice by E, of his disclaimer and assertion of title: And, quære: If he must not surrender the possession to T. Idem, 220

11th. A, by entering upon a part of the land as purchaser from E, thereby becomes subject to the same relations held by E towards his lessor T; and neither could set up an adverse title, unless he showed he had restored the possession to T, or had disclaimed and held adversely, with full notice to T, for the period of limitation prescribed by the statute. Idem, 220

12th. E and A could no more deny that the possession under which E entered was the possession of T, than they could controvert his title. Idem, 220

LEGACIES AND LEGATEES.

1. Testator gives his land to his wife for her life, and at her death to his son J; and he gives his personal estate, after payment of his debts, to be equally divided among his eight children. The widow renounces the will, and takes her thirds of the real and personal estate. The rent of the two-thirds of the land not assigned to the widow, shall be applied to indemnify the legatees of the personal estate for the loss sustained by the widow's taking one-third of that fund.
McReynolds *v.* Counts & als., 242

2. After the legatees have been satisfied for the loss, or after the death of the widow, whichever event shall first occur, the said two-thirds is to be deliveved to the remainderman. Idem, 242

3. The word "loan," in a legacy of personal estate, construed to mean "give."
Parker & wife *v.* Wasley's ex'or & als., 477

4. A bequest of "all the money," held to include money deposited in a savings institution, but not debts due the testator.
Dabney & als. *v.* Cottrell's adm'x & als., 572

5. Testator charges his whole estate with payment of debts. Lands devised and legacies must contribute ratably to pay the debts.
Elliott *v.* Carter & als., 541

LIEN.

1. A case in which, between two equities, the junior preferred, and lien ousted.
Cox & al. *v.* Romine, 27

2. See Vendor and Purchaser, No. 4, 5, and
Stuart's ex'ors *v.* Abbott & al., 252

3. A judgment is a lien upon lands in the hands of a purchaser, though at the time of the purchase the judgment was enjoined: And this, though the judgment was not

docketed, the purchaser having had notice of it.
Craig *v.* Sebrell, 131
772 *4. See Assignor and Assignee, No. 4, and
Ragsdale *v.* Hagy & als., 409

LIMITATION—Statute of.

Claim by administrator for services rendered his testatrix, barred by the statute as to all due more than five years before suit brought against her in her lifetime.
Jones *v.* Jincey & als., 708

MARRIAGE CONTRACT.

1. An endorsement on a marriage contract of the same date, is to be considered as a part of the contract.
Eidson *v.* Fontaine, adm'r &c. & als., 286

2. A marriage contract by which the wife has the power to dispose of her property in her lifetime, and the husband has a life interest only in that which remains at her death. Idem, 286

MILLS.

1. In a petition for leave to erect a dam, the petition which was ore tenus, states that the applicant is owner of the banks on both sides of the stream. This is in effect, a statement that he is owner of the land.
Mairs *v.* Gallahue, 94

2. The petition states that the applicant desired a writ of ad quod damnum to issue, for the purpose of erecting a grist mill, &c. This is a sufficient compliance with the statute. Idem, 94

3. When upon a fair and reasonable construction of the inquisition, it is substantially responsive to the requirements of the statute, that is sufficient. Idem, 94

4. Where neither the petition nor the order of the court directing the writ of ad quod damnum to issue, specifies the height of the dam proposed to be erected, it is proper for the jury to specify it in the inquisition. Idem, 94

5. There is an exception for the refusal of the County court to continue the cause on account of the absence of a material witness. On appeal to the Circuit court by the exceptant, the witness is present and examined, and the judgment of the County court is affirmed. The want of the witness's testimony in the County court is no ground of complaint in the Court of appeals. Idem, 94

6. An exception is taken to the judgment of the County court authorizing the erection of the dam, on the ground that it will be injurious to the health of the neighborhood, and the evidence is stated. The Circuit court passes upon that question upon full evidence, and there is no exception. The Court of appeals must presume these courts decided right. Idem, 94

7. The judgment of the court giving leave to erect the dam, provides that the applicant shall keep a ferry boat at the crossing of a public road over the stream across which the dam is to be erected. This is authorized by the act, 2 Rev. Code, p. 277, § 5; and as the County and Circuit court have held upon the proof, that a ferry boat will be sufficient to accommodate the public, the Court of appeals will presume they acted rightly, nothing being shown to the contrary. Idem, 94

8. The duty of keeping up the ferry boat is not merely personal to the grantee of the privilege of erecting the dam, but it is a condition and incident of the grant, and attaches to it into whosoever hands it may pass. Idem, 94

9. The kind of boat to be kept must be such an one as the exigencies of the travel and trade on the road shall require. Idem, 94

10. It is the duty of the party required to keep up the ferry boat, to ferry the public over the stream without charge. Idem, 94

MISTAKE.

In a written contract for the sale and purchase of land by the acre, the purchaser will not be relieved in equity on the ground of mutual mistake as to the boundaries of the land, unless the mistake is fully and clearly proved.
Leas' ex'or *v.* Eidson, 277

MONEY.

A bequest of "all the money," held to include money deposited in a savings institution, but not debts due the testator.
Dabney & als. *v.* Cottrell's adm'x & als., 572

NORTHWESTERN BANK OF VA.

The act incorporating the Northwestern Bank of Virginia is a public act of which the courts will judicially take notice; and in an action by the bank it is not required to prove its incorporation.
Hays *v.* Northwestern Bank of Va., 127

NOTICE.

1. In an action on a bill of exchange, by the endorsee against the endorser,
773 *where it is proper to send the notice of protest by mail, and it has not arrived at as early a day as in the regular course of the mail it might have come, if started at the proper time, the onus is upon the plaintiff to prove that it was put into the mail at the proper time.
Friend *v.* Wilkinson & Hunt, 31

2. When tenant or person claiming under him, not entitled to notice. See Landlord and Tenant, No. 5, and
Emerick, &c. *v.* Tavener, 220

OVERSEERS OF THE POOR.

1. The County court makes an order against the putative father of a bastard child, that he shall pay to the overseers of the poor twenty dollars a year for seven years. Though the overseers of the poor

may never have paid anything for the support of the child, they are entitled to recover these annual sums from the putative father.
Willard *v.* Overseers of the poor of Wood county, 139

2. Upon an appeal by the overseers of the poor from a judgment of the County court in such a case, the Circuit court upon reversing the judgment, should not send the case back for a new trial, but should render a judgment in favor of the overseers of the poor for the amount appearing to be due, but without interest. Idem, 139

PARENT AND CHILD.

1. In a case of habeas corpus to obtain possession of a child, by a mother, the father being dead, the petition may be in the name of the mother and a second husband.
Armstrong *v.* Stone & wife, 102

2. The father being dead, the mother is entitled to the custody of her child, as of right; and she does not loose this right by a second marriage. But where she is seeking by the writ of habeas corpus to have the child placed in her custody, the court may exercise its discretion, and determine whether, under all the circumstances, it is best for the infant that he should be assigned to the custody of the mother.
Idem, 102

3. A case in which a female child was taken from the custody of its grandfather and grandmother, and delivered to the mother, though she was married to a second husband, all the parties being respectable.
Idem, 102

PARTIES.

1. L buys land of D and T, and gives to each his bonds for his share of the purchase money. The contract is afterwards rescinded, but before this is done, D assigns one of the bonds. On a bill to enjoin a judgment recovered on this bond by the assignee, T is not a necessary party.
Drake *v.* Lyons, 54

2. A bill is filed to subject lands to the satisfaction of a judgment, after the death of the debtor, and charges fraud in certain conveyances from the debtor to his son. The son having conveyed some of the lands to third persons, all such persons must be made parties.
Henderson *v.* Henderson's ex'x, 394

3. In a bill by a surety whose principal is dead, to compel his executor to pay the debt, the creditor is a necessary party.
Stephenson *v.* Taverners, 398

4. A bill to marshal assets and for administration, should be in behalf of all the creditors; and the heirs and devisees should be parties. Idem, 398

5. In general one distributee cannot maintain a suit to recover his distributable share of the estate, without making the other distributees parties.
Sillings & als. *v.* Bumgardner, guardian, 273

PARTITION.

In a bill for partition, where both parties claim under the same person, it is sufficient to prove the derivation of title from him, without proving his title.
Hannon & als. *v.* Hannah, 146

PARTNERS.

1. One partner having a knowledge of the debts of the partnership of which the other is ignorant, and selling out to his partner, is bound to the utmost good faith on his part. He is bound not only to disclose truly any information in his possession that may be called for, but if he perceives that the purchasing partner is laboring under incorrect views in reference to the amount of debt due by the concern, by which he may be misled into a too high offer for the interest to be sold, it is his duty to furnish all the data he may have, by which such views may be corrected, and the mischief prevented.
Sexton *v.* Sexton, 204

2. Whether a bond and deed of trust to secure it, given by a partner after the dissolution of the partnership, for a simple contract debt of the partnership, releases the other partner in equity, depends
774 *upon the intention of the parties in giving and taking them; and this intention may be ascertained from the attendant circumstances.
Niday *v.* Harvey & Co. & als., 454

3. In debt on a note signed with a partnership name, the declaration charges that the defendants by their partnership name subscribed the note; and there was no affidavit by the defendants or any one of them, putting the execution of the note in issue. They are precluded from showing that the partnership had been dissolved before the note was made, and that the person making it had no authority to execute it for the partners.
Phaup, &c. *v.* Stratton, 615

PATENTS.

Land having been granted by the commonwealth, and a party claiming under a junior patent not showing a forfeiture of the land or a transfer of the forfeited title to him, the land was not waste and unappropriated, and nothing passed by his junior grant: And as the junior patent issued after the commencement of the suit there could be no adverse possession under it.
Hannon & als. *v.* Hannah, 146

PLEADINGS.

1. In a declaration on a constable's official bond, the assignment of the breach did not set out specifically the claims put into the constable's hands, but stated that the relator had placed divers claims in his hands for collection, which were particularly set out in a receipt given by him as constable, and which was thereto annexed, marked A; and then proceeded to aver the collection of the moneys by the constable, and his failure

sume the proceedings were such as to give it jurisdiction. Idem, 323

3. When sheriff and his sureties will not be allowed to question whether the County court was properly constituted to lay a county levy. See County Levy, No. 1, and
Cook, sheriff, & als. v. Hays, 142

COVENANTS.

In a covenant for the sale of land, possession is to be delivered on a day certain. The last payment is to be made on another certain day subsequent; and on the completion of said payments the vendor is to convey. The two last are dependent covenants, and in an action by the vendor to recover the money, he must aver, either that he had executed or that he had tendered the deed. The averment that he was ready and willing to convey, is not sufficient.
Roach v. Dickinsons, 145

763 *CREDITORS.

1. What is not such a completed contract as will entitle the creditors of one of the parties to subject the profits to satisfy their debts.
Carroll & als. v. Tiffany, 269

2. As to creditors' suits against executors. See Executors and Administrators, No. 10, 11, 12, 13, 14, and
Stephenson v. Taverners, 398

CRIMES AND PUNISHMENTS.

1. The act, Code of 1849, ch. 199, § 25, p. 729, which inflicts the additional punishment of five years' imprisonment on a second conviction for felony, applies to the case of a prisoner who had been convicted and sentenced previous to the passage of the act.
Rand v. Commonwealth, 738

2. The act as applicable to such a case, is not ex post facto and unconstitutional. Idem, 738

3. The act does not apply to the case of a conviction for an offence committed after the commission of that for which the prisoner is on trial. Idem, 738

4. Quære: When the evidence of a former conviction should be submitted to the jury. Idem, 738

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. An indictment contains several counts, one for simple larceny, others for receiving stolen goods knowing them to be stolen, and others for aiding another person to conceal stolen goods knowing them to be stolen. The charges in all the counts, however, relate to the same goods, which in different counts, are laid to be the goods of different persons or of a person unknown. It is not a case in which the court should quash some of the counts, or compel the prosecution to elect on which count the prisoner shall be tried.
Dowdy v. Commonwealth, 727

2. If a prisoner's objection to a juror is improperly overruled, the error is not cured by the juror's name being struck from the panel by the prisoner, or his not being drawn as one of the twelve who are to try the prisoner. Idem, 727

3. The act, Code of 1849, ch. 208, § 34, p. 778, authorizes a prisoner who is tried on an indictment containing several counts, some of which are faulty, to move the court to instruct the jury to disregard the faulty counts. A motion to exclude evidence, which could only be applicable to a faulty count, is in effect a motion to disregard that count.
Rand v. Commonwealth, 738

4. In a prosecution under the act, Code ch. 199, § 25, p. 752, to subject the prisoner to the additional imprisonment on a second conviction for a felony, the indictment in that respect being defective, and evidence having been improperly admitted to prove a former conviction, the whole judgment must be reversed, and a new trial awarded. Idem, 738

5. What the indictment must set out in such a case. See Indictments, No. 1, and Idem, 738

6. Quære: When the evidence of a former conviction should be submitted to the jury. Idem, 738

DAMAGES.

1. The measure of damages in an action on a prison bounds bond, is the debt, interest and costs.
McGuire & als. v. Pierce, assignee, &c., 167

2. A petition for an appeal having been presented to the court before the 1st of July 1850, though an appeal was not allowed until after that date, no damages are to be allowed upon affirming the appeal.
Price v. Kyle, 247

3. A bill of exchange having fallen due and been protested before the act allowing three per cent. damages, and interest upon the costs of protest, went into operation, such damages and interest are not recoverable thereon.
Friend v. Wilkinson & Hunt, 31

4. When damages not allowed upon the dissolution of an injunction by vendee against vendor. See Vendor & Purchaser, No. 7, and
Young's adm'r & Bowyer v. McClung & als., 336

DECLARATION.

1. See Pleadings.

2. When the appellate court will send the cause back with leave to amend the declaration. See Appellate Court, No. 5, and
Strange v. Floyd, 474

DECREES.

1. A claim is made in the defendant's answer, but has no connection with the relief sought in the bill, and is not necessary to be decided in deciding upon the case

made in the bill. Though the court in its decree expresses an opinion in favor of the defendant, this decree does not conclude *the question when it is afterwards set up by the defendant by a cross bill in the cause.
764
Niday *v.* Harvey & Co. & als., 454

2. It is error to make a joint decree in favor of several persons who have been wards of the defendant's testator, when one of them is an infant, though the decree is made by consent of the next friend of the infant.

Armstrong's heirs *v.* Walkup & others, 372

3. Decree corrected on an admission in the bill and affirmed.

Boyce's adm'r & als. *v.* Smith, 704

DEEDS.

1. Under the act of October 1785 regulating conveyances, a deed made by a citizen of Virginia, and acknowledged in New York before the mayor, his certificate thereof is a sufficient authentication to authorize its admission to record.

Hasler's lessee *v.* King, 115

2. Though the certificate of acknowledgment bears date a short time before the act of October 1785 went into operation, yet having been intended to be made under that act, the authentication is sufficient to authorize its admission to record.

Idem, 115

3. Though not admitted to record within the time prescribed by the act of 1785, it was properly admitted in 1833, under the act of 1819. Idem, 115

4. The original deed having been authenticated for record, in the manner prescribed by law, is admissible as evidence without further proof of its execution, though not recorded. Idem, 115

5. In a suit for partition, both parties derive title under a deed recorded in H, but not in the county where the land lies; the subsequent conveyances through which the defendant's claim, refer to the deed as recorded in the county of H. They cannot object to its validity for want of registry in the county where the land lies.

Hannon & als. *v.* Hannah, 146

6. The recitals in the deed of a commissioner of delinquent lands, is not evidence against a party claiming adversely to the deed.

Walton *v.* Hale, 194

7. What deed of a commissioner of delinquent lands is void. See Delinquent Lands, No. 2, and Idem, 194

8. A deed conveying lands, mills thereon, and appurtenances, which includes the acre of land on the opposite side of the stream condemned for an abutment, and reserves the right to build a saw mill on the opposite side of the river, or at the further end of the dam. The reservation is too uncertain to withdraw any part of the land from the operation of the deed; and ejectment cannot be maintained for it.

Butcher *v.* Creel's heirs, 201

9. Deeds made by an old man shortly before his death, by which he conveys the whole of his property which he had not before disposed of, to one of his sons. The principle which has been applied to wills in respect to the degree of capacity sufficient to make a valid devise or disposition of his property, is equally applicable to these deeds.

Greer *v.* Greers, 330

10. The grantor not laboring under a total or temporary deprivation of reason, he is of legal capacity to make a valid disposition of his property, if he is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the objects of his bounty.

Idem, 330

11. Although a grantor or testator may labor under no legal incapacity to do a valid act, or make a contract, yet if the whole transaction taken together with all the facts, mental weakness being one of them, shows that the particular act was not attended with the consent of his will and understanding, it is void. Idem, 330

12. Monomania no way connected with the subject of a contract, will not invalidate a bond and deed made in execution of the contract.

Boyce's adm'r & als. *v.* Smith, 704

DELINQUENT LANDS.

1. The recitals in the deed of a commissioner of delinquent lands, are not evidence against a party claiming adverse to the deed.

Walton *v.* Hale, 194

2. A commissioner for the sale of delinquent lands conveys under a power, and a deed executed by him to other persons than those reported by him as the purchasers, can avail nothing where his authority to make it does not appear, unless long acquiescence and possession raises a presumption in its favor. Idem, 194

DEMURRER.

1. When a party waives his demurrer. See Practice at Common Law, No. 5, and

Roach *v.* Gardner, 89

2. See Pleadings.

3. In an action upon a protested negotiable note against the makers and endorser, *the accidental omission of the sum for which the note was given in the description of it in the declaration, where it appears from other parts of the same count, is not ground of demurrer.
765

Archer *v.* Ward, 622

DEPOSITIONS.

1. A commissioner appointed by the Circuit court to take depositions, had authority under the act, Sup. Rev. Code, p. 165, § 80,

and 1830 Sess. Acts, p. 75, ch. 62, § 2, to take depositions in a common law cause.
McGuire & als. *v.* Pierce, assignee, &c., 167

2. When an affidavit, as ground to take a deposition, will be presumed to have been made and lost.
Perkins' adm'r *v.* Hawkins' adm'x, 649

3. Deposition having been read without objection in a suit between same parties, in which there was a nonsuit, in a second suit for same cause, after great delay and death of witness, objection for want of affidavit overruled. Idem, 649

DEVISEES.

Testator charges his whole estate with the payment of his debts. Devisees must contribute ratably with legatees to pay debts.
Elliott *v.* Carter & als., 541

DISTRIBUTEES.

1. In general one distributee cannot maintain a suit to recover his distributable share of the estate, without making the other distributees parties.
Sillings & als. *v.* Bumgardner, guardian, 273

2. One distributee who is guardian of another, sues in his own name as guardian to recover his ward's interest, and obtains a decree. Appellate court will reverse the decree because he cannot thus sue, but will send the cause back that the bill may be amended and proper parties made. Idem, 273

EJECTMENT.

When ejectment cannot be maintained under a reservation in a deed. See Deeds, No. 8, and
Butcher *v.* Creel's heirs, 201

EMANCIPATION.

A subsequent condition annexed to a provision for emancipation, is void.
Forward's adm'r *v.* Thamer, 537

ENDORSEMENTS.

1. An endorsement on a bond, though made at a subsequent day, is to be considered as a part of the bond.
Price *v.* Kyle, 247

2. An endorsement on a marriage contract of the same date, is to be considered as a part of the contract.
Eidson *v.* Fontaine, adm'r &c. & als., 286

3. An endorsement on a marriage contract, made by the husband after the marriage, cannot have any effect upon the wife's rights. Idem, 286

ENTRY.

1. A party can only make an entry of so much land as will be covered by the warrants under which it is made; and if the entry is made by specified boundaries, and these boundaries contain so much more land than his warrants authorize him to enter, that the quantity he is authorized to enter may be laid off on different lines of the entry, so that they will not embrace any part of the same land, the entry is void for uncertainty.
Harper & Weston *v.* Baugh & Seguine, 508

2. If another person makes an entry calling for the same boundaries as the first entry, and entering all the lands embraced in these boundaries not covered by the first entry, as the first entry is void for uncertainty, so also is the second entry void for uncertainty. Idem, 508

3. The party making the first entry having procured other warrants sufficient to cover all the lands within the boundaries specified in the first entry, not covered by the warrants under which the first entry was made, makes a second entry of all these lands not covered by the first entry. The first entry being void for uncertainty, the second entry is also void for the same cause. Idem, 508

4. The two entries of the first locator being in fact distinct entries, they cannot be treated as one entry covering the whole land, and thus avoid the objection for uncertainty in the entry. Idem, 508

EQUITABLE JURISDICTION AND RELIEF.

1. A judgment creditor comes into equity to set aside a deed of trust as usurious. He fails to set aside the deed, but the court having possession of the cause, will decree the sale of the land, and the 766 *application of the proceeds according to the priorities of the parties.
Martin *v.* Hall & als., 8

2. When a court of equity will not relieve against a judgment at law. See Judgments, No. 1, 2, 3, and
Slack *v.* Wood, 40
Allen, Walton & Co. *v.* Hamilton, 255
Hudson *v.* Kline, 379

3. When court will not decree specific execution of a contract for opening a lane. See Specific Execution, No. 4, and
McCue *v.* Ralston, 430

4. Upon what terms judgment debtor entitled to relief against assignor. See Practice in Chancery, No. 4, and
Drake *v.* Lyons, 54

ESTOPPEL.

1. In an action upon a bond given by deputy sheriff and his sureties, in which they are all recited to be deputies: They are estopped from denying the fact.
Cox & others *v.* Thomas' adm'x, 312

2. The bond reciting that the plaintiff was high sheriff and one of the defendants was deputy, the obligors are estopped from denying these facts. Idem, 312

3. When sheriff estopped from objecting that the County court was not properly constituted when the county levy was laid. See County Levy, No. 1, and
Cook, sheriff, & als. *v.* Hays, 142

EVIDENCE.

1. Upon a motion to exclude evidence, the party making the motion, should specify the evidence to which he objects. And where the motion is to exclude a mass of evidence, some of which is proper to be received, the motion may be properly overruled on account of its generality.
Friend *v.* Wilkinson & Hunt, 31

2. When the question is, whether a promissory note is signed as principal or agent, and that is doubtful on its face, parol evidence is admissible to prove the note was intended to be signed as principal.
Early *v.* Wilkinson & Hunt, 68

3. If a note upon its face appears to be signed as principal, the admission of parol evidence to prove it was so signed, is not error for which the judgment will be reversed; though such evidence is improper.
Idem, 68

4. Proof of the declarations of the maker of the note, as to another note executed in the same way, except as to brackets around the second name on the note, is admissible to confirm the evidence arising from the face of the note. Idem, 68

5. An original deed having been authenticated for record in the manner prescribed by law at the time of its execution, is admissible as evidence, without further proof of its execution, though it has not been duly recorded.
Hasler's lessee *v.* King, 115

6. In a suit for partition both parties derive title under a deed recorded in the county of H, but not in the county where the lands lie: The recitals in the subsequent conveyances direct attention to that deed. These recitals are evidence against parties and privies in blood, in estate and in law; and an office copy of the said deed from the place described as the place of record, is competent evidence in controversies with them.
Hannon & als. *v.* Hannah, 146

7. The recitals in a deed of a commissioner of delinquent lands, are not evidence against a party claiming adversely to the deed.
Walton *v.* Hale, 194

8. What evidence tenant will not be allowed to introduce in a controversy with his landlord. See Landlord and Tenant, No. 7, and
Emerick *v.* Tavener, &c., 220

9. On a motion by administratrix of high sheriff against deputy and his sureties, for failure to pay over money made on execution, the whole record of the cause on the motion against her, is not necessary, but the judgment is sufficient; that and its recitals being prima facie evidence against the deputy and his sureties.
Cox & als. *v.* Thomas' adm'x, 233

10. R assigns the bond of G to K, to enable K to purchase goods on the credit of the assignment, and K purchases goods of H upon the credit thereof. In an action by H against R upon the assignment, the statements of K to H in relation to said assignment, pending the negotiation for the goods and the transfer of the bond of G, are competent evidence against R: But not so the statements of K made subsequently.
Hopkins, Brother & Co. *v.* Richardson, 485

11. Declarations made by R during the consultations and conversations in relation to the assignment of the bond of G to K, though made a day or two before the bond was assigned, are competent evidence for R, as a part of the res gestæ, to show that he did not make the assignment under such circumstances, or with such intent, as would render him liable upon the assignment to the holder of the bond.
Idem, 485

767 *12. In an action upon a promissory note purporting to be made in the name of a partnership, unless the defendants file an affidavit under the statute, they will not be allowed to prove that the partnership was dissolved by the death of one of the partners before the note was made.
Phaup, &c. *v.* Stratton, 615

13. In such action the defendant will not be allowed to question the genuineness of the note, or to show that it had been altered after it was endorsed by him, without the affidavit.
Archer *v.* Ward, 622

14. What is competent evidence to corroborate other evidence of an agency.
Perkins' adm'r *v.* Hawkins' adm'x, 649

15. What competent evidence to sustain presumption of payment from lapse of time and other circumstances. Idem, 649

16. Proof being offered tending to prove an agency, a paper signed by such person, showing he had settled the price of certain hogsheads of tobacco with defendant's intestate, for plaintiff's intestate, is competent evidence of setoff. Idem, 649

17. A paper consisting of figures, with a receipt attached to it, accompanied by evidence explaining what was meant by the figures, is competent evidence.
Idem, 649

EXCEPTIONS.

1. When a bill of exceptions may be looked to in considering the question made in another bill of exceptions.
Perkins' adm'r *v.* Hawkins' adm'x, 649

2. When exceptions to a commissioner's report properly overruled, without considering their merits. See Practice in Chancery, No. 27, and
Miller *v.* Holcombe's ex'or & als., 665

EXECUTIONS.

A sheriff is entitled to commissions on a ca. sa. executed on the defendant, who, after the taking the benefit of the prison bounds, pays the amount of the execution to the plaintiff, by whom he is thereupon

discharged from custody before the return day of the execution.
Gardner *v.* Neal, 85

EXECUTORS AND ADMINISTRATORS.

1. What will constitute a devise to sell land, a power coupled with an interest. See Powers, No. 2, and
Mosby's adm'r & als. *v.* Mosby's adm'r, 584

2. Sheriff administrator with the will annexed, may execute the power.
Idem, 584

3. Upon a sale of land by executors, immediately after the property is cried out, and before anything is done, the executors accept another person as purchaser, both being men of property and credit. They will not be liable if the latter fails before the purchase money is paid.
Elliott *v.* Carter & als., 541

4. For the principles upon which the responsibility of executors will be adjudged.
Idem, 541

5. A case in which, under the circumstances, an administrator was not charged with interest on a balance in his hands, from 1826, when his account was settled, until 1846, when the family ceased to live together; and was charged with interest from the last date on the whole balance, principal and interest.
Peale *v.* Hickle & others, 437

6. In a suit for distribution, though there is a decree for the plaintiff, yet if the administrator has been in no default he shall have costs.
Eidson *v.* Fontaine, adm'r, &c. & als., 286

7. Vendor retaining title, and vendee being insolvent, a court of equity will not enforce a contract between a subsequent purchaser and one of three executors of the vendor, for the release of the lien.
Stuart's ex'ors *v.* Abbott & al., 252

8. When a surety may file a bill against the executor of his principal to have the assets marshaled and debt paid. See Sureties, No. 1, and
Stephenson *v.* Taverners, 398

9. When an account will be recommitted. See Practice in Chancery, No. 25, and
Thomas *v.* Dawson & wife, 531

10. A bill to marshal assets, or for their administration, should be on behalf of the plaintiff and all other creditors; and the heirs and devisees should be parties. But if the proper parties are not made, the bill should not be dismissed, but the plaintiff should have leave to amend and make the proper parties, unless a decree for an account has been made in another suit having the same object.
Stephenson *v.* Taverners, 398

11. If several suits are pending by different creditors, the court will order the proceedings in all but one to be stayed, and will require the several parties to come in under the decree in said suit, so that only one account of the estate may be necessary.
Idem, 398

12. A creditor who with a knowledge
768 *that there has been a decree for an account in another creditor's suit, brings a separate suit for his own claim, will be compelled to pay costs.
Idem, 398

13. A decree in one creditor's suit for an account, operates a suspension of all other pending suits of creditors; and they must come in under the decree. Idem, 398

14. When several creditors' suits are pending, the decree may be made in the cause first ready for hearing, though that is not the first suit brought. Idem, 398

15. Testator gives certain property to his wife for life, and directs that at her death his executors shall sell it and divide it among his children. After the widow's death the executor sells the property. His sureties are liable for his devastavit.
Almond & wife *v.* Mason's adm'r & als., 700

FERRIES.

When a mill owner will be compelled to keep up a ferry. See Mills, No. 8, and
Mairs *v.* Gallahue, 94

FRAUDS—Statute of.

1. Upon a contract for the exchange of land, a deed executed by one of the parties conveying his land to the other, though not delivered, is a sufficient memorandum in writing to bind the grantor, under the statute of frauds.
Parrill *v.* McKinley, 1

2. The obligee in a bond endorses his name on the back thereof for the purpose of enabling his son in law to buy goods on the faith of his endorsement; and the goods are bought. This is not an undertaking for the debt of another, to which the statute applies.
Hopkins, Brother & Co. *v.* Richardson, 485

3. A fraudulent sale of slaves is made at under value, and the price is paid to the creditors of the vendor. The purchaser is liable to the creditors of the vendor for the whole value of the slaves.
Williamson's ex'or *v.* Goodwin & als., 503

4. A deed conveying lands void as to creditors, though in lieu of slaves given by parol by grantor to grantees, they never having taken and retained possession of the slaves: And this especially, as the grantor was largely indebted at the time of the gift of the slaves.
Fones *v.* Rice & als., 568

5. In such a case the grantees being females and having married, the deed will be void as to the husbands, unless they show that the marriage took place before the creditors recovered their judgments.
Idem, 568

6. But the deed being valid between the parties, any other land of the grantor shall be first applied to pay his debts.
Idem, 568

GUARDIAN AND WARD.

1. A guardian is not authorized to file a bill in his own name to obtain possession of his ward's estate. He must file it in the name of the ward by his next friend.
Sillings & als. *v.* Bumgardner, guardian, 273

2. A guardian of infants is entitled to compensation for their support, though he may have promised their friends that he would not make any charge for it, and has kept no account against them.
Armstrong's heirs *v.* Walkup & others, 372

3. A payment made to the husband of one of three who had been wards, and who is the guardian of another of them, though intended to be a payment to all, is not to be credited against the third ward, who is then an adult, she not having authorized him to receive it; but is to be credited against the husband and wife, and his ward. Idem, 372

4. The accounts of the three wards should be stated separately, from the commencement, or at least from the time when their expenses differed in amount.
Idem, 372

5. One of the wards being still an infant, there should not be a joint decree in their favor, though made with the consent of the next friend of the infant. Idem, 372

HABEAS CORPUS.

1. The petition for a writ of habeas corpus to obtain possession of a child, may be in the name of the infant by his next friend, or in the name of the person claiming possession; and where it is the mother of the child who is claiming possession, and she is a married woman, it may be in the name of the husband and wife.
Armstrong *v.* Stone & wife, 102

2. The proper office of a writ of habeas corpus is to release from illegal restraint; and where the party is of years of discretion and sui juris, nothing more is done than to discharge him. But if he be not of an age to determine for himself, the court or judge must decide for him, and make an 769 order for his being *placed in the proper custody: and to do so must determine to whom the right to the custody belongs. Idem, 102

3. See Parent and Child, No. 1, and
Idem, 102

HUSBAND AND WIFE.

1. Widow renouncing her husband's will, is entitled to occupy and cultivate the farm on which the husband had lived without rent, until dower is assigned her, and she may permit another to do it for her.
McReynolds *v.* Counts & als., 242

2. When petition for a writ of habeas corpus may be in the name of husband and wife. See Parent and Child, No. 1, and
Armstrong *v.* Stone & wife, 102

3. That marriage may protect a voluntary conveyance against creditors, the marriage must take place before the creditor obtains a judgment.
Fones *v.* Rice & als., 568

INDICTMENTS.

1. In a prosecution under the act, Code, ch. 199, § 25, p. 729, to subject a prisoner to the additional imprisonment prescribed upon a second conviction for a felony, the indictment must set out the time and place of the first conviction, and must show that the previous conviction was for an offence committed before the commission of that for which the prisoner is on trial.
Rand *v.* Commonwealth, 738

2. Quære: Whether each count in the indictment must set out the former conviction, or whether one statement of that fact may be made, applicable to all the counts.
Idem, 738

INFANTS.

See Habeas Corpus, and Parent and Child.

INJUNCTIONS.

1. An injunction to a judgment at law not showing equity on its face, dissolved without answer, as improvidently granted.
Slack *v.* Wood, 40

2. When judgment at law will not be enjoined, to give defendant an opportunity to establish offsets against it. See Judgments, No. 3, and
Hudson *v.* Kline, 379

3. Pending a bill for an injunction to a judgment, and for a rescission of a contract for the purchase of land, on the ground of an incumbrance and defect of title, the vendor removes the incumbrance and procures the title. The injunction is properly dissolved, but without damages, and with costs to the plaintiff.
Young's adm'r & Bowyer *v.* McClung & als., 336

4. But if vendee might have obtained relief by supplemental bill or petition in another pending suit, he shall not have costs. Idem, 336

INQUISITION.

1. Upon an application to build a mill, where, upon a fair and reasonable construction of the inquisition, it is substantially responsive to the requirements of the statute, that is sufficient.
Mairs *v.* Gallahue, 94

2. If the petition or order of the court directing the writ of ad quod damnum, does not specify the height of the dam proposed to be erected, it is proper for the jury to specify it in the inquisition. Idem, 94

3. The act, Code, p. 613, in relation to the writ of habeas corpus, construed in
Armstrong *v.* Stone & wife, 102

4. The charter of the Northwestern Bank of Virginia, construed in
Hays *v.* Northwestern Bank of Virginia, 127

5. The act, Code, ch. 208, § 4, 9, 10, in relation to jurors, construed in
Dowdy *v.* Commonwealth, 727

6. The act, Code, ch. 199, § 25, p. 752, in relation to additional punishment for a second offence in felony, construed in
Rand *v.* Commonwealth, 738

7. The act, Code, ch. 208, § 34, p. 778, in relation to several counts in an indictment, construed in. Idem, 738

8. The act, 1 Rev. Code of 1819, ch. 104, § 52, p. 388, in relation to sheriffs' administrators, construed in
Mosby's adm'r & als. *v.* Mosby's adm'r, 584

SUBSCRIPTIONS.

1. A subscription of money for the accomplishment of an object, like any other promise or offer, may be conditional. If particular terms are prescribed in the subscription paper, these terms are themselves conditions, which must be complied with before the subscription is binding.
Galt's ex'or & als. *v.* Swain, 633

2. To make a subscription binding, it must be acceded to, and the party must be apprised that his offer is accepted; and this must be done in a reasonable time.
Idem, 633

3. A subscription, like any other promise or offer, requires a consideration to support it, either of profit to the party making it, or of loss to the other party.
Idem, 633

4. If a subscription be acceded to in the terms in which it is made, and labor and money are expended on the faith thereof, the party making the subscription is bound thereby. Idem, 633

SURETIES.

1. A surety whose principal is dead, may file a bill quia timet against the creditor and the executor of the debtor, to compel the latter to pay the debt, so as to exonerate the surety from his responsibility. He may enforce for his exoneration any lien of the creditor on the estate of his principal, and may bring any suit in equity which the creditor could bring, for a settlement of the administration and account of the assets, whether legal or equitable; but the creditor must be a party, that he may receive the money when it is recovered.
Stephenson *v.* Taverners, 398

2. For what sureties of administrator with the will annexed liable. See Executors and Administrators, No. 15, and
Almond & wife *v.* Mason's adm'r & als., 700

3. A levy of an execution having been made in the first year of a high sheriff's term of office, his sureties for that year will be responsible for the failure of the deputy to pay over the money, though it was not received until a venditioni exponas issued after the expiration of the high sheriff's term.
Tyree & als. *v.* Wilson, 59

4. As to sureties of deputy sheriffs, see Sheriffs, No. 13, 14, 16, 17, 18, 19, 23, and
Cox & others *v.* Thomas' adm'x, 312
Cox & als. *v.* Thomas' adm'x, 323
Miller *v.* Jones & als., 584

782 *SURVEYORS.

1. It is not the duty of a surveyor of a county to furnish a warrant, and make an entry for any person, and a promise by him without consideration, to do this, will not entitle the party to an action of assumpsit against him.
Hale *v.* Crow & wife, 263

2. The surveyor is to survey any land that any person may enter and require him to survey, though he knows it has been entered and surveyed previously, for another person. Idem, 263

TENANT IN COMMON.

1. The payment of taxes on an undivided third of a tract of land, or a conveyance of a portion by metes and bounds, not followed by actual entry and possession, does not constitute an actual ouster by one tenant in common of his cotenant.
Hannon & als. *v.* Hannah, 146

2 Quære: If a tenant in common of an undivided interest in land, may not maintain a caveat against the issuing of a grant to a third person, upon a survey of part of the land embraced within the limits of the grant in which he holds an undivided interest.
Walton *v.* Hale, 194

TRESPASS.

1. In an action of trespass, assault and battery, the plea is "son assault demesne," and the replication is "de injuria." It is the plaintiff's right to introduce his evidence first.
Young *v.* Highland, 16

2. In such a case, if the defendant is permitted to commence and introduce his evidence first, it is still the right of the plaintiff to introduce his evidence to prove the assault and battery charged in the declaration. Idem, 16

TRUSTS AND TRUSTEES.

1. A deed of trust is made to secure certain creditors, for some of whose debts sureties are bound; and the deed directs the trustees so to dispose of the trust property that no surety in the said debts suffer or be injured on account thereof. The debts for which sureties are bound are preferred debts, and to be first paid.
Miller *v.* Holcombe's ex'or & als., 665

2. Property is conveyed to trustees to be

sold for the payment of creditors of the grantor. Under the circumstances of the case, both trustees are responsible for the application of the whole of the trust fund.
Idem, 665

3. Trustees having sold slaves, a part of the trust subject, to three partners, all of whom were men of wealth, without taking any security for the price, and having permitted them to retain it for years, until they all became insolvent, are personally responsible for the amount of the trust fund so lost. Idem, 665

4. A trustee making a compromise with a third person, in relation to the trust subject, though he may purchase the subject for himself, is bound to account for all the profits made on the transaction.
Idem, 665

5. For the principles on which trustees who act bona fide, will be held responsible.
Elliott *v.* Carter & als., 541

TURNPIKES.

For the construction of the statutes in relation to the turnpike over Price's mountain, see
Price's heirs *v.* Price's adm'r, 45

USURY.

1. A deed of trust upon land is executed to secure a usurious debt. Afterwards a new bond is executed, from which all the usurious premium is excluded, and it is agreed between the parties that the deed of trust shall stand as a security for the new bond. Subsequent to this agreement, a third party recovers a judgment against the grantor, upon a bond executed before the deed was made, and files a bill to set aside the deed as usurious. The parties having by their agreement, done all that a court of equity would have done, and having agreed that the deed of trust should stand as a security for the second bond, that agreement is valid, and the deed is a valid security for the bond.
Martin *v.* Hall & als., 8

2. In a controversy between the obligor and assignee of a bond, the obligee is not a competent witness to prove the usury.
Wise *v.* Lamb, 294

3. The answer explicitly denying the allegations of the bill as to the usury, and there being no competent evidence to prove it, an injunction obtained to the judgment at law, should be dissolved, and if the cause is ready for a hearing, the bill should be dismissed. Idem, 294

4. An issue should not be directed in such a case; and if directed and there is
83 *a verdict finding the usury, the injunction is still to be dissolved and the bill dismissed. Idem, 294

VARIANCE.

1. See Pleadings, No. 2, and
Friend *v.* Woods, 37

2. See Practice at Common Law, No. 1, and
Governor for Davis *v.* Roach & als., 13

VENDOR AND PURCHASER.

1. A sells and conveys land to M, and takes bonds for the purchase money, retaining the vendor's lien, one of which bonds he assigns to R. M sells part of the land to C, and before he conveys, it is agreed between M, C and R, that C shall execute his bond to R, in lieu of the bond of M assigned to R by A, and that R shall retain his lien on the land. Before M conveys to C, C by contract in writing, sells the land to M W, who pays a part of the purchase money to C, without notice of R's lien. There is a conveyance by M to C, but no conveyance by C to M W. R files his bill to subject the land to the satisfaction of his debt: *held*:

1st. That R had a lien upon the land in the possession of C, as such was the intention of the parties.

2d. But M W having been permitted to take possession of the property, to hold it for a time, and make payments for it without notice, his equity shall be preferred to that of R, and the land shall only be liable to the extent of the purchase money unpaid at the time M W received notice of R's lien.

3d. Quære: If R would have had a lien upon the land in the hands of C, in the absence of evidence that such was the intention of the parties.
Cox, &c. *v.* Romine, 27

2. L buys land of D and T, and executes to each, bonds for his share of the purchase money. The contract is afterwards rescinded; but before this is done, D assigns one of the bonds executed to him. L is entitled to recover from D the amount of the bond; but D being liable as assignor of that bond, L is not to collect the amount until he shall have paid off the judgment upon the bond, or D is otherwise released from his liability as assignor.
Drake *v.* Lyons, 54

3. A vendor retaining the title retains a lien upon the land for the purchase money in the hands of a second purchaser.
Stuart's ex'ors *v.* Abbott & al., 252

4. The vendee being insolvent, a contract between one of the executors of the vendor and the second purchaser, which is doubtful in its import, will not be construed into an agreement to release the lien upon the land. Idem, 252

5. If one of the ex'ors does contract to release the lien, it being the only security for the debt, it will not be enforced in a court of equity against the executors.
Idem, 252

6. In a contract for the sale of land by the acre, the purchaser will not be relieved in equity on the ground of a mutual mistake as to the boundaries of the land, unless the mistake is fully and clearly made out.
Leas' ex'or *v.* Eidson, 277

7. Pending a bill for an injunction to a judgment, and for the rescission of a contract for the purchase of land on the ground of an incumbrance and defect of title,

vendor removes the incumbrance, and procures the title. The injunction is properly dissolved, but without damages, and with costs to the plaintiff.

Young's adm'r & Bowyer *v.* McClung & als., 336

8. The title having been obtained by a suit in equity, by the assignee of the purchase money, in which a conveyance was decreed; after the decree, but before the conveyance is made, a son of the vendor files a bill in another court, in which he falsely and fraudulently alleges that he had paid off the incumbrance on the land and retained the lien; and with the fraudulent connivance of the vendor, who is insolvent, he obtains a decree for the sale of the land to satisfy his pretended lien; and the land is sold and the sale is confirmed: *held*, that the conveyance to the vendee having been made in pursuance of a contract entered into long before the commencement of the suit by the son of the vendor, and in obedience to a decree made before the commencement of that suit, the deed had relation back to the date of the contract, or at least to the date of the decree directing it; and therefore the decree and sale in the son's suit is inoperative against the title of the vendee, and gives him no equity for an injunction and rescission of the contract.

Idem, 336

9. The decree in the son's suit may, and must if necessary for the protection of the vendor and his assignee, be held to be wholly inoperative as to them.

Idem, 336

10. The purchaser under the decree in the son's suit having been conusant of the proceedings in the suits of the vendee to enjoin the purchase money, and of the as-
784 signee to procure the title, *and being in fact bound as surety for that purchase money, and having purchased and permitted the sale to be confirmed without objection, is not entitled to be relieved from his purchase, and from paying his purchase money, though he acquires no valid title to the land purchased by him.

Idem, 336

Bowyer *v.* Hughart, 336

11. Though purchaser may come into equity to enjoin a judgment for defect of title, and though the title is afterwards procured, he will be entitled to his costs, yet if there was another suit in which he might have had the relief, by petition or supplemental bill, he will not be allowed his costs. Idem, 336

12. A vendee of land being entitled to come into equity to enjoin a judgment recovered by an assignee of a bond given fo the purchase money, on the ground of diffi culties in the title, though the title is de creed to him in the suit, he is entitled t set up in equity offsets which he hel against the vendor prior to the assignment and he was not bound to plead them at law

Ragsdale *v.* Hagy & others, 40

WASTE AND UNAPPROPRIATED LAND.

See Entry.

WILLS.

1. Testator not laboring under a total o temporary deprivation of reason, he is o legal capacity to make a valid dispositio of his property, if he is capable of recol lecting the property he is about to dispos of, the manner of distributing it, and th objects of his bounty.

Greer *v.* Greers, 33

2. Although the testator may labor unde no legal incapacity to do a valid act, yet i the whole transaction taken together wit all the facts, mental weakness being one o them, shows that the particular act wa not attended with the consent of his wil and understanding, it is void.

Idem, 33

3. Testator by one clause of his will says I loan to my daughter M a negro girl C an 200 dollars in cash, which is her full shar of my estate. By a codicil to his will h says, I loan to my daughter M 300 dollars in lieu of a negro girl named C, which loaned her in my will. M takes the abso lute interest in the legacy.

Parker & wife *v.* Wasley's ex'or & als., 47

4. Every part of a will considered in as certaining the construction of one of th legacies in it. Idem, 47

5. A devise of a plantation on which tes tator resided, held to carry with it a coa property which was on the same tract o land, but which was leased separately a the time of making the will.

Dabney & als. *v.* Cottrell's adm'x & als., 57

6. A bequest of "all the money," held t include money deposited in a savings in stitution, but not debts due the testator.

Idem, 57

WITNESS.

In a controversy between the obligor an assignee of a bond, the obligee is not a competent witness to prove usury in th bond.

Wise *v.* Lamb, 29

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

BY PEACHY R. GRATTAN.

VOLUME X.

FROM APRIL 1, 1853, TO APRIL 1, 1854.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

JOHN J. ALLEN, PRESIDENT.

WILLIAM DANIEL, RICHARD C. L. MONCURE,

GEORGE H. LEE, GREEN B. SAMUELS.

Attorney General: WILLIS P. BOCOCK.

Entered according to the Act of Congress, in the year one thousand eight hundred and fifty-five, for the

COMMONWEALTH OF VIRGINIA,

In the Clerk's Office of the Eastern District of Virginia.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Johnson's Ex'x v. Jennings' Adm'r.

April Term, 1853, Richmond.

[60 Am. Dec. 323.]

(Absent DANIEL, J.)

1. **Contracts—Failure of Consideration*—Recovery of Money Paid.**—To entitle a party to recover back money which he has paid upon a contract which has been wholly rescinded, or the consideration of which has wholly failed, he must not have been guilty of any fraud or illegal conduct in the transaction.

2. **Same — Same — Same — Common Count — Special Count.†**—In such case, the usual and better mode of counting is the common count for money had and received. But if the plaintiff declares specially, it must appear with sufficient certainty from the facts so set out, or from apt averments, made in the count, that the consideration has wholly failed, and that such failure did not proceed from any fraud or illegal conduct on the part of the plaintiff.

3. **Assumpsit—Plea of Statute of Limitations—Special Replication—Case at Bar.**—In an action of *assumpsit* against an administrator, he pleads the statute of limitations. It is no answer to the plea, that the defendant's intestate sold to plaintiff slaves in payment of the debt declared on, and that the defendant, since the death of his intestate, had, as administrator, sued for, and upon the title alone, without regard to intestate's indebtedness to the plaintiff, had recovered the said slaves from the plaintiff within five years before the action brought.

2 *4. **Exceptions—Admission of Improper Evidence—What Bill Must State.**—A party complaining of the admission of improper evidence, must state the facts in his bill of exceptions, from which it will appear affirmatively to the appellate court, that the evidence was improper.

5. **Assumpsit—Defences‡—Case at Bar.**—In an action of *assumpsit* for various sums of money lent to or paid for the defendant's intestate, though payments or setoffs cannot be proved without an account of such payments or setoffs filed, yet defendant may prove that the money sued for or any part of it was not lent to or advanced for the intestate, but was paid out of money of the intestate in the hands of the plaintiff.

6. **Same—Two Pleas—Verdict on One Plea—Effect of Admission of Improper Evidence as to the Other.**—In such action, the issues being on *nonassumpsit*, and the statute of limitations, and the verdict being for the defendant alone on the latter plea, the admission of improper evidence having reference to the issue on the first plea only, and which could have no influence on the issue on the last plea, is not ground for reversing the judgment.

7. **Appellate Practice—Evidence—Exception to Question Asked—Failure of Bill to State Answer.§**—A question is propounded to a witness, which is objected to, but the objection is overruled, and an

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***Contracts—Failure of Consideration—Assumpsit.**—That assumpsit will lie for money paid under an agreement for a consideration that wholly failed, see Garber v. Armentrout, 32 Gratt. 235, and *foot-note*; Bier v. Smith, 25 W. Va. 834; Brockenbrough v. Ward, 4 Rand. 352. See also, monographic *note* on "Assumpsit" appended to Kennaird v. Jones, 9 Gratt. 183.

†**Same—Same—Same—Special Count.**—Buena Vista Co. v. McCandlish, 92 Va. 302, 23 S. E. Rep. 781, and Haigh v. U. S., etc., Ass'n, 19 W. Va. 802, approve the proposition that where money has been paid on a contract which has been wholly rescinded, or the consideration of which has wholly failed, if the party has been guilty of no fraud or illegal conduct, he may recover back his money under the common count for money had and received, or on a special count properly setting out the facts, from which the cause of action arose.

See generally, monographic *note* on "Consideration" appended to Jones v. Obenchain, 10 Gratt. 259.

Exceptions—Admission of Improper Evidence—What Bill Must State.—See Beirne v. Rosser, 26 Gratt. 537, and *foot-note*. And see also, the principal case approved in Carlton v. Mays, 8 W. Va. 246.

‡**Assumpsit—Defences.**—In Richmond City, etc., Ry. Co. v. Johnson, 90 Va. 777, 20 S. E. Rep. 148, the court said: "Under this statute (1 R. C. 1819, p. 510), it was held in *Johnson v. Jennings, 10 Gratt. 1*, that in the absence of such an account as the statute contemplated, evidence was not admissible to prove a specific payment under the plea of nonassumpsit; and the statute, as it now stands in the Code, is, in this respect, substantially the same as it was in the Revised Code of 1819. It enacts that 'in a suit for any debt, the defendant may at the trial prove and have allowed against such debt any payment or setoff which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise.' Code (1887), sec. 3298."

§**Appellate Practice—Evidence—Exception to Question Asked—Failure of Bill to State Answer.**—In Edgell v. Conaway, 24 W. Va. 753, the court said: "This exception fails to state the testimony given of the contents of this paper, and therefore, it may be questionable whether it is not obnoxious to the rule, that where a question is propounded to a witness which is objected to and the objection overruled, or where the exception is to the rejection or admission of a written document, if the bill of exceptions does not state the answer of the witness in the one case, or the written document in the other, the appellate court will not reverse the judgment. *Johnson v. Jen-*

exception is taken. The exception does not state the answer of the witness, or that he answered the question. The appellate court will not reverse the judgment.

8. **Exceptions—Exclusion of Evidence—What Bill Must Show.**‖—If an exception is taken to an opinion of the court excluding evidence, the exception must show the relevancy of the evidence, or it is no ground for reversing the judgment.

9. **Same—Exclusion of Written Evidence Prejudicial to Exceptor.**¶—If an exception is taken to an opinion of the court excluding written evidence, and the evidence is made a part of the exception, and is against the party excepting, the exclusion of the evidence is not error of which the exceptant can complain.

10. **Evidence—Record of Another Suit.**—A record of another suit between the same parties, in which the same causes of action are in controversy, and the finding of the jury is against them, is competent evidence.

11. **Written Evidence—Construction of—Function of Court.****—An instruction, which is not relevant to the evidence in the cause, or which is only relevant to written evidence, which does not authorize it, properly refused: the court being the proper tribunal to construe the written evidence.

The facts of this case are stated in the opinion of the court. There was a verdict for the defendant; and Johnson's executrix applied to this court for a supersedeas, which was allowed.

Baxter & Cabell and Garland, for the appellant.

Cooke, for the appellee.

MONCURE, J., delivered the opinion of the court.

3 *This was an action of assumpsit, brought by John F. Johnson, and afterwards revived by his executrix, against Henry Dunnington, administrator of Philip Jennings. The original declaration contained only the three common counts. There were two amended declarations. The last count of the first, and the last two counts of the second, amended declaration, were special counts; in which it was stated, that Jennings, in his life time, being indebted to Johnson in various sums of money on various accounts, as therein mentioned, it was agreed between them that Jennings, in consideration of said indebtedness and in satisfaction and payment thereof, would sell and deliver to Johnson the following slaves, viz: Lucy, Rives, Henry and Elvira; and the said Jennings did then and there sell and deliver to said Johnson the said slaves, in payment and discharge of his indebtedness aforesaid. But the said defendant, as administrator as aforesaid, not regarding the promises and agreement of his intestate, so by him made as aforesaid, caused his action of detinue to be brought against said plaintiff for said slaves; and,

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nings, 10 Gratt. 1; Stoneman's Case, 25 *Id.* 887; Fowler v. Lee, 4 Mun. 373; 2 Tuck. Com. 294."

The principal case was also cited as authority on this point in Continental Insurance Co. v. Kasey, 25 Gratt. 276; Beirne v. Rosser, 26 Gratt. 547; Nease v. Capehart, 15 W. Va. 309.

See also, Stoneman v. Com., 25 Gratt. 887; Taylor v. Com., 90 Va. 110, 17 S. E. Rep. 812.

‖**Exceptions—Exclusion of Evidence—What Bill Must Show.**—It is a firmly established proposition of law that where an exception is taken to the opinion of the court excluding evidence, a bill of exceptions must show affirmatively the relevancy of the evidence or else the appellate court will not reverse the judgment; for it will be perceived what the act of the court below was, and, not discovering that it was wrong, will presume it to have been right.

The principal case was cited as authority on this point in McDowell v. Crawford, 11 Gratt. 387; Valley, etc., Ass'n v. Teewalt, 79 Va. 425; Lawrence v. Com., 86 Va. 579, 10 S. E. Rep. 840; Union, etc., Ins. Co. v. Pollard, 94 Va. 157, 26 S. E. Rep. 421; Nease v. Capehart, 15 W. Va. 308; Todd v. Gates, 20 W. Va. 471; 4 Min. Inst. (3d Ed.) 916.

Other authorities for the proposition are Rowt v. Kile, 1 Leigh 216; Carpenter v. Utz, 4 Gratt. 270; Harman v. Lynchburg, 33 Gratt. 37, and *foot-notes*; Fitzhugh v. Fitzhugh, 11 Gratt. 300; Dickinson v. Dickinson, 25 Gratt. 321, and *foot-note*; Martz v. Martz, 25 Gratt. 361, and *foot-note*; Taylor v. Boughner, 16 W. Va. 327. See McDowell v. Crawford, 11 Gratt. 397 *et seq.* (opinion of MONCURE, J.).

See further, monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

¶**Same—Exclusion of Written Evidence Prejudicial to Exceptor.**—The principal case was cited and approved in Travelers' Insurance Co. v. Harvey, 82 Va. 962. In 4 Min. Inst. (3d Ed.) 1074, it is said: "It is a proposition which meets us at the threshold of the discussion, that an appellant cannot complain of irregularities in the court below for which he is himself accountable, nor for errors of his own committing. (Carpenter v. Utz, 4 Gratt. 270; Howery v. Helms, 20 Gratt. 1; Avendano v. Gay, 8 Wal. 376.) Nor can he complain of errors which are beneficial to him, nor even of those which are not injurious, provided it clearly appear that they did not, nor under the circumstances could, prejudice his interests. (Ross v. Gill, 1 Wash. 87; Pate v. Spotts, 6 Munf. 396; Eib v. Pindall, 5 Leigh 109; Morris v. Morris, 4 Gratt. 298; Crawford v. Morris, 5 Gratt. 90; Vance v. McLaughlin, 8 Gratt. 289; Early v. Wilkinson, 9 Gratt. 68; Johnson v. Jennings, 10 Gratt. 1; Stainback v. Bank of Virginia, 11 Gratt. 266-'67; Colvin v. Menefee, 11 Gratt. 87; Clarke v. Reins, 12 Gratt. 98; Harvey v. Epes, 12 Gratt. 153; Franklin v. Depriest, 13 Gratt. 257; Carrington v. Goddin, 13 Gratt. 587; R. & Dan. R. R. Co. v. Medley, 75 Va. 499; West. U. Tel. Co. v. Reynolds, 77 Va. 174; Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. Rep. 713; Clark v. City of Richmond, 83 Va. 355, 5 S. E. Rep. 369; R. & D. R. R. Co. v. Norment, 84 Va. 167, 4 S. E. Rep. 211; Lucas' Case, 84 Va. 303, 4 S. E. Rep. 695; Blackwell v. Patton, 7 Cr. 471; Campbell v. Pratt, 2 Pet. 354; Greenleaf v. Birth, 5 Pet. 132; Deery v. Gray, 5 Wal. 807; Bethell v. Matthews, 13 Wal. 1.)"

****Written Evidence—Construction of—Function of Court.**—In Washington, etc., R. Co. v. Lacey, 94 Va. 465, 26 S. E. Rep. 834, it was laid down as a general rule that the construction of all written documents in evidence belongs to the court exclusively and the principal case. 1 Taylor on Ev., § 43, etc.; Union, etc., Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. Rep. 421; 4 Min. Inst. (3d Ed.) p. 1086, are cited as authority for the proposition. See also, Herbert v. Wise, 3 Call 239.

upon the question of title alone, without regard to the indebtedness aforesaid, recovered a judgment for said slaves, with damages for their detention and costs; which judgment was satisfied; and the contract for said slaves, so sold and delivered as aforesaid, having been vacated as aforesaid, and rendered null and void, cause of action thereupon accrued to the plaintiff to recover of the defendant, administrator as aforesaid, the consideration money so paid for said slaves. In consideration whereof, and of assets in his hands, the defendant promised to pay the same to the plaintiff. These special counts differ somewhat in their details, but may be regarded as substantially the same, so far as it may be necessary now to consider them. I have stated, substantially, the details of the next to the last; which seems to be the least
4 *objectionable. To each of them there was a general demurrer, in which the plaintiff joined, and which was sustained by the court. And this is the first error assigned in this case.

These counts can only be sustained, if at all, on the ground of a failure of consideration of the contract of sale. There can be no doubt but that if money be paid on a contract of sale, which is wholly rescinded, either by the mutual consent of the parties or by virtue of a clause contained therein, or the consideration of which wholly fails, the party making such payment, if he has been guilty of no fraud or illegal conduct in the transaction, may recover back the money under the common count for money had and received. And though that is the usual and better mode of counting in such cases, there can be no legal objection to a special count, properly setting out the facts from which the cause of action arises. But it must appear with sufficient certainty, from the facts so set out, or from apt averments made in the count, that the consideration has wholly failed, and that such failure did not proceed from any fraud or illegal conduct on the part of the plaintiff. Now, let us apply this test to the counts in question. In substance, they only show a sale and delivery of slaves on the one side, and payment of the purchase money on the other, and a subsequent recovery of the slaves in an action of detinue brought by the vendor against the vendee. They do not show what connection there was, if any, between the contract of sale, and subsequent recovery of the slaves. After the sale, they may have been repurchased by the vendor from the vendee. If the contract of sale was rescinded by mutual consent of parties, or by virtue of a clause contained therein, the fact should have been so averred. So far from this, it is averred in these counts that the action of detinue was brought in
5 disregard *and violation of the contract of sale. But if so, why did the plaintiff in that action recover? This is an enigma which ought to have been, but is no where in the declaration explained. If the sale and delivery of the slaves conferred on the vendee an absolute title therein, how could the vendor recover them back without having previously reacquired the title? If he recovered on his original title, unaffected by the supposed contract of sale, the recovery negatives the existence of such contract, or conclusively shows that it was void. It is difficult to conceive how a cause of action could arise out of a void contract; and I suppose it certainly could not, if the contract was rendered void by the fraud or illegal conduct of the plaintiff in the action. It should appear from the count, if special, that the contract was not so rendered void.

But it is argued for the plaintiff in error, that a good cause of action is set forth in the special counts, which is not destroyed by the subsequent transactions therein stated. It is true, these counts set forth a general indebtedness, somewhat in the form of the common counts; but they expressly charge that such indebtedness was satisfied by a sale and delivery of slaves; and rely on the supposed violation of the contract of sale, and not on the implied promise resulting from the fact of the original indebtedness, as the cause of action.

I think therefore the demurrer to the special counts was rightly sustained.

The second error assigned is, that the court rejected the plaintiff's special replication to the defendant's pleas of the statute of limitations.

The plaintiff sought by these replications to remove the bar of the statute, by relying on, substantially, the same statement of facts on which she had unsuccessfully relied in the special counts. I think
6 the *replications were properly rejected, for reasons already stated, besides others. They do not show on what ground the supposed vendor recovered the property, after it was sold and delivered for valuable consideration, as averred in the replications. If the contract of sale was void, it could not have barred or suspended the right of action for the original debt; and certainly it could not, if rendered void by the fraud or illegal conduct of the vendee.

Two cases were much relied on in the argument, in support of these replications; but, I think, do not sustain them. The first is the case of Cowper v. Godmond, 23 Eng. C. L. R. 452. That was an action of assumpsit for money had and received, for the recovery of the consideration money of a void annuity, rendered void by an informality in the memorial thereof, which, under a British statute, was required to be made and registered. The annuity was granted more than six years before the action was brought, but was treated by the grantor as a subsisting annuity within that period. The question in the case was, "At what time did the cause of action arise?" Tindal, C. J., said, "The cause of action comprises two steps: The first is the original advance of the money by the grantee; the second, is the grantor's election to avail himself of the defect of the memorial of annuity. The cause of action, therefore,

was not complete till the last step was taken." It is the duty of the grantee of the annuity to see that the memorial is properly made and enrolled; and if there be any defect therein, he cannot avail himself of it to avoid the contract. The grantor may treat the contract as a legal one, and perfect it, or he may avoid it, at his option. So long as he continues to treat it as a subsisting annuity, the grantee has no cause of action against him for the consideration money. The grantee has been guilty of no fraud, but of a mere 7 omission *of a legal formality; and though, by the terms of the statute, he must lose the benefit of the annuity, he is entitled to have the purchase money restored to him, after deducting so much of the annuity as he may have received. The difference between that case and this must be sufficiently obvious, without further remark. The other case relied on is Elmore's adm'x v. Bowles' ex'or, 7 Gratt. 385; which, I think, is also very different from this. There, the replication to the plea of the statute of limitations set forth a covenant between the parties, which was intended, and had the effect, to suspend the right of action on the note until the happening of a certain contingency, and then to revive it. Here, the replications set forth an executed contract of absolute sale, intended to discharge the original debt, and not to suspend the right of action therefor. If the contract was valid, it discharged the debt; if void, it does not appear how it could have suspended the right of action for the debt.

The third and last error assigned is, that the court admitted certain testimony of William B. Brown on the trial of the issues joined on the general replication to the pleas of non assumpsit and the statute of limitations. The bill of exceptions states, that while the said witness was under cross examination, the defendant's counsel propounded to him this question: "Do you know of any money received by John F. Johnson, in his life time, for Philip Jennings?" To the answering of which, the plaintiff objected, because the defendant had not filed with his pleas any account of payments or setoffs; but the court overruled the objection, and directed the witness to answer the question. To which opinion the plaintiff excepted. It does not appear from the bill of exceptions what answer the witness gave to the question. It may have been, that he had no knowledge on the subject; and if so, was wholly 8 unimportant, and would *certainly not be a good ground for reversing the judgment. Though, in the state of the pleadings, it could not have been legal evidence, if it only tended to prove a specific payment or setoff, yet it might have been legal evidence, if it tended to prove that the money charged in the account on which the suit was brought, or any of it, was not loaned or advanced, as charged, but was paid out of the money of Jennings in Johnson's hands. The evidence would then have gone to the foundation of the cause of action, and not to its discharge by payment or setoff. As was said by Judge Carr, in Rowt's adm'x v. Kile's adm'r, 1 Leigh 216, 223, "It is certain the jury ought to have all the evidence which is relevant: of its weight it is to judge. But when we are called on to reverse the decision of a judge, it is incumbent on the party seeking this, to show that there is error; and to this end he ought to present to us such a case as shows the relevancy of the evidence rejected." In that case, the evidence objected to was set out in the bill of exceptions; and the court was only asked to presume it irrelevant because its relevancy did not appear. In this, the court is asked to presume, first that the question was answered, and then, that the answer was of such a nature as to be inadmissible. But the answer could have had no influence on the issue on the plea of the statute of limitations, on which alone a verdict was found for the defendant, and could not therefore have prejudiced the plaintiff. I think there is no error apparent in this bill of exceptions; and certainly none which can have the effect of reversing the judgment.

Exceptions were taken by the plaintiff to other opinions of the court given on the trial, which, though no errors are assigned thereon, must be briefly noticed, especially as some of them were noticed in the argument of one of the counsel for the plaintiff in error.

9 *The first of these additional exceptions was to the opinion of the court excluding the bill of sale for the slaves aforesaid, as evidence in the case. Nothing is stated in the bill of exceptions to connect this bill of sale with the account on which the suit was brought; and, in the absence of such connection, which ought to appear in the record, the bill of sale was irrelevant, and properly excluded.

The next of these exceptions was to the opinion of the court excluding the record of the proceedings in the action of detinue, in which the slaves aforesaid were recovered by the defendant from the plaintiff. There is nothing set out in the bill of exceptions to this opinion of the court to show the relevancy of the said record as evidence in the case, except the record itself; and there is nothing in that record tending to show its connection with the cause of action in this case, except the evidence set out in a bill of exceptions taken to the opinion of the court overruling a motion for a new trial; some of which evidence tended to show that the slaves had been sold and conveyed by Jennings to Johnson in payment or security of the account on which this suit was brought, and two bond debts due by the former to the latter. If it had appeared in this record that the bill of sale was avoided in such manner or for such cause as entitled Johnson to reclaim the purchase money of the slaves, or to claim payment of the debt intended to have been satisfied or secured by the bill of sale, it would then have been admissible in the case, and would have had the effect of

repelling the bar of the statute of limitations. But so far from that, it appears by the record that the slaves were recovered on the ground of fraud in obtaining the execution of the bill of sale. The evidence tended to prove such fraud; and the court having instructed the jury, on the motion of the defendant in that case, that if
10 they believed from the *evidence that the bill of sale was executed without fraud, the title to said slaves was thereby vested in the defendant, whether the purchase money was paid or not, the finding of the jury against the defendant was an affirmance that the bill of sale had been fraudulently obtained. The record was therefore against, and not in favor of, the plaintiff in this action, and she cannot complain of any error in the opinion of the court which excluded it.

The next exception was to the opinion of the court overruling the objection of the plaintiff to the introduction by the defendant, as evidence, of the record of the proceedings in a suit brought at the same time with this action, by the same plaintiff, against the same defendant, on the two bond debts above mentioned; in which suit judgment was recovered by the plaintiff. The defendant in that case claimed, as setoffs, the damages and costs recovered in the detinue case; and also various payments claimed to have been made by Jennings to Johnson, in money, services rendered as a carpenter, cash received in rents, and hires of negroes; of which offsets, accounts were filed. The plaintiff, on the other hand, introduced an account containing all or nearly all the items of the account on which this action was brought, and offered to prove the same for the purpose of lessening any amount which the defendant might show himself entitled to as offsets to the said bonds; and the court, notwithstanding that the defendant objected, among other things, that the account was barred by the act of limitations, permitted the plaintiff to give evidence of said account, and to rely on the same before the jury. Evidence was accordingly introduced tending to prove both the setoffs and the counter setoffs, or some of them; and the jury having by their verdict disallowed the counter setoffs, at least beyond the amount of any payments claimed to have been made by Jen-
11 nings to Johnson *as aforesaid, the judgment in that suit was evidence in this, that the claims asserted in both, and disallowed, or set off in that, were not due.

The next and last exception was to the opinion of the court refusing to instruct the jury, on the motion of the plaintiff, "that if from the evidence adduced in the cause (and set out in the bill of exceptions) they were of opinion that the plaintiff could not, by any lawful impediment, have brought his action, or was prevented from bringing his action, by a mode of payment which afterwards failed, until a period within five years next preceding the commencement of this action, then the statute of limitations did not apply, and the plaintiff might recover, notwithstanding the lapse of time."

I think enough has been already said to show that the court was right in refusing to give this instruction. After the bill of sale and record in the detinue suit were excluded, there was no foundation for it in the evidence. Regarding them as part of the evidence, it was for the court to construe them, and they showed nothing which could have suspended the action, or ought to repel the bar of the statute.

Upon the whole, we see no error in the judgment, and are for affirming it.

Judgment affirmed.

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12 *Muire v. Falconer & al.

April Term, 1853, Richmond.

(Absent LEE, J.)

1. **Appellate Practice—Establishment of Public Landing—Report of Viewers—No Motion to Quash in Lower Court.***—Upon an application to establish a public landing, if no motion has been made in the County court to quash the report of the viewers, it is too late to object to it in the appellate court.
2. **Public Landing—Establishment of—Report of Viewers—Case at Bar.**—The viewers report, that a public landing at the place viewed would be of very great convenience to the public, as a list of persons, all heads of families, to the number of one hundred and twenty, had been shown to them, all of whom, as well as many others, would be benefited by the proposed landing. HELD: It was no error in the report that this list of persons was not returned with the report.
3. **Same—Same—Writ of Ad Quod Damnum Awarded by Benefited Justices—Effect.**—Two of the persons on this list were justices of the peace of the county; and when the order awarding the writ of *ad quod damnum* was made, they were on the bench; and one of them was on the bench when the landing was established. This was no legal objection.
4. **Same—Same—Notice to Owner of Land.**—There is no time fixed by the statute for which notice shall be given to a party upon whose land a public landing is sought to be established. If, therefore, the notice is served upon him at any time before the end of the return day of the notice, it is sufficient in law; and he must show that it was insufficient or not reasonable notice.
5. **Same—Same—Same—Waived.**†—Such person having made himself a party in the cause, and taken an appeal, upon which all the proceedings subse-

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***Appellate Practice—Report of Viewers—No Motion to Quash in Lower Court.**—See the proposition laid down in the first headnote approved in Mitchell v. Thorne, 21 Gratt. 173. See also, Bohn v. Sheppard, 4 Munf. 403; Lewis v. Washington, 5 Gratt. 265.

†**Notice of Suit—How Waived.**—In Ballard v. Whitlock, 18 Gratt. 242, the court said: "The defendants in the circuit court, by appearing (as their own bill of exceptions shows they did) in opposition to the motion to set aside the erroneous judgment and quash the execution upon it, without making any objection to that motion upon the ground of failure to give them notice of it, must be held to have waived the notice, and cannot now be heard to make the objection. Ayres v. Lewellin, 3 Leigh 609;

quent to the report of the viewers were quashed; and it being proved that after the cause went back he was served with notice, and he having appeared and opposed the establishment of the landing, without objecting to the sufficiency of the notice, he cannot object to it in the appellate court.

6. **Same—Same—Writ of Ad Quod Damnum—Return of.**—The statute does not require the writ of *ad quod damnum* to be returned to the next court after it is awarded. And if the order awarding it so directs, the direction is merely directory to the officer, and his failure to make the return within the time prescribed will not affect the validity of the inquest properly taken.

7. **Same—Same—Same—Charge to Jury of Inquest.**—A jury of inquest upon a writ of *ad quod damnum* to establish a public landing is charged according
13 ing to the act 2 Rev. Code, *p. 288, § 15, but is not charged according to the act of January 30th, 1834, Sess. Acts 97. This is not error, this provision having no application to public landings.

8. **Same—Same—Assessment of Damages—Case at Bar.**—The application is to establish a landing at a certain place, which is in fact on the lands of two adjoining proprietors; and the precise locality of the dividing line between them is a matter of controversy between them, though the line had been previously fixed by processioners. The land being open and unenclosed, it was proper for the jury, in assessing the damages to each, to take the line fixed by the processioners as the true line.

9. **Same—Same—Same—Same.**—With the consent of the party to whom the damages were assessed, the court directed that the damages so assessed to him should be withheld until the dispute about the dividing line should be determined, and that the damages should then be paid to the party to whom it appeared the land belonged. This is no error.

10. **Same—Same—Same—Conclusiveness of Inquest.**‡—In the absence of evidence clearly showing that the damages assessed are insufficient, the inquest taken upon the ground must be deemed conclusive on the question.

This was an application by Falconer and Haskins to the County court of King & Queen, for the establishment of a public landing at Walkerton in that county, on the Mattaponi river. The appellant Muire opposed the application; but the County court established the landing; and upon appeal to the Circuit court, the order of the County court was affirmed. Whereupon, Muire applied to this court for a supersedeas, which was allowed. The facts are sufficiently stated in the opinion of Judge Allen.

The cause was argued orally by Griswold & Claiborne for the appellant, and there was a printed argument filed for the appellees.

ALLEN, J. This is an appeal from a judgment of the Circuit court of King & Queen county, affirming an order and judgment of the County court establishing a public landing on the lands of the appellant, and of A. S. Sale.

The two first errors assigned in the petition are for alleged imperfections in
14 the report of the viewers. No *motion to set aside the report for this cause seems to have been made in the County court. At the final hearing of the cause in the County court, the appellant moved to quash the petition, for errors on its face, and also moved to quash the inquisition; but does not appear to have objected to the report of the viewers. Such objection, according to the case of Lewis v. Washington, 5 Gratt. 265, should have been made in the

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Poling v. Johnson, 2 Rob. R. 255; Pulliam, etc., v. Aler, 15 Gratt. 54; *Muire v. Falconer, etc., 10 Id. 12.*"

See also, in accord, Cunningham v. Mitchell, 4 Rand. 189; Bernard v. Brewer, 2 Wash. 77; *foot-note* to Ballard v. Whitlock, 18 Gratt. 235.

‡**Assessment of Damages—Conclusiveness of Inquest.**—In Supervisors v. Stout, 9 W. Va. 705, the court said: "It is objected, that the compensation allowed the defendant is grossly inadequate. There is nothing in the record showing that to be so. Therefore, upon the principle in *Muire v. Falconer, 10 Gratt. 18,* 'in the absence of evidence clearly showing that the damages are insufficient, the inquest taken on the ground is conclusive.'"

Same—Benefits.—In assessing damages in condemnation proceedings, it is a well-established rule in both Virginia and West Virginia that the owner of the land is entitled to receive the value of the land taken, without reduction, and such further damages as the residue of his tract has sustained less the *special but not general* benefits. Mitchell v. Thorne, 21 Gratt. 164, and *foot-note*; Blair v. City of Charleston, 43 W. Va. 62, 26 S. E. Rep. 341.

But as to what are general benefits, and what is to be included in the term "special benefits" there does not seem to be complete harmony in West Virginia.

In James River, etc., Co. v. Turner, 9 Leigh 313, the assessors were required to pay a just regard to the advantages which the owner of the land would derive from the improvement for the use of which his land was condemned. It was held that the advantages to the owner which should be taken in consideration by the assessors were such advantages as had particularly and exclusively affected the particular tract or parcel of land whereof the portion was condemned—not advantages of a general character, which might be derived to the owner in common with the country at large from the improvement. This statement of the rule is approved in Mitchell v. Thorne, 21 Gratt. 179; Railroad Co. v. Tyree, 7 W. Va. 696, and Railroad Co. v. Foreman, 24 W. Va. 672. And, in the principal case also, the holding in James River, etc., R. Co. v. Turner was cited and approved.

Yet in Blair v. City of Charleston, 43 W. Va. 71, 26 S. E. Rep. 345, the court said: "Many authorities tell us that we must consider as general benefits,—and not charged against the owner,—not only benefits throughout the city or town, but also benefits common to all persons along the line of the improvement. Likely, we must so construe Kanawha Co. v. Turner, 9 Leigh 313, and Railroad Co. v. Foreman, 24 W. Va. 662. But in *Muire v. Falconer, 10 Gratt. 17,* the opinion says the jury must 'show a just regard to the advantages resulting from the passing of the road through the land,' and that the advantages to be excluded are those 'derived to the owner in common with the county at large,' thus not excluding from consideration those advantages di-

County court, by a motion to set aside the report.

But the objections, if taken in time, should have been overruled. In their report, the viewers state that a public landing at Walkerton would be a very great convenience to the public, as a list of persons, all heads of families, to the number of one hundred and twenty, had been shown to them, all of whom, as well as many others, would be benefited by the proposed landing. The report is objected to, first, in not returning the list of one hundred and twenty names shown to them, to enable the appellant to object to any of them being witnesses, judges or jurors; and in the second place, because the report professes to be made, not upon their own judgment and upon a view of the land, but upon the list of names so exhibited to them.

As was said in the case of Lewis v. Washington, ubi supra, the authority of the County courts to establish public roads and landings, is a branch of their police jurisdiction, conferred for the benefit, and to be exercised at the common expense of all the citizens of the county. It is therefore necessary and proper that the court should look to the necessities of those applying for the landing, how far it may be productive of convenience or inconvenience to the public or individuals, and whether, in view of all the circumstances, a proper case is made for the application of the county resources to the object. To aid in arriving at a proper conclusion, the viewers are required to
15 report truly and *impartially the conveniences and inconveniences which will result, as well to individuals as the public, if such landing be established. It was proper that the viewers should enquire whether the public convenience would be promoted by the establishment of the landing; and this could be best done, by ascertaining what number of individuals would be accommodated by it, rather than by relying on vague generalities as to its being a public benefit. But the law does not require a return of the names of those benefited or accommodated, either where a list is made out by the viewers themselves, or where it is shown to them by others; and it was not necessary to allude to it in their report. Nor is there any foundation for the objection that the report is not based on their own judgment and view. They report expressly, as their own judgment upon the view, that a public landing at Walkerton would be a very great convenience to the public, and they refer to this list of one hundred and twenty names, as well as many others not on the list, and to other facts adverted to in their report, as the circumstances which had conducted them to that conclusion.

The third error assigned is, that the appellant was not duly summoned to show cause, at August court 1848, against the establishment of the landing. The appellant, as early as June 1847, was, on his own motion, admitted a party to the controversy, appealed from the order made at that term to establish the landing, and reversed the order in the Circuit court. That court quashed all the proceedings subsequent to the return of the report of the viewers, and remanded the cause. When returned to the County court, a new summons issued, which was returned "Copy handed to Muire and Sale." The return is without date, and it is objected that it is insufficient, because it does not appear the notice was reasonable. It is conceded that the act, under which this proceeding was had, pre-
16 scribes *no particular time for the service of process. The act regulating proceedings in civil suits, 1 Rev. Code 506, § 70, permits process to be executed at any time before the return day shall have passed. And the act 1 Rev. Code 260, § 76, directs the proceedings in the County courts to conform, as nearly as may be, to the proceedings in the Circuit courts. The service here was intended to give notice to the party; and as it would be sufficient, if executed at any time before the return day had passed, the service must be deemed reasonable, unless the contrary appears. Here the appellant appeared and contested the application on its merits, without objecting to the return on the summons. In the case of Bernard v. Brewer, 2 Wash. 76, the act required ten days' notice of the motion for the writ of ad quod damnum; and all the judges were of opinion that a defence, made upon the merits, would have been a waiver of the objection of want of notice. So that even if the act had required the summons to be executed a certain number of days before the return, yet, according to this authority, as he did appear, which was the object of the summons, and being the only person interested in the fact of notice, and as he did not object to the want of

rectly conferred on property along the line of the improvement; leading us to infer they ought to be deducted from the damages. So in Mitchell v. Thornton, 21 Gratt. 179. So in Kanawha Co. v. Turner, 9 Leigh 313, the words 'country at large' are used, but the case seems to exclude benefits immediately from the work, shared by all along it."

In this case (Blair v. City of Charleston) the court held that if property is enhanced in value by reason of a public improvement, as distinguished from the general benefits to the whole community at large, it is specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may, to a greater or less extent, be likewise specially benefited. In other words, that it is not only such benefits as are special, or limited to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but it is such benefits as that the particular property is by the improvement enhanced in value—that is, specially benefited—that are to be considered. That if a piece of property is enhanced in value, its enhancement, or, in other words, benefits to the property, cannot be said to be common to any other piece of property specially enhanced in value, and it is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties.

notice, he must be considered as waiving it. Here the service was good according to law, and the burden was on him to show the notice was insufficient or not reasonable.

I think there is nothing in this objection. The service is legal, and for aught the record shows, the notice was sufficient. It, therefore, is unnecessary to consider the objection taken in the eighth assignment of errors, which was to the hearing the evidence of the officer to prove due service of the summons. The appellant was not injured by it.

There is nothing in the fourth error assigned. The road law does not require the writ of ad quod damnum and inquest to be returned to the next court. The 17 *provision of the act, 2 Rev. Code, 234, § 2, is, that the inquest, with the writ, shall be returned to the court. The writ in this case did require a return to the next court; but that is merely directory to the officer, and his failure to make the return within the time prescribed would not affect the validity of an inquest properly taken.

It is further objected, that the inquest was not properly charged. The 15th section of the act concerning public roads, &c., 2 Rev. Code, 238, provides, that the same proceedings shall be had upon an application for the establishment of a landing as in applications for the opening or alteration of roads. The writ was sued out and the sheriff required to charge the jury according to the directions of this law. By the act of January 30th, 1834, Sess. Acts, 97, it is provided, that whenever a jury of inquest is impaneled according to the directions of the 2d section of the act of 1819, concerning public roads, and for the establishing of public landings, the sheriff shall, in addition to the charge prescribed by the said section, charge the jury to combine, with the estimate of the damages to be occasioned by the opening of the road, a just regard to the advantages which the proprietors or tenants will derive from the passing of the same through their lands. Though the first clause directs that whenever a jury is impaneled, under the 2d section of the act of 1819, the additional charge therein prescribed shall be given, the subsequent provision, prescribing the charge, shows that the charge was confined to road cases. The jury is to combine, with the estimate of the damages occasioned by the opening of the road, a just regard to the advantages resulting from the passing of the road through the land; a charge totally inapplicable to the case of a landing, according to the letter of the law. Nor does it come within the spirit of the 18 act. It was held in *the case of the Jas. River and Ka. Co. v. Turner, 9 Leigh 313, under a similar provision in respect to lands condemned for the use of the canal, that the advantages thereby contemplated are such as particularly and peculiarly affect the particular tract of land a portion whereof is condemned, and not advantages of a general nature, which may be derived to the owner in common with the county at large.

A landing merely lays open to the public use a portion of the property of an individual. Nothing is done thereby to improve the residue of the particular tract, or to give to it advantages which it did not possess before. Its relative position, with regard to the navigable stream, is not thereby altered, and the public is merely let in to participate in the advantages theretofore enjoyed by the owner. There would seem, therefore, to be no good reason for embracing the case of a landing in the charge required by the act of January 30, 1834. So that this additional charge to the jury is neither required by the words or the spirit of the act, upon an application to establish a landing.

The sixth error assigned is, that the jury have undertaken to run a dividing line between the appellant and Sale, and to decide which was Sale's and which the appellant's land, when the same, as appears by the record, was in dispute between them.

It appears from the order of the court establishing the landing, that the appellant claimed title to the land for which damages were assessed to A. G. Sale, and by the consent of Sale, it was ordered, that the damages so assessed to Sale should be withheld from him until it should be determined, in any manner between Sale and the appellant, to whom the land in dispute really belonged; and then that the damages assessed should be paid to the party entitled to the land.

From some exhibits filed in the 19 papers, it seems that *there was a dispute between the appellant and Baylor Temple, under whom Sale claimed, as to the true position of the line between them. In 1840, the processioners reported the fact of the dispute and the conflicting pretensions of the parties, and the surveyor, with a jury, was ordered to lay out the bounds in dispute. The jury so impaneled decided the controversy against the appellant. What shape the controversy thereafter assumed, does not appear by the record. The viewers reported that the land lies between the main road and the river Mattaponi, open and unenclosed; and the plat returned with the inquest shows it to be a small triangle between the river and two roads branching from a common stem, and running, one to Sale's wharf, the other to a store-house of the appellant. There being no actual occupancy of the land, and each party claiming to be the proprietor, the viewers and the jury could only treat each as the proprietor up to the line so established by the jury, under the previous order of the court. The effect of the survey returned with the inquest in this case, was not to determine the right, but to ascertain the quantity of land on each side of the disputed line, so as to assess the damages properly. They could not have pursued any

ther course. The controversy between the oterminous landholders could not deprive ne community of the right to condemn the and for a public landing. The land lying pen or unenclosed, the jury and the viewers reated each as in possession up to the line s surveyed on the former occasion; and the aw, in the absence of any actual possession, ould consider him in possession who had ne right. In running the line to ascertain ne quantity, it passed through the edge of small pen enclosed by one of the servants f the appellant. An inspection of the plat hows it to have been so near the line as not to affect the question of possession. The inference would *rather be, that the line was recognized, and the nclosure made with reference to it, but ccidentally crossed it a few feet. I think he jury, under the circumstances, did right n assessing the damages to each of the pparent owners up to the disputed line, eaving the subject of boundary and claim o the damages to be litigated between the arties themselves.

Nor is there anything in the seventh assignment of errors, objecting to so much of he order as withheld payment of the damges assessed to Sale until the dispute about he boundary should be determined, and irecting that the damages should be paid o the party to whom it appeared the land elonged. Being made with the consent f Sale, he cannot and does not object; and he reservation was made for the benefit of he appellant, upon his claim of title. The aw, directing the levy for such damages o be made at the next court, is directory; nd the omission to do so would not deprive he party of his right to them. In this ase, there can be no doubt the court would e bound to levy for the damages whenever he appellant shows that he is entitled to hem.

The last error assigned is that the damges are too small. The land condemned, nd for which damages were assessed to he appellant, contains two roods and hirty-one poles, a portion of it covered by vater at every rise of the tide, and the resdue for the most part a barren sand bank, nd worthless for purposes of cultivation, detached from the main body of the appellant's land by a public road, but not separated from his wharf and granary. It is manifest, therefore, the land is intrinsically of little value, and that the jury, in assessing the damages, have had regard to considerations connected with its position on a navigable stream, where there was a public road leading to a ferry. The appellant had examined witnesses to prove, that if the public had no means 21 of access to the river except *through his wharf and granary, and should pay him a fair and reasonable compensation for the privilege, it would be a source of profit; but the evidence shows that the farmers had not been in the habit, for some years past, of storing their grain with the appellant, but have been in the habit, latterly, of delivering their grain at the wharf and granary of Sale, not far from the wharf and granary of the appellant. Another witness supposes the landing would diminish the value of the appellant's property one-third. This testimony is too vague and indefinite to enable an appellate tribunal to say that the estimate of the inquest was too low. The public had access to the river at the wharf and granary of Sale; so that the opinion that the wharf and granary of the appellant might be a source of profit, if the public could be accommodated at no other place, is entitled to but little weight; and it does not appear to what other property of the appellant the witness alluded, who supposed that it would be diminished one-third in value by the proposed landing; nor does he say what is the value of the property which would be so diminished in value. The evidence in the record does not show that the damages assessed were insufficient; and in the absence of such proof, the inquest taken upon the ground must be deemed conclusive.

After the order and judgment of the County court establishing the landing, the appellant appealed to the Circuit court; and the appeal being on the facts as well as the law, new testimony, not in the record, was offered at the trial in the Circuit court. Amongst other things, the appellant proved that the names of Fleet and Ryland were on the list of persons shown to the viewers, and who the viewers supposed would be benefited by the proposed landing. That Fleet and Ryland were justices of the peace, and both were on the bench, and members of the court at the August term 1848, when the order to award the writ of ad 22 *quod damnum was entered; and that Ryland was a member of the County court at the October term, when the landing was established.

Without stopping to enquire whether it would be regular to object in this mode to the competency of the justices who composed the court, it is sufficient to say that the evidence shows no legal disqualification. The fact that the viewers supposed that they, with other members of the community, would be benefited by the landing, does not show any direct interest in the controversy. Every individual who uses a public road, landing or other improvement, may, in some sense, be said to be benefited by it; but such conjectural benefit does not constitute an interest in the controversy which would disqualify a juror, and much less the court. In regard to the latter, it is in the power of the party to preserve on the record every decision made against him; and if erroneous in law or fact, the error can be corrected in an appellate tribunal. In the present case, no suggestion seems to have been made in the County court, that any member of the court had an interest in the controversy. The appellant excepted to the decision of the County court, and spread the facts on the record; and in the Circuit court the case was heard upon the record and proceedings of the County court, together with the viva voce testimony then

offered. If upon such hearing it appeared that the proceedings were regular, and that the facts entitled the petitioners to an order establishing the landing, the judgment of the County court in their favor was properly affirmed. I think the judgment of the Circuit court was right, and should be affirmed with costs.

The other judges concurred in the opinion of Allen, J.

Judgment affirmed.

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23 *Bank of Washington v. Hupp.

April Term, 1853, Richmond.

(Absent ALLEN and SAMUELS, Js.*)

1. **Deeds of Trust—Mortgages—Profits†—Case at Bar.**—A executed a deed of trust on real and personal property, to secure the purchase money; of which purchase money he paid a part, and the amount still due was unascertained, and a matter of doubt. He executed a second deed of trust upon the same property to secure a large bond to S, the consideration of which was in part a previously existing *bona fide* debt, in part debts which S had assumed or was to assume for A, and a part was usurious. A afterwards executed a mortgage on the same property to H, to secure a debt due to him, and to indemnify him as his surety: and by this mortgage H was authorized and did take possession of the property, and use the same for the purpose of applying the annual profits to the payment of his debts and those for which he was surety. The trustees in the second deed having advertised the property for sale, A and H filed a bill to enjoin the sale on the ground that the debt was usurious, until the question of usury could be tried at law. It was held that though the bond was usurious, the deed of trust should be a valid security for so much of the bond as was *bona fide*, and that the property should be sold to pay this amount, and what was due on the first deed of trust. The accounts were taken and the property sold, and the proceeds of the sale were not sufficient to pay the amount due on the first and second deed. HELD: That H was not liable to account to S, the creditor in the second deed, for the profits he had made pending the proceedings in the cause.

2. **Same—Same—Same—Same.**—Though by the terms of the mortgage to H, he had a discretion to apply the profits to pay his own debt and those for which he was surety, or to the debt of S, he was not bound to apply any part of these profits to the debts of S. And if this were more doubtful, the holders of that debt having claimed not under this deed but against it, they cannot complain that no part of these profits have been decreed to them.

This is the sequel of the case of the Bank of Washington v. Arthur & als., 3 Gratt. 173. When the cause *went back to the Circuit court, Hupp and Machir, in November 1846, filed an amended bill, in which they charged that Steenbergen did not pay the debts of Arthur to the amount he had undertaken to pay, and that he retained in his hands the sum of ten thousand dollars to meet the balance that was due on a deed of trust previously given by Arthur to secure a large debt due to the heirs of John Arthur, for the purchase money of the real estate embraced in the deed executed to secure him. That they were not advised what amount was paid by Arthur on account of this debt due to the heirs of John Arthur, but they believed that large payments had been made, and that the debt was nearly if not entirely discharged; yet that the deed stood upon the record in nowise released; and the balance, if any due thereon, was unascertained.

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They charged further, that James S. Arthur put his property, which was embraced in these deeds, into the hands of the complainant Hupp, to be held and used by him for the purpose of making profits therefrom, which profits were to be applied to discharge the debts which Arthur owed to Hupp, and also the debts of Arthur, for which Hupp was bound, as would appear by reference to a mortgage executed by Arthur, which was filed as an exhibit. That Hupp, under the provisions of this deed of mortgage, took the property into his possession, and had continually since held it for the purposes above stated, and had made profits therefrom, by manufacturing iron, milling and farming; but the amount he was unable to ascertain.

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*JUDGE ALLEN was related to some of the parties, and JUDGE SAMUELS had been counsel in the cause.

†**Deeds of Trust—Mortgages—Right to Rents and Profits.**—In Stout v. Philippi, etc., Co., 41 W. Va. 345, 23 S. E. Rep. 571, it was said: "If a mortgagor or grantor in a trust deed or judgment debtor is in possession pending suit to sell the land, he is not chargeable with rent; and if the creditors are doubtful of the adequacy of their security, and want the benefits of profits until a sale can be had, they must get an order of sequestration, commonly accomplished by appointment of a receiver. Clarke v. Curtis, 1 Gratt. 289; Childs v. Hurd, 32 W. Va. 66, 9 S. E. Rep. 362; *Bank v. Hupp, 10 Gratt. 23.* In the last case, JUDGE MONCURE said he thought this principle more applicable to deeds of trust than to mortgages." Again, in Frayser v. R. & A. R. Co., 81 Va. 391, the court said: "The law is now well settled that until possession of the mortgaged property is taken by the mortgagee, or a proper judicial authority, the mortgagor is entitled to the profits. When possession is thus taken the mortgagee becomes entitled to the profits, but only to such as thereafter accrue. 1 Jones on Mortgages (3d Ed.) sec. 670; Williamson's Adm'r v. W. C., V. M. & G. S. R. R. Co., 33 Gratt. 624; Gibert v. Same, *Id.* 645."

See also, 1 Min. Inst. (4th Ed.) 604. And see generally, monographic *note* on "Deeds of Trust," and monographic *note* on "Mortgages."

Appointment of Receiver.—In Bristow v. Home Building Co., 91 Va. 27, 20 S. E. Rep. 946, it was said: "The right to have a receiver appointed to hold rents to supply any deficiency which may exist after sale is made, when the debtor who is personally liable for the deficiency is insolvent, and in this way obtain a specific lien upon the rents to pay such deficiency, is supported by the highest authority. Clarke v. Curtis, 1 Gratt. 289; Beverley v. Brooke *et als.*, and Beverley v. Scott *et als.*, 4 Gratt. 187; *Bank of Washington v. Hupp, 10 Gratt. 23, 41.*"

After making the necessary parties, they asked that the amount due on the deeds of trust given by Arthur might be ascertained, and that the trust property might be sold and applied to the satisfaction of such of the liens as were valid, according to their priorities.

The deed executed to secure the debt due to the heirs of John Arthur was filed
25 as an exhibit, and is *dated September 17th, 1833. The bonds secured were executed to David Crawford and Philip Williams, jr., the commissioners who had sold the property, the price of which was twenty-nine thousand seven hundred and twenty-two dollars thirty-four cents.

The mortgage to Hupp bears date the 4th of September 1839, and provides that Hupp may take possession of the property and carry on the manufactory of iron, the mill and farm, and use the property conveyed for that purpose, applying the profits to the liquidation of the debts due to said Hupp, or to such debts as he may be or has become security for, or to the debt due to said John B. Steenbergen; or if the said Hupp shall think best to do so, to sell the said property, real and personal, upon such terms as he shall think most beneficial to the creditors, and apply the proceeds to the liquidation of said debts. But if Arthur paid the debt due to Hupp and the debts for which Hupp was or should become the security of Arthur, then the deed to be void.

Williams answered the bill, showing how much of the purchase money of the property sold by himself and Crawford had been paid to them; and stating that James S. Arthur insisted in his life time, that by paying the debts of John Arthur's estate, and by advances made to the children, he had paid a large portion of the balance of his debt.

In May 1847, the Bank of Washington filed a cross bill in the cause. After setting out the decree of the Court of appeals, and the filing of the amended bill, and the facts therein stated, from circumstances which they state, and information, they charge that the amount due to John Arthur's heirs has been paid. They say it is probable that the trust property will not sell for enough to pay the debt due to the bank; and as Hupp admits in both his original and amended bill, that he has been, from the time of the institution of
26 *this suit, in possession of the property under James S. Arthur, and accountable for rents and profits; and as Arthur and himself, by their bill of injunction in March 1841, prevented a sale then about to take place under the complainant's deed of trust, that from that time at least, the bank has a just claim upon Hupp for an account of said rents and profits, to subject the same to the payment of the debt due to the bank, or any balance of said debt which may remain after applying the net proceeds of the sale of the property itself. And making Hupp, Machir, the administrator of James S. Arthur, the heirs of John Arthur and others defendants, the prayer of the bill is that a commissioner may be directed to state and report: 1st. An account of what is due, if anything, and to whom, under the deed of trust executed by James S. Arthur to secure the purchase money of the property sold by Crawford and Williams as commissioners. 2d. An account of what is due upon the bond and deed of trust held by the bank. 3d. An account of the rents and profits of the property since it has been in the hands of Hupp, or since the injunction was obtained, or from such time as the court may think proper. That in the mean time a receiver may be appointed; and as soon as the two accounts first mentioned are reported and approved, that the property may be sold, and the complainant's debt be paid out of the proceeds of sale, and if necessary, out of the rents and profits.

The heirs of John Arthur answered the cross bill, denying that they had been paid by James S. Arthur, or that he had paid debts of John Arthur. Hupp also answered, admitting that he had held the property of Arthur for the purpose of paying the debt due to him, and the debts for which he was bound as Arthur's security; but denying that he was liable to the bank for the rents and profits he had received.

In September 1847, the court ap-
27 pointed a commissioner *to rent out the property. In April 1848, commissioners were appointed to state and report the accounts prayed for in the cross bill. In September 1849, commissioners were appointed to sell the property. The commissioners appointed to settle the accounts made their report, ascertaining the amount due to the Bank of Washington, upon the principles of the decree of the Court of appeals, to be on the 31st of December 1849, thirty-six thousand dollars and four cents, of which there was of principal twenty-four thousand one hundred and forty-two dollars seventy-nine cents. That there was due at the same date to the heirs of John Arthur, the sum of eleven thousand four hundred and sixty-nine dollars fifty-four cents, of which ten thousand and forty-seven dollars seventy-eight cents was principal; and that the annual value of the property from the 30th of April 1841, the day when the sale was advertised to take place, which was enjoined by the plaintiffs in the original bill, to the 1st of January 1848, when the commissioner appointed by the court took it into his possession, amounted to sixteen thousand one hundred and sixty-one dollars forty-eight cents.

The cause came on to be heard in April 1850, when it appearing from the report of the commissioners appointed to sell the property, that the proceeds of sale with the rents in the hands of the receiver were not sufficient to satisfy the debt due to the heirs of John Arthur and that due to the Bank of Washington, the court made a decree, directing payment to the heirs of the sums respectively due them; and that the balance of the fund should be paid to the bank; and holding that Hupp was not liable to the bank for the rents and profits of the prop-

erty whilst it was in his possession, dismissed so much of the cross bill as sought to subject him for these rents and profits, with costs to the complainants in the 28 original and amended bill *against Steenbergen and the Bank of Washington. Whereupon, the Bank of Washington applied to this court for an appeal, which was allowed.

Robinson and G. N. Johnson, for the appellant.

Patton and Cooke, for the appellee.

LEE, J. In 1 Coote on Mortgages, p. 332, the general doctrine is stated, that a mortgagor in possession is not bound to account for rents and profits to the mortgagee. He refers to the case of Colman v. The Duke of St. Albans, 3 Ves. R. 25. That case simply establishes that where the debt is due, and the mortgagee does no act to appropriate the rents to his debt, but permits the mortgagor to remain in possession, and to receive the rents and apply them as he thinks proper, he cannot call the mortgagor to account for what he may so have received. But it is undoubtedly true, that the mortgage subject and all its profits are or may be rendered liable for the debt secured by the mortgage. 1 Coote on Mortg. 325. Whilst the mortgagor remains in possession of the estate, he holds it by a frail and precarious tenure, which, in Beverley v. Brooke, 4 Gratt. 187, 209, was compared to that of a tenant at will; and like such a tenancy, it may be determined by any manifestation of the will of either party. Slight acts will be deemed sufficient to manifest that intention; and the right of a mortgagor to take the profits without account depending upon the will of the mortgagee, ceases whenever a manifestation of the mortgagee's intention to determine it is made. In the case of a formal lease, the mortgagee may entitle himself to receive the rents by notice to the tenant, and all the profits not theretofore received by the mortgagor will be held to be appropriated by the mortgage debt. Drummond v. The Duke of St. Albans, 5 Ves. R. 433; Pope v. Biggs, 17 Eng. C. L. 29 *R. 368. Now, it seems to me that Hupp can stand on no better footing than the mortgagor himself, or a tenant under him, and that his possession must be regarded as subject to the same rules and principles which will apply to theirs. If the prior mortgagee hold the legal title, he may treat a party in possession under the mortgagor as a trespasser, and after a recovery in ejectment, may hold him liable for rents and profits. But as he may thus secure them by a proceeding at law, a court of equity will not give relief as to rents and profits which he may permit the party in possession to receive and dispose of without resorting to his legal remedy: So that he cannot come into equity to have a receiver appointed. But the case of a second mortgagee, who has not the legal title, is different. If the first mortgagee be not in possession, he may have a receiver appointed, though of course without prejudice to the right of the first mortgagee to take possession, if he will. Coote on Mortg. 596; 2 Spence's Eq. 689; Berney v. Sewell, 1 Jac. & Walk. 627; Archdeacon v. Bowes, 3 Anst. R. 752. In this case, Crawford and Williams, the trustees in the deed of trust for the benefit of John Arthur's heirs, holding the legal title, could have entered upon Hupp or brought ejectment. They could not, therefore, have a receiver appointed on their motion: but Steenbergen, standing as second mortgagee without the legal title, was entitled to the appointment of a receiver by the court of chancery; and thus to secure the rents and profits for his mortgage debt.

And as the equitable mortgagee is entitled to the rents and profits from the time of the appointment of a receiver, he is also so entitled from the time of his doing any act which shall be equivalent to an application for such appointment; and an order of sale in a suit to foreclose the mortgage is such an act. Ex parte Living, 38 Eng. C. 30 L. R. 343. Again: A notice to a *first mortgagee in possession, by the second mortgagee, not to pay over the rents to the mortgagor, will be equivalent to the application for a receiver; because if the first mortgagee, after such notice, continue to pay over the rents to the mortgagor, he will be held answerable for them. Berney v. Sewell, 1 Jac. & Walk. 627; 2 Spence's Eq. 648. So after a bill filed by a second mortgagee, the first mortgagee in possession cannot pay over the rents to the mortgagor without making himself liable to account. Parker v. Calcraft, 6 Madd. R. 11. So if in a case in which the mortgagee is no party, a receiver have been appointed, he comes forward and moves to discharge the receiver, from the time of such discharge he will be entitled to the rents and profits. Thomas v. Brigstocke, 3 Cond. Eng. Ch. R. 570. Now, there can be no special virtue in the particular act which shall evince the mortgagee's determination to put an end to the possession held under the mortgagor, and to appropriate the whole subject, out and out, from that time to the payment of his debt. Any act, conforming to the nature of the case, which shall sufficiently fulfill the condition of plainly manifesting such purpose, and repel the presumption of consent to the mortgagor's possession, ought to be sufficient to found the right to have the accessory as well as the principal subject, so far as necessary, appropriated to his benefit from that time; and it seems to me, that what was done by the bank in this case should be deemed a sufficient foundation for the right to claim the rents and profits of the property that accrued after the injunction, in the actual result of the whole case. The bank determined to resort to a sale of the property, and directed the trustee to proceed to make it; and it gave notice of its claim and of such its intention to appropriate the whole subject to the purposes of its debt, by causing the sale to be advertised; and it formally and distinctly made claim

31 *and set up its title in the suit of Hupp and Arthur. Of the right of a junior mortgagee to foreclose the equity of redemption, and in the case of a deed of trust, to sell, no doubt can be entertained. The case of Howell v. Ripley, 10 Paige's R. 43, cited by the appellee's counsel for another purpose, is an authority for this proposition: though where the junior incumbrancer is about to sell, and the amount of previous liens is unascertained, the court of equity, rather ex gratia or as a matter of favor to the mortgagor, will stay a sale till it be ascertained. Thus, the bank, in ignorance for aught that appears, of any previous unsatisfied debt, was proceeding to take the appropriate means to reduce the subject to possession, by causing a sale to be made, when it was arrested by the injunction of Hupp and Arthur setting up a title adversary to that under which the bank claimed, alleging that the deed to Steenbergen was usurious, and seeking to avoid the whole security. It did not seek merely partial or equitable relief, but to get rid entirely of the deed under which the bank claimed. It is true there are certain allegations in the bill, upon the ground of which partial equitable relief might be administered; but it would seem that they are made rather as ancillary circumstances, with a view to aid in making out the case of usury, than for the simple purpose of reducing the amount due, and obtaining relief in part. Manifestly, the whole frame of the bill is to displace the Steenbergen debt entirely, and to let Hupp in. Now, as Hupp was thus seeking to delay the sale of the property, whereby a deficiency might be occasioned, (as it in fact has been in the result,) it could not be unreasonable for the court, on granting the injunction, to impose such terms as might fully protect the bank against loss or injury. Rogers v. Rathbun, 1 John. Ch. R. 367; Tupper v. Powell, Ibid. 439; both cases of usury,
32 in which the court held that *the party seeking relief must do what is just and right on his part. He that seeks equity must do equity; and it could not be unjust to require Hupp and Arthur seeking relief in the manner they were, to submit to such terms as would insure the bank against the loss of any part of the amount that might eventually be found actually due, by reason of the delay thereby occasioned. 2 Tuck. Comm. 468; Marker v. Marker, 4 Eng. Law & Eq. R. 95, 106. In the case of an injunction to a judgment at law, the statute provides for adequate bond and security; and in other cases, it is the right and duty of the court to require that sufficient security should be given. If the bill of Hupp and Arthur had stated the case as it really was, admitting what was really and justly due, the court would have taken some steps to secure that amount to the bank, and to prevent any portion of it from being lost by reason of its interference. This court has adjudged in this case, that Arthur and Hupp were not entitled to the relief they sought, but to equitable relief only, and upon equitable terms. It has directed the amount, justly due from Arthur to Steenbergen, to be ascertained by a proper proceeding. That has been done by a commissioner, and a report made, to which no exception was taken, and which was confirmed by the court. Thus, the amount for which the deed of trust stands as a security, has been fixed and ascertained; and the court has also, by its decree, established the right to raise that amount by a sale of the property. The property has accordingly been sold; and the proceeds of the sale have proved inadequate to satisfy the amount thus declared due. Now, it may not be unreasonable to infer that this deficiency was occasioned, in whole or in part, by the interference which caused the delay of the sale. Certainly, if the property had been sold in April 1841, (the period proposed,) and the proceeds then applied to the debt, the
33 *large accumulation of interest which took place between that period and the time of the sale, would have been avoided, or at least so much of it as accrued upon that portion of the debt that would have been covered by the proceeds of the sale.

Where a party is proceeding at law to get a judgment for more than is due, and the defendant appeals to the court of chancery for relief by way of injunction, the settled rule is, that it will only be granted on terms of confessing a judgment and executing a release of errors at law. And a judgment is always suffered to stand as a security for what may be really due, though obtained by fraud, accident or surprise, and although what may be due be the whole or a part only of the debt recovered. Farmers Bank v. Vanmeter, 4 Rand. 553, Judge Green's opinion. So where there is a recovery at law, and the defendant seeks relief in equity in the nature of a new trial, the judgment at law stands as a security for what the plaintiff may be justly entitled to, and the court of chancery continues the injunction and directs the proper issues; and upon the coming in of the verdict, perpetuates the injunction or dissolves it, in whole or in part, according to the finding of the jury. Knifong v. Hendricks, 2 Gratt. 212. These principles seem all to be in strict conformity to that favorite maxim of the court of equity, that he that seeks equity must do equity; and should be adhered to, however the manner of their application may be varied in different cases.

When, therefore, Arthur and Hupp applied for their injunction, due care should have been taken to protect the bank against any loss by reason of its being allowed, and to preserve entire the full benefit of the security which it then had. Hupp, it seems to me, should have been required to pay the rents into court or to surrender the property to the officer of the court, to be by him rented out, and the proceeds to be
34 *accounted for and paid as the court might direct; or the parties should have been required to give adequate security

was not complete till the last step was taken." It is the duty of the grantee of the annuity to see that the memorial is properly made and enrolled; and if there be any defect therein, he cannot avail himself of it to avoid the contract. The grantor may treat the contract as a legal one, and perfect it, or he may avoid it, at his option. So long as he continues to treat it as a subsisting annuity, the grantee has no cause of action against him for the consideration money. The grantee has been guilty of no fraud, but of a mere
7 omission *of a legal formality; and though, by the terms of the statute, he must lose the benefit of the annuity, he is entitled to have the purchase money restored to him, after deducting so much of the annuity as he may have received. The difference between that case and this must be sufficiently obvious, without further remark. The other case relied on is Elmore's adm'x v. Bowles' ex'or, 7 Gratt. 385; which, I think, is also very different from this. There, the replication to the plea of the statute of limitations set forth a covenant between the parties, which was intended, and had the effect, to suspend the right of action on the note until the happening of a certain contingency, and then to revive it. Here, the replications set forth an executed contract of absolute sale, intended to discharge the original debt, and not to suspend the right of action therefor. If the contract was valid, it discharged the debt; if void, it does not appear how it could have suspended the right of action for the debt.

The third and last error assigned is, that the court admitted certain testimony of William B. Brown on the trial of the issues joined on the general replication to the pleas of non assumpsit and the statute of limitations. The bill of exceptions states, that while the said witness was under cross examination, the defendant's counsel propounded to him this question: "Do you know of any money received by John F. Johnson, in his life time, for Philip Jennings?" To the answering of which, the plaintiff objected, because the defendant had not filed with his pleas any account of payments or setoffs; but the court overruled the objection, and directed the witness to answer the question. To which opinion the plaintiff excepted. It does not appear from the bill of exceptions what answer the witness gave to the question. It may have been, that he had no knowledge on the subject; and if so, was wholly
8 unimportant, and would *certainly not be a good ground for reversing the judgment. Though, in the state of the pleadings, it could not have been legal evidence, if it only tended to prove a specific payment or setoff, yet it might have been legal evidence, if it tended to prove that the money charged in the account on which the suit was brought, or any of it, was not loaned or advanced, as charged, but was paid out of the money of Jennings in Johnson's hands. The evidence would then have gone to the foundation of the cause of action, and not to its discharge by payment or setoff. As was said by Judge Carr, in Rowt's adm'x v. Kile's adm'r, 1 Leigh 216, 223, "It is certain the jury ought to have all the evidence which is relevant: of its weight it is to judge. But when we are called on to reverse the decision of a judge, it is incumbent on the party seeking this, to show that there is error; and to this end he ought to present to us such a case as shows the relevancy of the evidence rejected." In that case, the evidence objected to was set out in the bill of exceptions; and the court was only asked to presume it irrelevant because its relevancy did not appear. In this, the court is asked to presume, first that the question was answered, and then, that the answer was of such a nature as to be inadmissible. But the answer could have had no influence on the issue on the plea of the statute of limitations, on which alone a verdict was found for the defendant, and could not therefore have prejudiced the plaintiff. I think there is no error apparent in this bill of exceptions; and certainly none which can have the effect of reversing the judgment.

Exceptions were taken by the plaintiff to other opinions of the court given on the trial, which, though no errors are assigned thereon, must be briefly noticed, especially as some of them were noticed in the argument of one of the counsel for the plaintiff in error.

9 *The first of these additional exceptions was to the opinion of the court excluding the bill of sale for the slaves aforesaid, as evidence in the case. Nothing is stated in the bill of exceptions to connect this bill of sale with the account on which the suit was brought; and, in the absence of such connection, which ought to appear in the record, the bill of sale was irrelevant, and properly excluded.

The next of these exceptions was to the opinion of the court excluding the record of the proceedings in the action of detinue, in which the slaves aforesaid were recovered by the defendant from the plaintiff. There is nothing set out in the bill of exceptions to this opinion of the court to show the relevancy of the said record as evidence in the case, except the record itself; and there is nothing in that record tending to show its connection with the cause of action in this case, except the evidence set out in a bill of exceptions taken to the opinion of the court overruling a motion for a new trial; some of which evidence tended to show that the slaves had been sold and conveyed by Jennings to Johnson in payment or security of the account on which this suit was brought, and two bond debts due by the former to the latter. If it had appeared in this record that the bill of sale was avoided in such manner or for such cause as entitled Johnson to reclaim the purchase money of the slaves, or to claim payment of the debt intended to have been satisfied or secured by the bill of sale, it would then have been admissible in the case, and would have had the effect of

repelling the bar of the statute of limitations. But so far from that, it appears by the record that the slaves were recovered on the ground of fraud in obtaining the execution of the bill of sale. The evidence tended to prove such fraud; and the court having instructed the jury, on the motion of the defendant in that case, that if
10 they believed from the *evidence that the bill of sale was executed without fraud, the title to said slaves was thereby vested in the defendant, whether the purchase money was paid or not, the finding of the jury against the defendant was an affirmance that the bill of sale had been fraudulently obtained. The record was therefore against, and not in favor of, the plaintiff in this action, and she cannot complain of any error in the opinion of the court which excluded it.

The next exception was to the opinion of the court overruling the objection of the plaintiff to the introduction by the defendant, as evidence, of the record of the proceedings in a suit brought at the same time with this action, by the same plaintiff, against the same defendant, on the two bond debts above mentioned; in which suit judgment was recovered by the plaintiff. The defendant in that case claimed, as setoffs, the damages and costs recovered in the detinue case; and also various payments claimed to have been made by Jennings to Johnson, in money, services rendered as a carpenter, cash received in rents, and hires of negroes; of which offsets, accounts were filed. The plaintiff, on the other hand, introduced an account containing all or nearly all the items of the account on which this action was brought, and offered to prove the same for the purpose of lessening any amount which the defendant might show himself entitled to as offsets to the said bonds; and the court, notwithstanding that the defendant objected, among other things, that the account was barred by the act of limitations, permitted the plaintiff to give evidence of said account, and to rely on the same before the jury. Evidence was accordingly introduced tending to prove both the setoffs and the counter setoffs, or some of them; and the jury having by their verdict disallowed the counter setoffs, at least beyond the amount of any payments claimed to have been made by Jen-
11 nings to Johnson *as aforesaid, the judgment in that suit was evidence in this, that the claims asserted in both, and disallowed, or set off in that, were not due.

The next and last exception was to the opinion of the court refusing to instruct the jury, on the motion of the plaintiff, "that if from the evidence adduced in the cause (and set out in the bill of exceptions) they were of opinion that the plaintiff could not, by any lawful impediment, have brought his action, or was prevented from bringing his action, by a mode of payment which afterwards failed, until a period within five years next preceding the commencement of this action, then the statute of limitations did not apply, and the plaintiff might recover, notwithstanding the lapse of time."

I think enough has been already said to show that the court was right in refusing to give this instruction. After the bill of sale and record in the detinue suit were excluded, there was no foundation for it in the evidence. Regarding them as part of the evidence, it was for the court to construe them, and they showed nothing which could have suspended the action, or ought to repel the bar of the statute.

Upon the whole, we see no error in the judgment, and are for affirming it.

Judgment affirmed.

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12 *Muire v. Falconer & al.

April Term, 1853, Richmond.

(Absent LEE, J.)

1. **Appellate Practice—Establishment of Public Landing—Report of Viewers—No Motion to Quash in Lower Court.***—Upon an application to establish a public landing, if no motion has been made in the County court to quash the report of the viewers, it is too late to object to it in the appellate court.
2. **Public Landing—Establishment of—Report of Viewers—Case at Bar.**—The viewers report, that a public landing at the place viewed would be of very great convenience to the public, as a list of persons, all heads of families, to the number of one hundred and twenty, had been shown to them, all of whom, as well as many others, would be benefited by the proposed landing. HELD: It was no error in the report that this list of persons was not returned with the report.
3. **Same—Same—Writ of Ad Quod Damnum Awarded by Benefited Justices—Effect.**—Two of the persons on this list were justices of the peace of the county; and when the order awarding the writ of *ad quod damnum* was made, they were on the bench; and one of them was on the bench when the landing was established. This was no legal objection.
4. **Same—Same—Notice to Owner of Land.**—There is no time fixed by the statute for which notice shall be given to a party upon whose land a public landing is sought to be established. If, therefore, the notice is served upon him at any time before the end of the return day of the notice, it is sufficient in law; and he must show that it was insufficient or not reasonable notice.
5. **Same—Same—Same—Waived.**†—Such person having made himself a party in the cause, and taken an appeal, upon which all the proceedings subse-

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***Appellate Practice—Report of Viewers—No Motion to Quash in Lower Court.**—See the proposition laid down in the first headnote approved in Mitchell v. Thorne, 21 Gratt. 173. See also, Bohn v. Sheppard, 4 Munf. 403; Lewis v. Washington, 5 Gratt. 265.

†**Notice of Suit—How Waived.**—In Ballard v. Whitlock, 18 Gratt. 242, the court said: "The defendants in the circuit court, by appearing (as their own bill of exceptions shows they did) in opposition to the motion to set aside the erroneous judgment and quash the execution upon it, without making any objection to that motion upon the ground of failure to give them notice of it, must be held to have waived the notice, and cannot now be heard to make the objection. Ayres v. Lewellin, 3 Leigh 609;

quent to the report of the viewers were quashed; and it being proved that after the cause went back he was served with notice, and he having appeared and opposed the establishment of the landing, without objecting to the sufficiency of the notice, he cannot object to it in the appellate court.

6. **Same—Same—Writ of Ad Quod Damnum—Return of.**—The statute does not require the writ of *ad quod damnum* to be returned to the next court after it is awarded. And if the order awarding it so directs, the direction is merely directory to the officer, and his failure to make the return within the time prescribed will not affect the validity of the inquest properly taken.

7. **Same—Same—Same—Charge to Jury of Inquest.**—A jury of inquest upon a writ of *ad quod damnum* to establish a public landing is charged according
13 to the act 2 Rev. Code, *p. 288, § 15, but is not charged according to the act of January 30th, 1834, Sess. Acts 97. This is not error, this provision having no application to public landings.

8. **Same—Same—Assessment of Damages—Case at Bar.**—The application is to establish a landing at a certain place, which is in fact on the lands of two adjoining proprietors; and the precise locality of the dividing line between them is a matter of controversy between them, though the line had been previously fixed by processioners. The land being open and unenclosed, it was proper for the jury, in assessing the damages to each, to take the line fixed by the processioners as the true line.

9. **Same—Same—Same—Same.**—With the consent of the party to whom the damages were assessed, the court directed that the damages so assessed to him should be withheld until the dispute about the dividing line should be determined, and that the damages should then be paid to the party to whom it appeared the land belonged. This is no error.

10 **Same—Same—Same—Conclusiveness of Inquest.**‡—In the absence of evidence clearly showing that the damages assessed are insufficient, the inquest taken upon the ground must be deemed conclusive on the question.

This was an application by Falconer and Haskins to the County court of King & Queen, for the establishment of a public landing at Walkerton in that county, on the Mattaponi river. The appellant Muire opposed the application; but the County court established the landing; and upon appeal to the Circuit court, the order of the County court was affirmed. Whereupon, Muire applied to this court for a supersedeas, which was allowed. The facts are sufficiently stated in the opinion of Judge Allen.

The cause was argued orally by Griswold & Claiborne for the appellant, and there was a printed argument filed for the appellees.

ALLEN, J. This is an appeal from a judgment of the Circuit court of King & Queen county, affirming an order and judgment of the County court establishing a public landing on the lands of the appellant, and of A. S. Sale.

The two first errors assigned in the petition are for alleged imperfections in
14 the report of the viewers. No *motion to set aside the report for this cause seems to have been made in the County court. At the final hearing of the cause in the County court, the appellant moved to quash the petition, for errors on its face, and also moved to quash the inquisition; but does not appear to have objected to the report of the viewers. Such objection, according to the case of Lewis v. Washington, 5 Gratt. 265, should have been made in the

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Poling v. Johnson, 2 Rob. R. 255; Pulliam, etc., v. Aler, 15 Gratt. 54; *Muire v. Falconer, etc., 10 Id. 12.*"

See also, in accord, Cunningham v. Mitchell, 4 Rand. 189; Bernard v. Brewer, 2 Wash. 77; *foot-note* to Ballard v. Whitlock, 18 Gratt. 235.

‡**Assessment of Damages—Conclusiveness of Inquest.**—In Supervisors v. Stout, 9 W. Va. 705, the court said: "It is objected, that the compensation allowed the defendant is grossly inadequate. There is nothing in the record showing that to be so. Therefore, upon the principle in *Muire v. Falconer, 10 Gratt. 13,* 'in the absence of evidence clearly showing that the damages are insufficient, the inquest taken on the ground is conclusive.'"

Same—Benefits.—In assessing damages in condemnation proceedings, it is a well-established rule in both Virginia and West Virginia that the owner of the land is entitled to receive the value of the land taken, without reduction, and such further damages as the residue of his tract has sustained less the *special but not general* benefits. Mitchell v. Thorne, 21 Gratt. 164, and *foot-note*; Blair v. City of Charleston, 43 W. Va. 62, 26 S. E. Rep. 341.

But as to what are general benefits, and what is to be included in the term "special benefits" there does not seem to be complete harmony in West Virginia.

In James River, etc., Co. v. Turner, 9 Leigh 313, the assessors were required to pay a just regard to the advantages which the owner of the land would derive from the improvement for the use of which his land was condemned. It was held that the advantages to the owner which should be taken in consideration by the assessors were such advantages as had particularly and exclusively affected the particular tract or parcel of land whereof the portion was condemned—not advantages of a general character, which might be derived to the owner in common with the country at large from the improvement. This statement of the rule is approved in Mitchell v. Thorne, 21 Gratt. 179; Railroad Co. v. Tyree, 7 W. Va. 696, and Railroad Co. v. Foreman, 24 W. Va. 672. And, in the principal case also, the holding in James River, etc., R. Co. v. Turner was cited and approved.

Yet in Blair v. City of Charleston, 43 W. Va. 71, 26 S. E. Rep. 345, the court said: "Many authorities tell us that we must consider as general benefits,—and not charged against the owner,—not only benefits throughout the city or town, but also benefits common to all persons along the line of the improvement. Likely, we must so construe Kanawha Co. v. Turner, 9 Leigh 313, and Railroad Co. v. Foreman, 24 W. Va. 662. But in *Muire v. Falconer, 10 Gratt. 17,* the opinion says the jury must 'show a just regard to the advantages resulting from the passing of the road through the land,' and that the advantages to be excluded are those 'derived to the owner in common with the county at large,' thus not excluding from consideration those advantages di-

County court, by a motion to set aside the report.

But the objections, if taken in time, should have been overruled. In their report, the viewers state that a public landing at Walkerton would be a very great convenience to the public, as a list of persons, all heads of families, to the number of one hundred and twenty, had been shown to them, all of whom, as well as many others, would be benefited by the proposed landing. The report is objected to, first, in not returning the list of one hundred and twenty names shown to them, to enable the appellant to object to any of them being witnesses, judges or jurors; and in the second place, because the report professes to be made, not upon their own judgment and upon a view of the land, but upon the list of names so exhibited to them.

As was said in the case of Lewis v. Washington, ubi supra, the authority of the County courts to establish public roads and landings, is a branch of their police jurisdiction, conferred for the benefit, and to be exercised at the common expense of all the citizens of the county. It is therefore necessary and proper that the court should look to the necessities of those applying for the landing, how far it may be productive of convenience or inconvenience to the public or individuals, and whether, in view of all the circumstances, a proper case is made for the application of the county resources to the object. To aid in arriving at a proper conclusion, the viewers are required to
15 report truly and *impartially the conveniences and inconveniences which will result, as well to individuals as the public, if such landing be established. It was proper that the viewers should enquire whether the public convenience would be promoted by the establishment of the landing; and this could be best done, by ascertaining what number of individuals would be accommodated by it, rather than by relying on vague generalities as to its being a public benefit. But the law does not require a return of the names of those benefited or accommodated, either where a list is made out by the viewers themselves, or where it is shown to them by others; and it was not necessary to allude to it in their report. Nor is there any foundation for the objection that the report is not based on their own judgment and view. They report expressly, as their own judgment upon the view, that a public landing at Walkerton would be a very great convenience to the public, and they refer to this list of one hundred and twenty names, as well as many others not on the list, and to other facts adverted to in their report, as the circumstances which had conducted them to that conclusion.

The third error assigned is, that the appellant was not duly summoned to show cause, at August court 1848, against the establishment of the landing. The appellant, as early as June 1847, was, on his own motion, admitted a party to the controversy, appealed from the order made at that term to establish the landing, and reversed the order in the Circuit court. That court quashed all the proceedings subsequent to the return of the report of the viewers, and remanded the cause. When returned to the County court, a new summons issued, which was returned "Copy handed to Muire and Sale." The return is without date, and it is objected that it is insufficient, because it does not appear the notice was reasonable. It is conceded that the act, under which this proceeding was had, pre-
16 scribes *no particular time for the service of process. The act regulating proceedings in civil suits, 1 Rev. Code 506, § 70, permits process to be executed at any time before the return day shall have passed. And the act 1 Rev. Code 260, § 76, directs the proceedings in the County courts to conform, as nearly as may be, to the proceedings in the Circuit courts. The service here was intended to give notice to the party; and as it would be sufficient, if executed at any time before the return day had passed, the service must be deemed reasonable, unless the contrary appears. Here the appellant appeared and contested the application on its merits, without objecting to the return on the summons. In the case of Bernard v. Brewer, 2 Wash. 76, the act required ten days' notice of the motion for the writ of ad quod damnum; and all the judges were of opinion that a defence, made upon the merits, would have been a waiver of the objection of want of notice. So that even if the act had required the summons to be executed a certain number of days before the return, yet, according to this authority, as he did appear, which was the object of the summons, and being the only person interested in the fact of notice, and as he did not object to the want of

rectly conferred on property along the line of the improvement; leading us to infer they ought to be deducted from the damages. So in Mitchell v. Thornton, 21 Gratt. 179. So in Kanawha Co. v. Turner, 9 Leigh 313, the words 'country at large' are used, but the case seems to exclude benefits immediately from the work, shared by all along it."

In this case (Blair v. City of Charleston) the court held that if property is enhanced in value by reason of a public improvement, as distinguished from the general benefits to the whole community at large, it is specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may, to a greater or less extent, be likewise specially benefited. In other words, that it is not only such benefits as are special, or limited to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but it is such benefits as that the particular property is by the improvement enhanced in value —that is, specially benefited—that are to be considered. That if a piece of property is enhanced in value, its enhancement, or, in other words, benefits to the property, cannot be said to be common to any other piece of property specially enhanced in value, and it is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties.

notice, he must be considered as waiving it. Here the service was good according to law, and the burden was on him to show the notice was insufficient or not reasonable.

I think there is nothing in this objection. The service is legal, and for aught the record shows, the notice was sufficient. It, therefore, is unnecessary to consider the objection taken in the eighth assignment of errors, which was to the hearing the evidence of the officer to prove due service of the summons. The appellant was not injured by it.

There is nothing in the fourth error assigned. The road law does not require the writ of ad quod damnum and inquest to be returned to the next court. The 17 *provision of the act, 2 Rev. Code, 234, § 2, is, that the inquest, with the writ, shall be returned to the court. The writ in this case did require a return to the next court; but that is merely directory to the officer, and his failure to make the return within the time prescribed would not affect the validity of an inquest properly taken.

It is further objected, that the inquest was not properly charged. The 15th section of the act concerning public roads, &c., 2 Rev. Code, 238, provides, that the same proceedings shall be had upon an application for the establishment of a landing as in applications for the opening or alteration of roads. The writ was sued out and the sheriff required to charge the jury according to the directions of this law. By the act of January 30th, 1834, Sess. Acts, 97, it is provided, that whenever a jury of inquest is impaneled according to the directions of the 2d section of the act of 1819, concerning public roads, and for the establishing of public landings, the sheriff shall, in addition to the charge prescribed by the said section, charge the jury to combine, with the estimate of the damages to be occasioned by the opening of the road, a just regard to the advantages which the proprietors or tenants will derive from the passing of the same through their lands. Though the first clause directs that whenever a jury is impaneled, under the 2d section of the act of 1819, the additional charge therein prescribed shall be given, the subsequent provision, prescribing the charge, shows that the charge was confined to road cases. The jury is to combine, with the estimate of the damages occasioned by the opening of the road, a just regard to the advantages resulting from the passing of the road through the land; a charge totally inapplicable to the case of a landing, according to the letter of the law. Nor does it come within the spirit of the 18 act. It was held in *the case of the Jas. River and Ka. Co. v. Turner, 9 Leigh 313, under a similar provision in respect to lands condemned for the use of the canal, that the advantages thereby contemplated are such as particularly and peculiarly affect the particular tract of land a portion whereof is condemned, and not advantages of a general nature, which may be derived to the owner in common with the county at large.

A landing merely lays open to the public use a portion of the property of an individual. Nothing is done thereby to improve the residue of the particular tract, or to give to it advantages which it did not possess before. Its relative position, with regard to the navigable stream, is not thereby altered, and the public is merely let in to participate in the advantages theretofore enjoyed by the owner. There would seem, therefore, to be no good reason for embracing the case of a landing in the charge required by the act of January 30, 1834. So that this additional charge to the jury is neither required by the words or the spirit of the act, upon an application to establish a landing.

The sixth error assigned is, that the jury have undertaken to run a dividing line between the appellant and Sale, and to decide which was Sale's and which the appellant's land, when the same, as appears by the record, was in dispute between them.

It appears from the order of the court establishing the landing, that the appellant claimed title to the land for which damages were assessed to A. G. Sale, and by the consent of Sale, it was ordered, that the damages so assessed to Sale should be withheld from him until it should be determined, in any manner between Sale and the appellant, to whom the land in dispute really belonged; and then that the damages assessed should be paid to the party entitled to the land.

From some exhibits filed in the 19 papers, it seems that *there was a dispute between the appellant and Baylor Temple, under whom Sale claimed, as to the true position of the line between them. In 1840, the processioners reported the fact of the dispute and the conflicting pretensions of the parties, and the surveyor, with a jury, was ordered to lay out the bounds in dispute. The jury so impaneled decided the controversy against the appellant. What shape the controversy thereafter assumed, does not appear by the record. The viewers reported that the land lies between the main road and the river Mattaponi, open and unenclosed; and the plat returned with the inquest shows it to be a small triangle between the river and two roads branching from a common stem, and running, one to Sale's wharf, the other to a store-house of the appellant. There being no actual occupancy of the land, and each party claiming to be the proprietor, the viewers and the jury could only treat each as the proprietor up to the line so established by the jury, under the previous order of the court. The effect of the survey returned with the inquest in this case, was not to determine the right, but to ascertain the quantity of land on each side of the disputed line, so as to assess the damages properly. They could not have pursued any

other course. The controversy between the coterminous landholders could not deprive the community of the right to condemn the land for a public landing. The land lying open or unenclosed, the jury and the viewers treated each as in possession up to the line as surveyed on the former occasion; and the law, in the absence of any actual possession, would consider him in possession who had the right. In running the line to ascertain the quantity, it passed through the edge of a small pen enclosed by one of the servants of the appellant. An inspection of the plat shows it to have been so near the line as not to affect the question of possession. The inference would *rather be, that the line was recognized, and the enclosure made with reference to it, but accidentally crossed it a few feet. I think the jury, under the circumstances, did right in assessing the damages to each of the apparent owners up to the disputed line, leaving the subject of boundary and claim to the damages to be litigated between the parties themselves.

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Nor is there anything in the seventh assignment of errors, objecting to so much of the order as withheld payment of the damages assessed to Sale until the dispute about the boundary should be determined, and directing that the damages should be paid to the party to whom it appeared the land belonged. Being made with the consent of Sale, he cannot and does not object; and the reservation was made for the benefit of the appellant, upon his claim of title. The law, directing the levy for such damages to be made at the next court, is directory; and the omission to do so would not deprive the party of his right to them. In this case, there can be no doubt the court would be bound to levy for the damages whenever the appellant shows that he is entitled to them.

The last error assigned is that the damages are too small. The land condemned, and for which damages were assessed to the appellant, contains two roods and thirty-one poles, a portion of it covered by water at every rise of the tide, and the residue for the most part a barren sand bank, and worthless for purposes of cultivation, detached from the main body of the appellant's land by a public road, but not separated from his wharf and granary. It is manifest, therefore, the land is intrinsically of little value, and that the jury, in assessing the damages, have had regard to considerations connected with its position on a navigable stream, where there was a public road leading to a ferry. The appellant had examined witnesses to prove, that if the public had no means of access to the river except *through his wharf and granary, and should pay him a fair and reasonable compensation for the privilege, it would be a source of profit; but the evidence shows that the farmers had not been in the habit, for some years past, of storing their grain with the appellant, but have been in the habit, latterly, of delivering their grain at the wharf and granary of Sale, not far from the wharf and granary of the appellant. Another witness supposes the landing would diminish the value of the appellant's property one-third. This testimony is too vague and indefinite to enable an appellate tribunal to say that the estimate of the inquest was too low. The public had access to the river at the wharf and granary of Sale; so that the opinion that the wharf and granary of the appellant might be a source of profit, if the public could be accommodated at no other place, is entitled to but little weight; and it does not appear to what other property of the appellant the witness alluded, who supposed that it would be diminished one-third in value by the proposed landing; nor does he say what is the value of the property which would be so diminished in value. The evidence in the record does not show that the damages assessed were insufficient; and in the absence of such proof, the inquest taken upon the ground must be deemed conclusive.

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After the order and judgment of the County court establishing the landing, the appellant appealed to the Circuit court; and the appeal being on the facts as well as the law, new testimony, not in the record, was offered at the trial in the Circuit court. Amongst other things, the appellant proved that the names of Fleet and Ryland were on the list of persons shown to the viewers, and who the viewers supposed would be benefited by the proposed landing. That Fleet and Ryland were justices of the peace, and both were on the bench, and members of the court at the August term 1848, when the order to award the writ of ad *quod damnum was entered; and that Ryland was a member of the County court at the October term, when the landing was established.

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Without stopping to enquire whether it would be regular to object in this mode to the competency of the justices who composed the court, it is sufficient to say that the evidence shows no legal disqualification. The fact that the viewers supposed that they, with other members of the community, would be benefited by the landing, does not show any direct interest in the controversy. Every individual who uses a public road, landing or other improvement, may, in some sense, be said to be benefited by it; but such conjectural benefit does not constitute an interest in the controversy which would disqualify a juror, and much less the court. In regard to the latter, it is in the power of the party to preserve on the record every decision made against him; and if erroneous in law or fact, the error can be corrected in an appellate tribunal. In the present case, no suggestion seems to have been made in the County court, that any member of the court had an interest in the controversy. The appellant excepted to the decision of the County court, and spread the facts on the record; and in the Circuit court the case was heard upon the record and proceedings of the County court, together with the viva voce testimony then

offered. If upon such hearing it appeared that the proceedings were regular, and that the facts entitled the petitioners to an order establishing the landing, the judgment of the County court in their favor was properly affirmed. I think the judgment of the Circuit court was right, and should be affirmed with costs.

The other judges concurred in the opinion of Allen, J.

Judgment affirmed.

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23 *Bank of Washington v. Hupp.

April Term, 1853, Richmond.

(Absent ALLEN and SAMUELS, Js.*)

1. **Deeds of Trust—Mortgages—Profits†—Case at Bar.**—A executed a deed of trust on real and personal property, to secure the purchase money; of which purchase money he paid a part, and the amount still due was unascertained, and a matter of doubt. He executed a second deed of trust upon the same property to secure a large bond to S, the consideration of which was in part a previously existing *bona fide* debt, in part debts which S had assumed or was to assume for A, and a part was usurious. A afterwards executed a mortgage on the same property to H, to secure a debt due to him, and to indemnify him as his surety; and by this mortgage H was authorized and did take possession of the property, and use the same for the purpose of applying the annual profits to the payment of his debts and those for which he was surety. The trustees in the second deed having advertised the property for sale, A and H filed a bill to enjoin the sale on the ground that the debt was usurious, until the question of usury could be tried at law. It was held that though the bond was usurious, the deed of trust should be a valid security for so much of the bond as was *bona fide*, and that the property should be sold to pay this amount, and what was due on the first deed of trust. The accounts were taken and the property sold, and the proceeds of the sale were not sufficient to pay the amount due on the first and second deed. HELD: That H was not liable to account to S, the creditor in the second deed, for the profits he had made pending the proceedings in the cause.

2. **Same—Same—Same—Same.**—Though by the terms of the mortgage to H, he had a discretion to apply the profits to pay his own debt and those for which he was surety, or to the debt of S, he was not bound to apply any part of these profits to the debts of S. And if this were more doubtful, the holders of that debt having claimed not under this deed but against it, they cannot complain that no part of these profits have been decreed to them.

This is the sequel of the case of the Bank of Washington v. Arthur & als., 3 Gratt. 173. When the cause *went back to the Circuit court, Hupp and Machir, in November 1846, filed an amended bill, in which they charged that Steenbergen did not pay the debts of Arthur to the amount he had undertaken to pay, and that he retained in his hands the sum of ten thousand dollars to meet the balance that was due on a deed of trust previously given by Arthur to secure a large debt due to the heirs of John Arthur, for the purchase money of the real estate embraced in the deed executed to secure him. That they were not advised what amount was paid by Arthur on account of this debt due to the heirs of John Arthur, but they believed that large payments had been made, and that the debt was nearly if not entirely discharged; yet that the deed stood upon the record in nowise released; and the balance, if any due thereon, was unascertained.

They charged further, that James S. Arthur put his property, which was embraced in these deeds, into the hands of the complainant Hupp, to be held and used by him for the purpose of making profits therefrom, which profits were to be applied to discharge the debts which Arthur owed to Hupp, and also the debts of Arthur, for which Hupp was bound, as would appear by reference to a mortgage executed by Arthur, which was filed as an exhibit. That Hupp, under the provisions of this deed of mortgage, took the property into his possession, and had continually since held it for the purposes above stated, and had made profits therefrom, by manufacturing iron, milling and farming; but the amount he was unable to ascertain.

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*JUDGE ALLEN was related to some of the parties, and JUDGE SAMUELS had been counsel in the cause.

†**Deeds of Trust—Mortgages—Right to Rents and Profits.**—In Stout v. Philippi, etc., Co., 41 W. Va. 345, 23 S. E. Rep. 571, it was said: "If a mortgagor or grantor in a trust deed or judgment debtor is in possession pending suit to sell the land, he is not chargeable with rent; and if the creditors are doubtful of the adequacy of their security, and want the benefits of profits until a sale can be had, they must get an order of sequestration, commonly accomplished by appointment of a receiver. Clarke v. Curtis, 1 Gratt. 289; Childs v. Hurd, 32 W. Va. 66, 9 S. E. Rep. 362; *Bank v. Hupp, 10 Gratt. 23.* In the last case, JUDGE MONCURE said he thought this principle more applicable to deeds of trust than to mortgages." Again, in Frayser v. R. & A. R. Co., 81 Va. 391, the court said: "The law is now well settled that until possession of the mortgaged property is taken by the mortgagee, or a proper judicial authority, the mortgagor is entitled to the profits. When possession is thus taken the mortgagee becomes entitled to the profits, but only to such as thereafter accrue. 1 Jones on Mortgages (3d Ed.) sec. 670; Williamson's Adm'r v. W. C., V. M. & G. S. R. R. Co., 33 Gratt. 624; Gibert v. Same, *Id.* 645."

See also, 1 Min. Inst. (4th Ed.) 604. And see generally, monographic *note* on "Deeds of Trust," and monographic *note* on "Mortgages."

Appointment of Receiver.—In Bristow v. Home Building Co., 91 Va. 27, 20 S. E. Rep. 946, it was said: "The right to have a receiver appointed to hold rents to supply any deficiency which may exist after sale is made, when the debtor who is personally liable for the deficiency is insolvent, and in this way obtain a specific lien upon the rents to pay such deficiency, is supported by the highest authority. Clarke v. Curtis, 1 Gratt. 289; Beverley v. Brooke *et als.*, and Beverley v. Scott *et als.*, 4 Gratt. 187; *Bank of Washington v. Hupp, 10 Gratt. 23, 41.*"

After making the necessary parties, they asked that the amount due on the deeds of trust given by Arthur might be ascertained, and that the trust property might be sold and applied to the satisfaction of such of the liens as were valid, according to their priorities.

The deed executed to secure the debt due to the heirs of John Arthur was filed
25 as an exhibit, and is *dated September 17th, 1833. The bonds secured were executed to David Crawford and Philip Williams, jr., the commissioners who had sold the property, the price of which was twenty-nine thousand seven hundred and twenty-two dollars thirty-four cents.

The mortgage to Hupp bears date the 4th of September 1839, and provides that Hupp may take possession of the property and carry on the manufactory of iron, the mill and farm, and use the property conveyed for that purpose, applying the profits to the liquidation of the debts due to said Hupp, or to such debts as he may be or has become security for, or to the debt due to said John B. Steenbergen; or if the said Hupp shall think best to do so, to sell the said property, real and personal, upon such terms as he shall think most beneficial to the creditors, and apply the proceeds to the liquidation of said debts. But if Arthur paid the debt due to Hupp and the debts for which Hupp was or should become the security of Arthur, then the deed to be void.

Williams answered the bill, showing how much of the purchase money of the property sold by himself and Crawford had been paid to them; and stating that James S. Arthur insisted in his life time, that by paying the debts of John Arthur's estate, and by advances made to the children, he had paid a large portion of the balance of his debt.

In May 1847, the Bank of Washington filed a cross bill in the cause. After setting out the decree of the Court of appeals, and the filing of the amended bill, and the facts therein stated, from circumstances which they state, and information, they charge that the amount due to John Arthur's heirs has been paid. They say it is probable that the trust property will not sell for enough to pay the debt due to the bank; and as Hupp admits in both his original and amended bill, that he has been, from the time of the institution of
26 *this suit, in possession of the property under James S. Arthur, and accountable for rents and profits; and as Arthur and himself, by their bill of injunction in March 1841, prevented a sale then about to take place under the complainant's deed of trust, that from that time at least, the bank has a just claim upon Hupp for an account of said rents and profits, to subject the same to the payment of the debt due to the bank, or any balance of said debt which may remain after applying the net proceeds of the sale of the property itself. And making Hupp, Machir, the administrator of James S. Arthur, the heirs of John Arthur and others defendants, the prayer of the bill is that a commissioner may be directed to state and report: 1st. An account of what is due, if anything, and to whom, under the deed of trust executed by James S. Arthur to secure the purchase money of the property sold by Crawford and Williams as commissioners. 2d. An account of what is due upon the bond and deed of trust held by the bank. 3d. An account of the rents and profits of the property since it has been in the hands of Hupp, or since the injunction was obtained, or from such time as the court may think proper. That in the mean time a receiver may be appointed; and as soon as the two accounts first mentioned are reported and approved, that the property may be sold, and the complainant's debt be paid out of the proceeds of sale, and if necessary, out of the rents and profits.

The heirs of John Arthur answered the cross bill, denying that they had been paid by James S. Arthur, or that he had paid debts of John Arthur. Hupp also answered, admitting that he had held the property of Arthur for the purpose of paying the debt due to him, and the debts for which he was bound as Arthur's security; but denying that he was liable to the bank for the rents and profits he had received.

In September 1847, the court ap-
27 pointed a commissioner *to rent out the property. In April 1848, commissioners were appointed to state and report the accounts prayed for in the cross bill. In September 1849, commissioners were appointed to sell the property. The commissioners appointed to settle the accounts made their report, ascertaining the amount due to the Bank of Washington, upon the principles of the decree of the Court of appeals, to be on the 31st of December 1849, thirty-six thousand dollars and four cents, of which there was of principal twenty-four thousand one hundred and forty-two dollars seventy-nine cents. That there was due at the same date to the heirs of John Arthur, the sum of eleven thousand four hundred and sixty-nine dollars fifty-four cents, of which ten thousand and forty-seven dollars seventy-eight cents was principal; and that the annual value of the property from the 30th of April 1841, the day when the sale was advertised to take place, which was enjoined by the plaintiffs in the original bill, to the 1st of January 1848, when the commissioner appointed by the court took it into his possession, amounted to sixteen thousand one hundred and sixty-one dollars forty-eight cents.

The cause came on to be heard in April 1850, when it appearing from the report of the commissioners appointed to sell the property, that the proceeds of sale with the rents in the hands of the receiver were not sufficient to satisfy the debt due to the heirs of John Arthur and that due to the Bank of Washington, the court made a decree, directing payment to the heirs of the sums respectively due them; and that the balance of the fund should be paid to the bank; and holding that Hupp was not liable to the bank for the rents and profits of the prop-

erty whilst it was in his possession, dismissed so much of the cross bill as sought to subject him for these rents and profits, with costs to the complainants in the
28 original and amended bill *against Steenbergen and the Bank of Washington. Whereupon, the Bank of Washington applied to this court for an appeal, which was allowed.

Robinson and G. N. Johnson, for the appellant.

Patton and Cooke, for the appellee.

LEE, J. In 1 Coote on Mortgages, p. 332, the general doctrine is stated, that a mortgagor in possession is not bound to account for rents and profits to the mortgagee. He refers to the case of Colman v. The Duke of St. Albans, 3 Ves. R. 25. That case simply establishes that where the debt is due, and the mortgagee does no act to appropriate the rents to his debt, but permits the mortgagor to remain in possession, and to receive the rents and apply them as he thinks proper, he cannot call the mortgagor to account for what he may so have received. But it is undoubtedly true, that the mortgage subject and all its profits are or may be rendered liable for the debt secured by the mortgage. 1 Coote on Mortg. 325. Whilst the mortgagor remains in possession of the estate, he holds it by a frail and precarious tenure, which, in Beverley v. Brooke, 4 Gratt. 187, 209, was compared to that of a tenant at will; and like such a tenancy, it may be determined by any manifestation of the will of either party. Slight acts will be deemed sufficient to manifest that intention; and the right of a mortgagor to take the profits without account depending upon the will of the mortgagee, ceases whenever a manifestation of the mortgagee's intention to determine it is made. In the case of a formal lease, the mortgagee may entitle himself to receive the rents by notice to the tenant, and all the profits not theretofore received by the mortgagor will be held to be appropriated by the mortgage debt. Drummond v. The Duke of St. Albans, 5 Ves. R. 433; Pope v. Biggs, 17 Eng. C. L.
29 *R. 368. Now, it seems to me that Hupp can stand on no better footing than the mortgagor himself, or a tenant under him, and that his possession must be regarded as subject to the same rules and principles which will apply to theirs. If the prior mortgagee hold the legal title, he may treat a party in possession under the mortgagor as a trespasser, and after a recovery in ejectment, may hold him liable for rents and profits. But as he may thus secure them by a proceeding at law, a court of equity will not give relief as to rents and profits which he may permit the party in possession to receive and dispose of without resorting to his legal remedy: So that he cannot come into equity to have a receiver appointed. But the case of a second mortgagee, who has not the legal title, is different. If the first mortgagee be not in possession, he may have a receiver appointed, though of course without prejudice to the right of the first mortgagee to take possession, if he will. Coote on Mortg. 596; 2 Spence's Eq. 689; Berney v. Sewell, 1 Jac. & Walk. 627; Archdeacon v. Bowes. 3 Anst. R. 752. In this case, Crawford and Williams, the trustees in the deed of trust for the benefit of John Arthur's heirs, holding the legal title, could have entered upon Hupp or brought ejectment. They could not, therefore, have a receiver appointed on their motion: but Steenbergen, standing as second mortgagee without the legal title, was entitled to the appointment of a receiver by the court of chancery; and thus to secure the rents and profits for his mortgage debt.

And as the equitable mortgagee is entitled to the rents and profits from the time of the appointment of a receiver, he is also so entitled from the time of his doing any act which shall be equivalent to an application for such appointment; and an order of sale in a suit to foreclose the mortgage is such an act. Ex parte Living, 38 Eng. C.
30 L. R. 343. Again: A notice to a *first mortgagee in possession, by the second mortgagee, not to pay over the rents to the mortgagor, will be equivalent to the application for a receiver; because if the first mortgagee, after such notice, continue to pay over the rents to the mortgagor, he will be held answerable for them. Berney v. Sewell, 1 Jac. & Walk. 627; 2 Spence's Eq. 648. So after a bill filed by a second mortgagee, the first mortgagee in possession cannot pay over the rents to the mortgagor without making himself liable to account. Parker v. Calcraft, 6 Madd. R. 11. So if in a case in which the mortgagee is no party, a receiver have been appointed, he comes forward and moves to discharge the receiver, from the time of such discharge he will be entitled to the rents and profits. Thomas v. Brigstocke, 3 Cond. Eng. Ch. R. 570. Now, there can be no special virtue in the particular act which shall evince the mortgagee's determination to put an end to the possession held under the mortgagor, and to appropriate the whole subject, out and out, from that time to the payment of his debt. Any act, conforming to the nature of the case, which shall sufficiently fulfill the condition of plainly manifesting such purpose, and repel the presumption of consent to the mortgagor's possession, ought to be sufficient to found the right to have the accessory as well as the principal subject, so far as necessary, appropriated to his benefit from that time; and it seems to me, that what was done by the bank in this case should be deemed a sufficient foundation for the right to claim the rents and profits of the property that accrued after the injunction, in the actual result of the whole case. The bank determined to resort to a sale of the property, and directed the trustee to proceed to make it; and it gave notice of its claim and of such its intention to appropriate the whole subject to the purposes of its debt, by causing the sale to be advertised; and it formally and distinctly made claim

31 *and set up its title in the suit of Hupp and Arthur. Of the right of a junior mortgagee to foreclose the equity of redemption, and in the case of a deed of trust, to sell, no doubt can be entertained. The case of Howell v. Ripley, 10 Paige's R. 43, cited by the appellee's counsel for another purpose, is an authority for this proposition: though where the junior incumbrancer is about to sell, and the amount of previous liens is unascertained, the court of equity, rather ex gratia or as a matter of favor to the mortgagor, will stay a sale till it be ascertained. Thus, the bank, in ignorance for aught that appears, of any previous unsatisfied debt, was proceeding to take the appropriate means to reduce the subject to possession, by causing a sale to be made, when it was arrested by the injunction of Hupp and Arthur setting up a title adversary to that under which the bank claimed, alleging that the deed to Steenbergen was usurious, and seeking to avoid the whole security. It did not seek merely partial or equitable relief, but to get rid entirely of the deed under which the bank claimed. It is true there are certain allegations in the bill, upon the ground of which partial equitable relief might be administered; but it would seem that they are made rather as ancillary circumstances, with a view to aid in making out the case of usury, than for the simple purpose of reducing the amount due, and obtaining relief in part. Manifestly, the whole frame of the bill is to displace the Steenbergen debt entirely, and to let Hupp in. Now, as Hupp was thus seeking to delay the sale of the property, whereby a deficiency might be occasioned, (as it in fact has been in the result,) it could not be unreasonable for the court, on granting the injunction, to impose such terms as might fully protect the bank against loss or injury. Rogers v. Rathbun, 1 John. Ch. R. 367; Tupper v. Powell, Ibid. 439; both cases of usury,
32 in which the court held that *the party seeking relief must do what is just and right on his part. He that seeks equity must do equity; and it could not be unjust to require Hupp and Arthur seeking relief in the manner they were, to submit to such terms as would insure the bank against the loss of any part of the amount that might eventually be found actually due, by reason of the delay thereby occasioned. 2 Tuck. Comm. 468; Marker v. Marker, 4 Eng. Law & Eq. R. 95, 106. In the case of an injunction to a judgment at law, the statute provides for adequate bond and security; and in other cases, it is the right and duty of the court to require that sufficient security should be given. If the bill of Hupp and Arthur had stated the case as it really was, admitting what was really and justly due, the court would have taken some steps to secure that amount to the bank, and to prevent any portion of it from being lost by reason of its interference. This court has adjudged in this case, that Arthur and Hupp were not entitled to the relief they sought, but to equitable relief only, and upon equitable terms. It has directed the amount, justly due from Arthur to Steenbergen, to be ascertained by a proper proceeding. That has been done by a commissioner, and a report made, to which no exception was taken, and which was confirmed by the court. Thus, the amount for which the deed of trust stands as a security, has been fixed and ascertained; and the court has also, by its decree, established the right to raise that amount by a sale of the property. The property has accordingly been sold; and the proceeds of the sale have proved inadequate to satisfy the amount thus declared due. Now, it may not be unreasonable to infer that this deficiency was occasioned, in whole or in part, by the interference which caused the delay of the sale. Certainly, if the property had been sold in April 1841, (the period proposed,) and the proceeds then applied to the debt, the
33 *large accumulation of interest which took place between that period and the time of the sale, would have been avoided, or at least so much of it as accrued upon that portion of the debt that would have been covered by the proceeds of the sale.

Where a party is proceeding at law to get a judgment for more than is due, and the defendant appeals to the court of chancery for relief by way of injunction, the settled rule is, that it will only be granted on terms of confessing a judgment and executing a release of errors at law. And a judgment is always suffered to stand as a security for what may be really due, though obtained by fraud, accident or surprise, and although what may be due be the whole or a part only of the debt recovered. Farmers Bank v. Vanmeter, 4 Rand. 553, Judge Green's opinion. So where there is a recovery at law, and the defendant seeks relief in equity in the nature of a new trial, the judgment at law stands as a security for what the plaintiff may be justly entitled to, and the court of chancery continues the injunction and directs the proper issues; and upon the coming in of the verdict, perpetuates the injunction or dissolves it, in whole or in part, according to the finding of the jury. Knifong v. Hendricks, 2 Gratt. 212. These principles seem all to be in strict conformity to that favorite maxim of the court of equity, that he that seeks equity must do equity; and should be adhered to, however the manner of their application may be varied in different cases.

When, therefore, Arthur and Hupp applied for their injunction, due care should have been taken to protect the bank against any loss by reason of its being allowed, and to preserve entire the full benefit of the security which it then had. Hupp, it seems to me, should have been required to pay the rents into court or to surrender the property to the officer of the court, to be by him rented out, and the proceeds to be
34 *accounted for and paid as the court might direct; or the parties should have been required to give adequate security

to indemnify the bank against the loss of any portion of what should be really due, if any were thereby occasioned. Marker v. Marker, 4 Eng. Law and Eq. R. 95, 106; Pulteney v. Warren, 6 Ves. R. 73; Bond v. Hopkins, 1 Scho. & Lef. 413; O'Donel v. Browne, 1 Ball & Beat. 263. It could be no hardship or injustice to Hupp to require the rents to be brought into court, because if they should prove to be required to make up the amount justly due the bank, they should be so applied. If not, they could be paid over to Hupp, together with the balance of the proceeds of the sale of the property, if any there proved to be.

It is no answer to this view of the course that should have been adopted, to say that the parties looked to the sufficiency of the subject to pay the debt, and that no suggestion was made to the court that its sufficiency was questionable; because it would have been right for the court to protect the party against the possibility of loss in this way, by imposing suitable terms or granting the injunction; and that the court did not do what it might or would have done, if such a suggestion had been made, can furnish no good reason why it should not repair the mischief so far as it may be in its power. If it was the right of the bank that the means should have been provided by the court of putting it in the same condition as to the whole or any part of the debt that should prove to be just, as if it had not interfered, then its failure to remind the court of its omission or to call upon it to take measures to secure the rents and profits, (in confidence possibly that Hupp was a solvent and responsible man, and a willingness to rely on his personal ability to answer them,) cannot and ought not to impair such right thus existing at the very time the injunction was granted.

35 *But the court has required no such security from Hupp. It has taken no measures to have the rents brought into court; but has upon the bill of Arthur and Hupp, assailing and seeking to set aside the whole debt claimed under the deed of trust to Steenbergen, prevented the bank from availing itself of its security for any amount whatever, and has made no provision to protect the bank against the loss of a portion of the amount justly due in consequence of the delay, by reason of the depreciation in the value of the property, the accumulation of interest or otherwise. It has suffered Hupp to remain in possession contrary to the will and intention of the bank, and to receive the rents and profits during the pendency of the injunction, and put them in his pockets, while the trust creditor during the same time is kept out of his money without any indemnity. Is there then no remedy for this wrong? Is this a case of damnum absque injuria? Shall Hupp, the junior incumbrancer, thus be permitted to appropriate a large sum issuing out of the trust subject to the prejudice of the prior incumbrancer, and that after the latter had made the proper effort in the appropriate way to avail himself of the trust subject, but was prevented, and his hands tied by the act of Hupp? And shall the prior incumbrancer thus be made to lose so much of the amount justly due him? I do not see how this can be made to conform to justice or the established principles and maxims of the court of equity. Hupp having sought and obtained the aid of a court of equity, should be held and taken to submit to everything that equity and good conscience required, and upon that principle to do what is right and just. It was but right and just that the bank, being the prior incumbrancer, under the circumstances of this case, and after its ineffectual effort, (rendered so by the act of Hupp,) to appropriate the subject, should have the benefit of the whole subject, at least

36 *from and after that period, in preference to Hupp, the junior incumbrancer. I am of opinion that it is a case eminently proper for the application of the principles, if not the precise form, of the case of Pulteney v. Warren, 6 Ves. R. 73. In that case, the doctrine is broadly avowed that it is the duty of the court to relieve a party, as far as it can, from the injustice to which the shortness of its proceedings may have exposed him. It is said there to be a principle on which courts of justice should act without scruple, to relieve parties against the injustice that may be occasioned by its own acts or oversights, at the instance of the party against whom the relief is sought. The doctrine of this case is recognized as unquestionable by Lord Redesdale, in Bond v. Hopkins, 1 Sch. & Lef. 413; and by Lord Cotterham, in Sanxter v. Foster, 1 Cr. & Phil. 302, 18 Eng. Ch. R. 302. It is in effect recognized or acted upon in various other cases. Anonymous, 2 Ch. Cas. 217; Ross v. Reid, 8 Gratt. 229; Elliot v. Davis, Bunb. R. 23; Morgan v. Morgan, 2 Dick. R. 643; Grant v. Grant, 3 Cond. Eng. Ch. R. 533; O'Donel v. Browne, 1 Ball & Beat. 263. It is also recognized in 1 Story's Eq. § 514, p. 578; and it was distinctly acted upon in the case of Ashby v. Kiger, Gilmer 153. In that case the chancellor, on granting an injunction to a judgment at law, omitted to require a release of errors. It was held that the party should not be permitted to take advantage of the omission.

It is in vain to say that this doctrine only applies in cases in which the injunction has been wholly dissolved; and that in this case the injunction never was dissolved. This is a matter which in this court and in a case like the present, goes more to form than to substance. The principle is not to protect the party against damage or loss only where the plaintiff in the injunction wholly fails in his case, but also in cases in which he succeeds in part. In the

37 case of White v. *Clay, 7 Leigh 68, which was an action at law upon an injunction bond, it was expressly decided that the condition of such a bond applies to the case of a partial as well as of a total dissolution of the injunction. And although

no formal order of dissolution was entered in this case, the injunction was practically and in effect dissolved as to so much of the debt as was found to be justly due, and a sale directed to be made to raise the same. And, however it might be if this were an action on an injunction bond at law, in which a dissolution in form as well as in effect might perhaps be necessary to be averred, yet in this court and in this case such a mere matter of form would scarcely be permitted to defeat the justice of the case. And the Circuit court might readily have avoided any difficulty on this score by dissolving the injunction in form as to the amount really due. Nor can I perceive the force of the objection to this course, that it might expose the party to the peril of a sale under a deed tainted with usury. The sale under the decree was still founded on the same deed; and if it had been made by permission of the court, instead of its order, in dissolving the injunction after the subject matter had been thus fully and finally adjudicated, I apprehend the court would have found little difficulty in preventing the controversy from being revived, and fully quieting the title.

The counsel for the appellees strenuously insists that the loss of the bank was occasioned by its own default; that it was its duty, if it desired to secure the rents and profits to be applied if necessary to its debt, to move for the appointment of a receiver in Hupp's injunction case; and having failed to do so, it cannot now be heard to set up a claim to such as were received by Hupp pending the cause. I do not regard this as a satisfactory answer to the claim of the bank. In the first place, I think it a matter admitting of serious 38 *question whether under the rules and principles governing the appointment of receivers in chancery, such a motion would have been allowed. The bill filed by Hupp and Arthur, as has been stated, assailed the debt claimed by the bank as usurious and utterly and absolutely void; it sought to get rid of it entirely, alleged their ability to prove the usury at law, and asked for a day in court for that purpose. It did not pray general relief, but special relief against the whole debt. It utterly denied any right whatever, legal or equitable, in the bank to set up the debt or charge the land with its payment. There are, it is true, certain allegations in the bill tending to show a failure on the part of Steenbergen to perform the agreement, and a failure in part of the consideration of the debt secured by the deed of trust; but those allegations seem rather to be subservient to the main object of overthrowing the deed of trust entirely, than to furnish themselves a ground for equitable relief. Now, to say nothing of the rule of practice stated by Judge Baldwin, in Beverly v. Brooke, 4 Gratt. 187, 214, that an application for a receiver comes regularly only from a party plaintiff, although where a party has a clear equitable title, the court will appoint a receiver as against others claiming equitable interests, without prejudice to those having prior legal estates, (3 Daniel Chy. Pract. 1950, et seq.,) yet where all right, both legal and equitable, in a party is denied, the power of the court to appoint a receiver, which is entirely discretionary, will not be exercised at his instance until he shall first clearly show his right in evidence, unless there appear to be positive danger of spoliation to the fund. 3 Daniel Ch. Pr. 1950, 1956, 1962; 2 Story's Eq. Ju. § 836, § 837. If Hupp and Arthur had filed such a bill as only they could maintain, if they had stated the case as it really was, had not contested the whole claim of the bank, but admitted its right to a part of the 39 debt *claimed, contesting only the amount due, undoubtedly a receiver might have been appointed on motion of the bank. They did not adopt that course: they alleged that Hupp, though the third incumbrancer in point of time, was next to John Arthur's heirs in point of right; that he was entitled to displace the bank, and was in the actual possession of the trust subject, as he rightfully might be as against the bank. Thus, the right of the bank was contested out and out; and in the state of the adjudications on the subject at that time, might have been regarded as of the greatest doubtfulness; and the court might have denied the motion for a receiver in such a case until the final decision of the cause; because not until such final decision should be made could the right of the bank be made to appear. There was no suggestion of any danger to the fund, or that Hupp was in insolvent or doubtful circumstances: and it may be inferred that no such suggestion could have been truthfully made; and if the court proceeded to decide the question of a receiver, a consideration of the whole merits of the case would be necessarily involved, and a decision upon that question would be tantamount to an adjudication of the cause. In effect, the decree pronounced by the Circuit court on the hearing may be fairly regarded as disaffirming the right of the bank to a receiver at any period in the cause. This court, it is true, held that the bank was entitled to charge the trust subject with so much of the debt claimed as was justly due; but it was not until its decree was pronounced that the right of the bank to any interest (utterly denied by Hupp and Arthur) was made apparent; nor until then could laches be justly imputed to it in failing to apply for a receiver. Ought the bank to be deprived then of the benefit of the rents and profits in aid of the payment of its debt for which the proceeds of the sale of the property 40 have proven wholly inadequate, *because Hupp and Arthur did not present the real and proper case to the court? Ought Hupp to have an advantage, by seeking a mode and measure of relief to which he was not entitled, which he could not have claimed if he had conceded to the bank what was its just right, and had only sought that redress to which he was declared by the court to be entitled? It was at his

election to adopt either course; and if he chose to place himself in an adversary and antagonistic position entirely by contesting the whole of the claim of the bank, and denying to it any right, legal or equitable, it should seem that it was at his peril, and that the consequences of making a case, not fitting for the appointment of a receiver, should devolve upon him.

But however this may be: In the second place, I cannot concur in the supposed necessity for an application on the part of the bank for the appointment of a receiver, to entitle it to claim the rents and profits, after what it had previously done to manifest its purpose to take away the subject from Arthur and Hupp, and appropriate it to the payment of its debt. When its purpose had been thus avowed, and the attempt made to carry it out, which was frustrated by the act of Hupp, and when it had asserted its title in Hupp's suit, it might safely, and without forfeiting any of its rights, await the course of events. From that period the whole subject, the principal and its profits, was taken by the action of the court under its control, was amenable to its disposition; and neither the one nor the other should thereafter be suffered to be applied otherwise than in the order of the legal priorities of the parties. Certainly, if the bank distrusted Hupp's ability to account for the rents and profits, and desired to secure them from spoliation in his hands, an application for a receiver would have been a very proper and expedient measure; but if it was satisfied with his responsibility, it might, as I think, treat him as a self-constituted 41 *receiver, looking to his personal accountability for the value of the rents and profits, if in the sequel it should prove necessary to resort to them in aid of the proceeds of the sale of the property for payment of its debt; but in my view it was not necessary for the bank to go through the form of such an application, in order to found its right to call for such an account as against Hupp, under the circumstances of this case.

The counsel for the appellees strenuously urges that the doctrine upon this subject is settled, and no longer a subject for discussion. He insists that a mortgagor left in possession may take the rents and profits without being liable to account to the mortgagee: and for this he cites several authorities, and among others the case of Clarke v. Curtis, 11 Leigh 559, concluded, 1 Gratt. 289. I certainly do not mean to controvert any of the authorities maintaining this position. But what I mean to say is, that this right or privilege of the mortgagor is founded upon the consent and permission of the mortgagee, express or implied, to his so taking the profits; but where there is no such consent, or it has ceased, and that plainly manifested, the right depending upon it will cease also. The relation subsisting between the mortgagee and the mortgagor in possession has been assimilated, as I have before remarked, to that between landlord and tenant at will. This may be determined by the will of either party, or it may be determined by the tenant assuming a hostile attitude towards the landlord, as by claiming the fee or disclaiming to hold under the landlord's title. In this case, I conceive the measures taken by the bank as sufficiently manifesting its withdrawal of the permission to Arthur, and Hupp claiming under him, to hold the possession further without account. And if that were otherwise doubtful, yet the termination of any thing like a permissive holding was fixed and definitely 42 *ascertained by the hostile attitude thereupon assumed by Arthur and Hupp. They sufficiently put an end to the previous relation by their own act. For can it be said, that after filing such a bill as they did against the bank, alleging that the security under which it claimed was utterly invalid and void for all purposes, and denying to it any right on the subject whatever, legal or equitable, the amicable relations and the permission to Arthur and Hupp to hold the possession and receive the profits to their own use, any longer continued? I think not; and although I do not assert that the relation between the mortgagee and the mortgagor in possession is that of landlord and tenant, for nullum simile est idem, yet I think that Arthur and Hupp having resorted to such a decisive measure, must stand the hazard of the issue which they invited, and so far as the right to receive anything further from the property is involved, must abide by the result which would show whether the bank was entitled to receive anything, and if anything, how much; and that to satisfy the amount that might be found justly due the bank, the whole subject, principal and profits, from that time must be appropriated, before Hupp can be permitted to receive any portion of either.

The counsel for the appellant, in reply to the assertion of the appellee's counsel, that the mortgagor in possession may receive the profits without account, is not only generally but universally true, cites the case of Cadwallader v. Mason, Wythe's R. 58; and the opinions of Judges Green and Cabell, in 2 Leigh 58 to 64, and 65, 66, as showing or tending to show that the doctrine is not without qualification. It is an enquiry, however, which in this case I do not think it at all material to pursue, after what I have heretofore said.

The appellee's counsel cited the case 43 of Wilton v. *Dunn, 7 Eng. Law & Eq. R. 406, in which a notice by a mortgagee to a tenant in possession by lease from the mortgagor after the mortgage, unaccompanied by an averment of a subsequent payment by the tenant, was held not a good defence to an action at law for use and occupation by the mortgagor. But I do not think that this case can be reconciled with the case of Pope v. Biggs, (above cited,) and the class of cases in which it has been held that the mortgagee may entitle himself to the rents by notice to the tenant. In Wilton v. Dunn, two of the judges say the defence was not a good one

in a court of law. The other two who were present held that the mortgagee could not recover of the tenants the rents overdue at the time of his notice. The case, however, does not touch the question here, because, if for no other reason, the claim advanced by the bank is only for the rents and profits accrued after the time it declared and gave notice of its intention to appropriate the whole subject.

But it is supposed that a sufficient reason for rejecting the claim of the bank to hold Hupp to an account for rents and profits, may be found in the character of the security upon which it must depend; that as it has been ascertained and adjudged to be usurious and void, and as the bank, to prefer such claim, must step forth from its position of mere defendant, must itself become an actor, and prefer a claim in the character of a party plaintiff, it is in effect asking the court of chancery to lend its aid to enforce a security void for usury, which, according to its settled rule, it always refuses to do. If this view were correct, it would perhaps furnish a sufficient answer to the argument that the bank has lost all right to the rents and profits by its default in not filing a cross bill at once, and asking for the appointment of a receiver. I think, however, it cannot be sustained. This court has adjudged that the bank was enti-
44 tled to a decree in the *Circuit court that the deed of trust should stand as a security for the amount actually due, and for a sale of the property, if necessary. Whatever steps, therefore, it may be necessary for the bank to take, in order to have the benefit of this measure of relief, will be sanctioned and sustained by the court; and if an account of rents and profits pendente lite be necessary in aid of the sale of the property, it should be allowed as a necessary incident. A cross bill is but a means of more effectually defending the original bill, by maintaining the rights of the defendant, whatever they may be, and a proceeding necessary to a complete determination of the matter in litigation. Though the relief which it seeks must of course be equitable relief, it need not show any ground of equity to support the jurisdiction of the court. It is treated as a mere auxiliary suit or a dependency upon the original suit. Story Eq. Pl. § 399. And I can perceive no valid objection to the right of the bank to resort to any means necessary to enable it to realize the measure of relief to which it had been declared entitled as defendant, whether by cross bill or otherwise. In effect, the cross bill here was but to carry into execution the decree of this court in regard to an incident to its principal subject matter.

There is another view of this subject presented by the counsel for the appellant, involving an enquiry into the character in which Hupp took and held possession of the trust subject, and which has been presented with great plausibility. The deed from Arthur to Hupp, of the 4th of September 1839, is somewhat confused in its terms and rather awkwardly expressed; but it provides in substance, among other things, that Arthur might retain possession of the property and carry on the manufactory of iron and the mill and farming operations until such time as Hupp might take possession, but the proceeds of the
45 business were *to be applied in payment of the debts due Hupp or for which he might be bound, or the debt due Steenbergen, the object being declared to be to use the property so as to liquidate "the debts" as far as possible; and Hupp was authorized to take possession of the property, carry on all the works, applying the profits to liquidate "the debts aforesaid;" or, if he thought best, to sell the property and apply the proceeds to liquidate "the said debts." And it is insisted that as Arthur and Hupp state in their amended bill, the property had been placed in the hands of the latter for the purpose of making profits to be applied to the discharge of the debts of Arthur, and as Hupp admits he took the property into possession under the deed of the 4th of September 1839, and has made profits, he must now be regarded as having done so as trustee for the benefit of Steenbergen, in common with the other creditors, and should be held to apply them in the order of the legal priority of the parties. I am of opinion, however, that the pretensions of the appellants cannot be maintained on this ground. I fully concur with Judge Moncure in the opinion, that the appellants cannot be considered to have done anything to evince their acceptance of any benefit under the deed of the 4th of September 1839, but the contrary; and that they must be regarded as in fact claiming not under that deed but against it, and as having in effect by their cross bill disclaimed any interest under it. I also fully concur with him, and for the reasons which he has given, that upon the true construction of the terms of that deed, and considering its character and declared object, the bank was not entitled to claim priority to Hupp in the application of the rents and profits received by him whilst in possession under its provisions. No intention can be deduced from the terms of the deed to extend the priority which Steenbergen had over Hupp, any further than it then
46 *existed; and it does not follow because in case of a sale the proceeds would have to be first applied to the debt of Steenbergen, the rents and profits accruing in the mean time should also be necessarily so applied. Arthur and Hupp could not by any act of theirs prevent the former from being so applied, while the application of the latter might be otherwise directed; and I think it was the plain purpose of Arthur to dispose of the rents and profits in such manner as should be most to the interest of Hupp, and that they might, so far as the construction of the deed is to determine the question, be applied by Hupp, in the manner in which he alleges in the pleadings he did apply them, towards the payment of the debt due him from the said Arthur.

But for the reasons which I have endeavored to assign, in considering the first ground on which the liability of Hupp is sought to be placed, I am of opinion that the decree should be reversed.

MONCURE, J. The appellants must be entitled to the rents which they claim in this case, if at all, on one or more of these three grounds, viz: 1st. By the terms of the mortgage under which the appellee Hupp took and held possession. Or 2dly. That a mortgagor, at least after forfeiture, holds and enjoys the mortgaged subject by the mere will of the mortgagee, which may be determined at any time; from the period of which determination the mortgagee becomes entitled to rents and profits; that the advertisement and injunction of the sale under the deed of trust under which the appellants claim, was equivalent to a determination of their will, by which the appellees had previously held and enjoyed the property conveyed by the deed; and that the appellants are therefore entitled to the rents from the time of the injunction. Or 3dly. That the appellants have been injured, at least 47 to the extent of *the value of the rents, by means of the injunction; and the court having granted the injunction, without requiring adequate security or imposing such equitable terms as were proper to protect them against such injury, ought to put them in the same situation as if that had been done; or ought, at least, to compel Hupp to pay to them rents which he has been enabled to receive by means of the injunction. Let us see whether these grounds, or any of them, will sustain the claim.

First, as to the terms of the mortgage under which Hupp took and held possession.

The appellants claim the rents in controversy, not under the mortgage aforesaid, but against it. If they had been entitled to claim under it, they were not bound to do so, but might have disclaimed any interest under it. They did, in effect, disclaim any such interest by their cross bill; and, having done so, cannot complain that no such such interest was decreed to them by the court.

But were they entitled to claim any interest under the mortgage; or, at least, to claim priority over Hupp in the application of the rents and profits received by him under the mortgage? I think not. That mortgage was obviously made for the benefit alone of Hupp. It is a deed inter partes, between Arthur of the one part and Hupp of the other. The only declared object of the deed is the security of Hupp; and it was expressly declared, that if Arthur should pay and indemnify Hupp, the deed should be void. It is true that the deed provides that the net proceeds of the property, while it might remain in the hands of Arthur, should be applied to the payment and indemnity of Hupp, "or to the debt due to said Steenbergen." But the latter alternative was merely incidental to the indemnity of Hupp. Arthur had conveyed the property, or most of it, for the 48 benefit of Steenbergen. *He wished to afford all the indemnity he could to Hupp. His means of doing so were the property previously conveyed for the benefit of Steenbergen, subject to that conveyance; the profits of that property until it should be sold under that conveyance; and his remaining property: And these means he devoted to that object by the mortgage. He and Hupp supposed the property conveyed for Steenbergen's benefit would yield a surplus, after satisfying the purposes of that conveyance; and it was therefore a matter of little consequence to Hupp whether the profits of the property, while it might remain in Arthur's hands, were applied to the payment of the debt to Steenbergen or the debt to Hupp; as the application in either case would, as the latter supposed, enure to his benefit. But it was obviously not designed by the mortgage, and such is not its fair construction, to give to Steenbergen any further priority over Hupp than already existed. Its design was that the mortgaged subject should be applied, as best it might, to the indemnity of Hupp; and though the proceeds of sale of the property previously conveyed for Steenbergen's benefit would have been necessarily applicable first to the payment of his debt, for which the property was first bound; yet the mesne profits of the property were not necessarily so applicable, but might be applied by Hupp first to the payment of his own debt; and would naturally be so applied, if it were his interest to make such application. That he received and held the property for the purpose of so applying them, he states both in his original and amended bill.

Secondly. Are the appellants entitled to these rents, on the second ground before stated?

A mortgagee, by virtue of his mortgage, becomes the legal owner of the land, and consequently entitled at law to immediate possession, or to the receipt of the 49 *rent, if the land be in lease. It is a privilege annexed to his estate, that he may evict the mortgagor without notice or demand of possession, and retain the emblements, and if the lease be granted subsequently to the mortgage, without his concurrence, he may also evict the lessee of the mortgagor without notice and retain the emblements; and may have an action for mesne profits not actually paid over to the mortgagor. Coote on Mortgages 339. But in equity the mortgagor remains the actual owner of the land until foreclosure; and it is a privilege annexed to his estate, that he is not bound to account for the rents and profits while in possession, even although the security shall prove insufficient. Id. 325. But while a mortgagee is entitled to immediate possession, he rarely takes or demands it, unless the security be insufficient: for he prefers not to make himself the bailiff of the mortgagor, and receive his debt, in small payments, out of the

rents and profits; but to have a foreclosure of the mortgage, and where the terms of the mortgage or the local law will admit of it, a sale of the mortgaged subject. The possession of the mortgagor is not adverse to that of the mortgagee, and the latter may foreclose the mortgage, without having first obtained actual possession. After foreclosure, the mortgagee, or the purchaser, if there be a sale, may take possession of the subject as his absolute property. The commencement of proceedings for foreclosure is not, in itself, a termination of the possession of the mortgagor and his incidental privilege to receive the rents and profits. The mortgagee may no more desire to make himself the bailiff of the mortgagor pending these proceedings than before; and, if the security be ample, would not do so. Wilder v. Houghton, 1 Pick. R. 87; Howell v. Ripley, 10 Paige's R. 43; Cooper v. Davis, 15 Conn. R. 556. The mortgagee may take possession, or have a receiver appointed, as well after as
50 before the commencement *of his suit for foreclosure; but until he does so, or something equivalent thereto, the right and privilege of the mortgagor remain. Not having done so, he cannot, when he ascertains that the security is insufficient, claim the rents and profits received by the mortgagor pending the suit.

These principles, which are applicable to mortgages, are if possible still more so to deeds of trust. As ordinarily drawn, a mortgage conveys an estate on condition to be defeated by payment of the debt; while a deed of trust conveys an estate in trust to be sold for the payment of the debt. The mortgagee may take possession, receive the rents and profits, and apply them to the payment of the debt; and this is consistent with the terms of the mortgage, and sometimes with the actual intention of the parties. A deed of trust rarely gives any such power, or contemplates any such means of payment: and the only mode in which a trust creditor can ordinarily have the rents and profits accruing before a sale, applied to the payment of his debt, is to have them sequestrated for that purpose by a court of chancery, if the subject itself be not ample security. If the subject be in the adverse possession of another, and a suit for possession be necessary, the creditor or his trustee, after recovering possession, may recover the mesne profits; and these profits, with any other that may accrue before a sale can be made, will be applicable to the payment of the debt. This however is merely incidental to the object of the deed, which is the security of the debt by a sale of the subject, if necessary, and not by renting it out.

Let us now apply these principles to the case under consideration. The advertisement of the sale was not a demand of possession: Actual possession, we have seen, was not necessary to give validity to the sale. The object of the advertisement was to effect a sale, not to obtain posses-
51 sion, which could be obtained by *the purchaser after the sale. The sale was enjoined on the ground of usury, and because the whole debt claimed under the deed was not due. When it was enjoined, it was for the appellants to determine whether they would take actual possession, or have a receiver appointed; or rely upon the subject alone as their security, and in the mean time permit the grantor and his assigns to remain in possession. If they considered the subject as ample security, they would naturally prefer to rely alone on that, and not to incur the trouble, responsibility and inconvenience of becoming the bailiffs of their debtor, and receiving payment of their debt by an application thereto of the rents and profits. They may have so considered, and therefore chose to let the matter stand as it was until the questions raised by the injunction suit could be decided. If so, they could of course have no right, when they found they were mistaken, to demand the rents and profits which had been received by the debtor or his assigns. But whether they so considered or not, or whatever may have been their reason for not taking possession, or applying for the appointment of a receiver, it is enough that they did not do so; and they cannot therefore recover the rents and profits which they claim. They did nothing which was inconsistent with the continuance of things precisely as they were when the injunction was obtained. They did nothing to indicate that they desired possession of the subject, or a sequestration of its rents and profits; and they cannot, after permitting the appellees to remain in undisturbed possession for nearly seven years, require them to account for rents and profits which have been received and applied.

Thirdly. Are the appellants entitled to the rents in question, on the third and last ground before stated?

The injunction in this case having been granted not to stay proceedings on a
52 judgment or in a suit, but to *restrain a sale of property under a deed of trust; the court which granted it, having no rule prescribed by statute, should have required security to such extent and of such kind as in the exercise of a sound discretion seemed to it proper. 2 Rob. Pr. 240. If the property was considered ample security for the payment of the debt secured by the deed, in case the whole of it should turn out to be due, it might not have been an improper exercise of the discretion of the court to have required sufficient security for the payment only of such costs and damages as might be recoverable on a dissolution of the injunction, if the property should prove to be sufficient for the payment of the debt ascertained to be due. If the appellants differed with the court as to the sufficiency of the security, they might, on showing that it was insufficient, or even that there was room for rational doubt upon the subject, have obtained an order that the injunction should stand dissolved, unless further security were given; and, as a means of affording it, the appellee Hupp

might have been required to surrender the property into the hands of a receiver, or be himself accountable for rents and profits as a receiver of the court. This, I think, was the only additional security which should have been required in the case, if application for additional security had been made and the propriety of requiring it had been shown. The bill stated a case which made it improper for the trustees in the deed of trust to sell the property until the validity of the deed was established, and the amount of the debt due to the appellants was ascertained. And the impropriety of such a sale was established by the decrees rendered in the case; which showed not only that the deed was tainted with usury, but that the principal debt due to the appellants, instead of being forty thousand dollars, was only twenty-four thousand one hundred and
53 forty-two dollars and *seventy-nine cents, and that the property was subject to a prior incumbrance of a large amount, which was unascertained when the injunction was granted. It was the duty of the trustees, under these circumstances, before making a sale, to have applied to a court of chancery to remove the cloud over the title, raised by the imputation of usury, and to ascertain the amount due to the appellants, and the amount of the prior incumbrance. And the trustees failing in that duty, it was the right of Arthur as grantor in the deed, and Hupp as subsequent incumbrancer, to make such application. Lane v. Tidball, Gilm. 130; Gay v. Hancock, 1 Rand. 72; Miller v. Argyle's ex'ors, 5 Leigh 460; Bryan v. Stump, 8 Gratt. 241. It would therefore have been unreasonable to have required the appellees to give security for the payment of the trust debt, or so much thereof as might be ascertained to be due, in case the injunction should be dissolved, in whole or in part: but it would not have been unreasonable to have required them to surrender the property to a receiver, or be accountable for the rents, if it had been shown that any ground for doubt existed as to the sufficiency of the security in any event. But the appellants may have concurred with the court in considering the property as ample security for the payment of the whole trust debt, and therefore did not choose to interfere with the possession, or have anything to do with the rents, but preferred to wait for a dissolution of the injunction and a sale of the property. Whether they so concurred or not, they did not interfere; and I think they cannot, after the lapse of six or seven years, and after ascertaining that the property is not sufficient security, recover the mesne profits, upon the ground that the court, without being asked, and without any evidence of the insufficiency of the security, should have placed the property in the hands of a receiver, or declared Hupp account-
54 able as such for *rents and profits, as a condition for granting the injunction. The appellants had the same right, and might have had the same motive, to permit the property to remain in the possession of the appellees after, as before, the institution of the suit; and that they preferred that the property should so remain, or considered it sufficient security, and were therefore indifferent on the subject, is fairly inferable from the fact that they made no attempt to interfere with it. It was not the duty of the court, and would not have been proper for it, ex mero motu, to have interfered with the possession of the appellees.

But it is contended for the appellants, that though they would have been entitled to have had a receiver appointed, if the appellees had framed their bill with a view to the modified relief which was granted to them by the court; yet, as the latter claimed full relief against the deed of trust on the ground that it was void for usury, the former were not so entitled; there being no case in which a receiver will be appointed against a party in possession claiming the legal title, unless the party applying for such appointment makes out a prima facie claim, and shows that the property is in danger, or that the other party has been guilty of fraud or spoliation. And it is, therefore, further contended, that the appellees, having so framed their bill as to prevent the appellant from having a receiver appointed, should be accountable for the rents. The rule contended for may be true when applied to a suit against the party in possession claiming the legal title. But in an injunction suit brought by that party against an adverse claimant, there can be nothing in such a rule which would prevent the court from appointing a receiver, as a condition for granting or continuing the injunction.

But what was there to prevent the appellees from bringing a suit at law for
55 possession under the deed of *trust? A party having the legal title cannot, in general, have a receiver appointed, because he has no need of one; having a right to recover the possession by action at law, and also the mesne profits from the commencement of the defendant's adverse possession. Or if the appellees had an equitable title only, under the deed of trust, what was there to prevent them from bringing a suit in equity for possession? The bill of injunction, so far from opposing the institution of such an action or suit, invited it. The chief if not only object of the bill was to drive the appellants to the institution of such an action or suit. If they had instituted one, and shown their right to the possession, they would have recovered it, and the mesne profits also, and the injunction would ipso facto have been dissolved; for the appellees would have had the benefit of all they asked, and all that the court below gave them—a day in court. Surely it can be no answer to this view to say that the deed was tainted with usury, and therefore the appellants could not recover the possession by action or suit. If they could not have recovered, it was because they were not entitled. And if they were not entitled in law or equity, to the possession, how can they be entitled to the rents and profits?

How then can the doctrine of Pulteney v. Warren, 6 Ves. R. 73, apply to this case? In that case, an account of mesne profits, since the title accrued, was decreed against executors, upon the special ground that the plaintiff was prevented from recovering in ejectment by a rule of a court of law, and by an injunction at the instance of the occupier, who ultimately failed both at law and in equity. The doctrine of that case seems to be very reasonable, and has never, so far as I know, been questioned: On the contrary, it had been since approved and followed in a number of cases and by the
56 best judges. Bond v. *Hopkins, 1 Sch. & Lef. 413; O'Donel v. Brown, 1 Ball & Beat. 263; Grant v. Grant, 3 Cond. Eng. Ch. R. 533; Sanxter v. Foster, 18 Id. 302. But in Pulteney v. Warren, Lord Eldon seems to place the decree upon two grounds: first, that the injunction was incapable of being maintained at the hearing; and secondly, that the plaintiff had no remedy at law; or that it was, at least, difficult or doubtful. In that case, the injunction had been wholly dissolved, and the plaintiff's remedy at law was at least extremely doubtful. Lord Redesdale, in Bond v. Hopkins, after citing with approbation Pulteney v. Warren, says: "It would be very strange that a party having no pretence finally to relief in equity, should get it, in effect, by the delay occasioned by the pretence under which he obtained the interference of the court in his favor." And Judge Story, in reference to the doctrine in question, says: "A definite and very satisfactory ground to maintain the jurisdiction in such cases is, that it is inequitable that a party, who suspends the just operation of a suit or judgment by an injunction, should thereby deprive the other party of his rights and profits belonging to the suit or judgment, if the merits turn out to be ultimately in favor of the latter."

Now, in this case, neither of the two apparent grounds of the doctrine of Pulteney v. Warren exists. First, the appellees in their bill set up no pretence; misstated no facts. They averred that the transaction was usurious, and they could prove it without a discovery; and that Steenbergen had not complied with his contract as he had made it, but had failed to pay a portion of the debts, and transfer a portion of the stock, he had contracted to advance and transfer. They substantially proved these averments, and the Circuit court, upon the doctrine of Marks v. Morris, gave them the relief for which they prayed, by decreeing the injunction to be continued
57 in force until the *question of usury should be decided by a court of law upon some regular proceeding on the bond or deed, and until the further order of the court upon a certificate of such decision. It is true this decree was reversed by this court in the Bank of Washington v. Arthur, 3 Gratt. 173; but reversed, upon the ground, not that the contract was not usurious, for the court expressly decided that it was, but that the usurious contract embraced a pre-existing debt which might have been recovered in an action at law, to which its having been embraced in the subsequent usurious contract would have been no defence. The fact that the usurious contract did embrace such a pre-existing debt, was admitted in the bill. But this court did not dissolve the injunction and dismiss the bill; but decreed that the amount justly due from Arthur to Steenbergen should be ascertained; that the bond and deed of trust should stand as securities for that amount and no more; that payment thereof should be enforced, if necessary, by a sale, under the direction of the court, of the property conveyed by the deed of trust; and that the case should be remanded for further proceedings accordingly. The appellees, then, stated a true case; sustained it by evidence; obtained in the court below the full relief which they claimed; and obtained in this court such relief as fully vindicated the propriety of their resort to a court of equity and the remedy by injunction. In fact, the injunction never has been dissolved, and was not intended so to be. To have dissolved it, might have been fatal to the appellant's security, by exposing the deed of trust to the objection of usury. The injunction was continued, and the cause was retained, in order that the proper accounts should be settled, the amounts and priorities of the incumbrances ascertained, and a sale made and the proceeds applied under the control and direction of the court. How then can it be said, as it was by
58 *Lord Eldon, in Pulteney v. Warren, that "the injunction was not capable of being maintained at the hearing;" or as it was by Lord Redesdale, in Bond v. Hopkins, "that the appellants had no pretense finally to relief in equity;" or as it was by Story, that "the merits of the suit turned out to be ultimate in favor of the appellants." Secondly, as we have already seen, the injunction interposed no obstacle to a suit at law for possession under the deed, and the legal remedy was therefore involved in no doubt or difficulty except what was created by usury; which can certainly be no ground for giving the appellants the benefit of the doctrine in question.

Since writing the above, I have read, and carefully considered, the opinion of Judge Lee, and though his views of the case are certainly very strong, they have not satisfied me that my opinion is in any respect erroneous. How stood the case at the time the injunction was granted? There were three incumbrances upon the property. 1st, a deed of trust for the benefit of John Arthur's heirs; the amount due on which was altogether unascertained and uncertain. 2dly, the deed of trust for the benefit of Steenbergen, which was grossly usurious, and the amount due on which was also unascertained and uncertain. 3dly, the mortgage to Hupp. The appellants, the assignees of Steenbergen, urged the trustees in his deed to close the same by a sale. What ought the trustees to have done? The answer is given by this court, through

Judge Roane, in the leading case of Lane v. Tidball, Gilm. 132. "We have no hesitation," say they, "in repeating the sentiments which have fallen from this bench, that a trustee in a deed of trust is to be considered the agent of both parties; that he ought to act impartially between them; that he ought to disregard the suggestions of either party, inconsistent with that duty; and has in general no greater powers
59 touching *his trust than a commissioner of a court of equity. We will add that he may, of his own motion, apply to a court of equity to remove impediments to a fair execution of his trust; as also, if necessary, to adjust the actual sum which ought to be raised by the sale." The trustees, however, did not do this. What then was the right of Arthur and Hupp? The answer to this question also is given in the same case. "If he," the trustee, say the court, "should fail, however, to do this, the party injured by his default has an unquestionable right to do it. These principles apply with peculiar force to the actual case before us. The party in this case has enacted no imperious law (if we may so express ourselves) ousting the jurisdiction of a court of equity. That jurisdiction, therefore, exists in full force, on its ordinary principles in relation to it." The party, at whose instance the court interposed in that case, was a creditor, in regard to whom the court said, "It is not the grantor himself who is to be affected, but a meritorious creditor; one equally entitled to the aid of a court of equity with the appellees themselves. That court delights to pay all creditors, and will not reject the just claims of any. Those claims cannot be paid unless that fund in question should be made to sell for its full value; and that cannot be done without the interposition that is now prayed; compared to these objects a little delay is deemed of no account in a court of equity." In Wilkins v. Gordon, 11 Leigh 547, 556, Tucker, P. (in whose opinion the other judges concurred), after repeating the principle laid down in Lane v. Tidball, says, "This indeed would seem to be an axiom in the law. Until the amount of the creditor's demand is adjusted, he cannot resort to compulsory means to enforce the payment."—"These judgment bonds, as they have been not inaptly called, to which, when the debt is certain, we have given, per-
60 haps unwisely, the force of *judgments, ought not to be regarded in that light, when they do not fix distinctly and definitely the amount of the demand. In all such cases, the deed of trust has but the effect of a mortgage. It secures the debt indeed, but it vests no power in the creditor, or in his trustee, to enforce payment, except through the agency of the courts, unless the amount be voluntarily adjusted by the agreement of the parties." There could not then have been a sale of the property in this case, without the interposition of a court of equity; and that interposition should have been invoked by the trustees, or the appellants. Suppose they had invoked it: Who would have been entitled to the possession and profits of the property until the sale? The grantor and his assigns of course. Instead of doing so, the appellants urged the trustees to close the deed by a sale; and the latter accordingly advertised, and were about to make a sale; which compelled the grantor and last incumbrancer, the appellees, to invoke the interposition of the court. That interposition was not a mere favor to the appellees, but their right. Why are they not equally entitled in this case, as they would have been in the other, to the possession and profits of the property until the sale? Can the failure of the trustees and the appellants to do what they ought to have done, and what was necessary to be done, to give effect to the deed, confer on the latter any benefit to which they would not have been entitled if they had performed their duty? Can the performance of that duty by the appellees take from them any benefit to which they would have been entitled if it had been performed by those to whom it more appropriately belonged? I think not. It is true, that whether the interposition of a court be invoked in such a case by the trustee, the debtor, trust creditor, or subsequent incumbrancer, a receiver will be appointed, on motion of any
61 of the creditors concerned, *if the property be insufficient for the satisfaction of all of them. But until such appointment or a sale, the right of the debtor and his assigns to the possession and the profits continues. In this case, a receiver was appointed so soon as a motion was made for that purpose by the appellants.

It is said that the bill of the appellees claimed relief alone on the ground of usury, and contained no prayer for general relief: that it sought to avoid the deed of trust entirely. It is true, that the main object of the bill was to avoid the deed entirely on the ground of usury. But it also stated that Steenbergen did not comply with his contract as he had made it, but failed to relieve Arthur from a portion of the debt he contracted to assume, and moreover failed to transfer a large amount of stocks according to contract; and it prayed all proper relief not inconsistent with the purpose of the bill, which was to procure a fair trial of the usury charged.

This court was of opinion, that though the bill was founded upon the doctrine of Marks v. Morris, and looked entirely to the measure of relief thereby indicated, yet, inasmuch as it presented a case, which, upon the facts disclosed, entitled the debtor, and those claiming under him, to relief against the usurious contract and securities upon equitable terms, it was proper, instead of dismissing the bill, to decree such relief as the general principles which govern courts of equity indicate and require; and the court therefore reversed the decree of the Circuit court, and directed the amount really due to the appellants to be ascertained, and the bond and deed of trust to stand as securities for its payment. And when the case went back to the Circuit court, an amended

bill was filed by the appellees, charging more specifically the failure of Steenbergen to comply with his contract, and referring to the prior incumbrance in favor of 62 John Arthur's *heirs, on account of which it seems that the appellees had before supposed there was little or nothing due. It turned out however, on the settlement of the accounts, that upwards of eleven thousand dollars were due on that prior incumbrance; and that the debt really due to the appellants was about fifteen thousand dollars less than they claimed. The sale then could not have been made until these accounts were settled; and until then the appellants could have had no just ground to complain of the postponement of the sale. That the appellees claimed relief on the doctrine of Marks v. Morris, which they did not obtain, cannot make them any more liable for rents and profits than they would have been, if no such claim had been asserted. It is enough that there was other ground for postponing the sale, which it was necessary to remove before a sale could be made; that such necessity devolved, peculiarly, on the appellants; and that they were never, for a moment, obstructed by the injunction, in the fulfillment of that necessity. They might have brought their suit for a settlement, and the appointment of a receiver in the mean time, as well before as after the decree of this court. If the deed of trust had been valid, the sale must still have been postponed, and the appellees would not have been liable. Can they be liable merely because the deed was void for usury? Will a court of equity not only set up a usurious deed, but give the user a premium for his usury? The fact is, the usury in the transaction, if nothing else, would be fatal to the claim of the appellants. They claimed as an intermediate incumbrancer, and could not have gotten the benefit of their incumbrance without coming, or being brought, into a court of equity. Suppose they had come; what would they have gotten? Nothing. They would even have lost the property itself; much less its rents and profits. What have they lost by being brought in by the 63 *appellees? Nothing. But they have gained the property, subject to the first incumbrance. Suppose the injunction bond had been taken in an ample penalty and with good security, conditioned to pay all damages which might be sustained by them by reason of the injunction: What damages could have been recovered on the bond?

I have not particularly noticed the many authorities referred to in the argument of this case, because it would take up too much time and space to do so. I have read and considered them all, with one or two exceptions, to which I had not convenient access, and believe that none of them are opposed to the views I have expressed. And though I have had some difficulty in coming to a conclusion, yet, upon the whole, I am of opinion that so much of the decree of the Circuit court as was appealed from in this case should be affirmed.

DANIEL, J., concurred in the opinion of Moncure, J.

Decree affirmed.

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64 *Nowlin's Adm'r & als. v. Scott.

April Term, 1858, Richmond.

(Absent MONCURE, J.)

Statute—Nuncupative Wills—"Habitation."—The word "habitation," in the act of 1 Rev. Code, ch. 104, § 7, p. 377, in relation to nuncupative wills, means "dwelling-house."*

At the December term 1847 of the County court of Campbell, the nuncupative will of Bryan W. Nowlin was propounded for probat by Robert Scott, a legatee therein, and the probat was resisted by the administrator and by some of the next of kin. At the August term 1848 of the court, the will was admitted to probat; and there was an appeal to the Circuit court. At the December term 1850 of the Circuit court, the sentence of the County court was affirmed; and thereupon the administrator and next of kin applied to this court for an appeal, which was allowed.

Several questions were made and discussed in the argument of the cause; but only one of these questions was considered by the court. It appears from the evidence that the testator resided on his plantation in the country. That at the time of his death he was building a mill in a tract of land owned by him adjoining that on which he lived. That the mill was about a mile and a half from his dwelling-house. That the day before he died he was at the mill-house, and was there taken suddenly and violently ill; and then and there spoke the words as a nuncupative will which 65 *were offered for probat. He was taken to his dwelling-house the same evening, and there died the next day.

Stanard and Bouldin, for the appellants.
Robinson, for the appellee.

SAMUELS, J. This case presents several questions under the statute regulating the execution of nuncupative wills. The facility with which fraud might be practiced by setting up pretended wills of this kind, was discovered long since. To prevent such fraud the statute 29 Charles 2, chap. 3, § 19, was enacted. It is thereby provided, amongst other things, that the will must be made at the "house of [testator's] habitation or dwelling;" or where he had been resident for the space of ten days or more

*The act says, "No nuncupative will shall be established unless it is made in the time of the last sickness of the deceased, at his or her habitation, or where he or she hath resided for ten days next preceding, except where the deceased is taken sick from home, and dies before he or she returns to such habitation; nor where," &c.

next before making such will. This statute, with some variation, has been re-enacted in Virginia. 5 Hen. Stat. p. 456, § 9, 10, 11, 12; 12 Hen. Stat. p. 141, ch. 61, § 5. The statute on this subject, existing at the time the will propounded was made, is found, 1 Rev. Code, ch. 104, § 7, p. 377. It is thereby required that the will be made at the habitation of testator, or where he hath resided for ten days next preceding, &c. The question is made, whether the will was executed at the habitation of Bryan W. Nowlin, within the intent and meaning of the statute. In my opinion, the term habitation is to be understood as dwelling-house or home; that its meaning is the same as that of the stat. 29 Ch. 2, which used the terms "house of his or her habitation or dwelling." Thus, I am of opinion that the will propounded was not executed at a place at which Bryan W. Nowlin, under the circumstances of the case, could make such will. This construction is according to the letter of the statute, and is within its reason; which is to place a testator, when
66 making *such will, under the protection of his family and near relations, and thereby secure him against the frauds of strangers.

If I am right in this construction of the statute, it is unnecessary to decide other questions presented by the record.

I am of opinion to reverse the sentence of the Circuit court with costs to the appellants; and rendering such sentence as the Circuit court should have rendered, to reverse the sentence of the County court, with the costs of both courts to the appellants, and to refuse to admit the will propounded to probat.

The other judges concurred in the opinion of Samuels, J.

Judgment reversed.

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67 *Sturdivant & al. v. Birchett.

April Term, 1853, Richmond.

Wills—Attestation of—Presence of Testator.*—A will is executed by the testator, and certain persons are requested by him to attest it. For convenience, they take it into another room, out the vision of the testator, and there subscribe their names to the paper as witnesses; and they immediately, within one or two minutes, return to the testator with the paper; and one of them, in the presence of the other, with the paper open in his hand, addresses the testator, and says, "here is your will witnessed;" at the same time pointing to the names of the witnesses, which are on the same page and close to the name of the testator. The testator then takes the paper and looks at it as if examining it, and then folds it up; and speaks of it as his will. HELD: That under these circumstances, the recognition of their attestation by the witnesses to the testator, is a substantial subscribing of their names as witnesses in his presence. ALLEN and DANIEL, Js., dissenting.

At the April term 1851 of the Circuit court of Prince George county, a paper, purporting to be the will of Richard Sturdivant deceased, was propounded for probat by Daniel L. Sturdivant and Daniel Heath, two of the legatees therein named; and the probat was resisted by Richard W. Birchett, one of the heirs at law of the testator. The court refused to admit the will to probat; and Sturdivant and Heath applied to this court for an appeal, which was allowed. The facts are stated by Judges Daniel and Lee, in their opinions.

Bouldin and Robinson, for the appellants.
Patton and Joynes, for the appellee.

LEE, J. The will in this case was attested by the witnesses subscribing their names as such in a different room from that in which the testator was lying
68 at the *time: And I regard it as proved in the cause that the testator could not see the witnesses in the act of attestation either from the bed on which he lay, or from any other place within the room.

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*Wills—Attestation of—Presence of Testator.—The true construction and meaning of the term, "in the presence of the testator," as used in the statute of wills, and what conjuncture of circumstances may or may not constitute such presence as is intended by the act, has often been the subject of judicial investigation. But it would seem that no definite and precise rule can be laid down, since, from its inherent nature, each case must, to a greater or less extent, be controlled by facts and circumstances peculiar to itself. See opinion of MONCURE, J., in Nock v. Nock, 10 Gratt. 117, 118.

On this subject, there has been some conflict of opinion in Virginia. In Young v. Barner, 27 Gratt. 105, it was said: "Our statute prescribes that the witnesses shall subscribe the will in the presence of the testator: but no form of attestation shall be necessary. The cases do not very accurately define what is meant by the phrase 'in the presence of the testator.' Upon this subject the judges of this court have held very conflicting opinions. Neil v. Neil, 1 Leigh 6; Moore v. Moore, 8 Gratt. 307; *Sturdivant v. Birchett, 10 Gratt. 67;* Nock v. Nock, 10 Gratt. 106."

Mr. Minor [3 Min. Inst. (2d Ed.) 545] says: "The idea of presence requires the attestation to occur within the range of the vision or perception of the testator, and within a reasonable decree of proximity in case of one who has the faculty of sight, so as to enable him to discern and discriminate the document attested. In case of a blind man, proximity is no doubt one criterion of presence, and he must be shown to have known the contents; but what other circumstances must concur therewith, where the testator is blind (supposing the attestation to occur in the same room), seems not to be settled by authority, and must be determined when the case happens. It must be observed, however, that in proportion as the infirmities of a testator expose him to deception, it becomes more imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction to be prepared with the clearest proof that no imposition has been practised. [3 Lom. Dig. 54, 55; 1 Redf. Wills (4th Ed.) 249-'50; 1 Jarm. Wills (5th Am. Ed.) 34 and n. 1; Id., 87 and n. 2; Neil v. Neil, 1 Leigh 22; Boyd v. Cook, 3 Leigh 32; 1 Redf. Wills, 52 *et seq.*; Long-

One of the two subscribing witnesses states that they could not have been seen in his opinion from any part of the room, whilst they were subscribing their names to the will: The other witness stated that it was impossible that they could be seen from the bed whilst attesting the will, but expresses the opinion that a person standing in the door of the room in which the testator lay, might have seen them by some turn of his body, if all the doors had been open. If this had constituted the whole case on this point, without stopping to enquire into the wisdom or soundness of the distinction between an attestation in the same room with the testator and one in a different room, which has been so often taken and reiterated by the courts, I should have no hesitation, in conformity to repeated decisions, in saying that the attestation was insufficient, and that the will could not be sustained. But there is another and an important feature in this case, which has been the subject of earnest discussion by the counsel. It appears that after the testator had signed the will, the witnesses who were present being requested to attest it, went together into another room for that purpose; it being inconvenient to do so in the room in which the testator lay. They did so, by subscribing their names, no other person being in the room with them at the time, and immediately returned together, with the will, into the room where the testator was lying in bed. Not more than a minute or two elapsed from the time they went out of the testator's room to attest the will until they returned with it. They then took the will to the testator lying in bed, and both the witnesses being together, one of them, Crawford, said to him, "Mr. Sturdivant, here is your
69 will witnessed," at the *same time pointing with his finger to the names of the witnesses, and holding the will open before him; the names of the witnesses being on the same page and close to that of the testator. The testator took the paper into his hands, and looked at it as if he was examining it, still holding it in the same position. The witness giving this detail supposes that he saw the names, the paper being near enough to him to see them. He (the testator) then closed the leaves, and perhaps folded the sheet crosswise. He was then told that as he was ill, he had better give the will to some one to keep for him. He enquired whether if he got well, he could take it back from the person to whom he should give it. Being assured that he could, he said, "It is my will and I wish it to stand; but I may hereafter, on getting well, wish to make some slight alteration in it." The testator then handed the will to a friend who was present. In this account of what transpired on this occasion, both the subscribing witnesses concur; and we are thus brought to consider the effect of what occurred in presence of the testator immediately after, but in close connection with the manual act of the witnesses in subscribing their names, in its

champ v. Fish, 5 Bos. & P. 415; Barton v. Robins, 3 Phill. (1 Eng. Ecc. R.) 445, note; Fincham v. Edwards, 3 Curt. 7 Eng. Ecc. R. 63.]"

An attestation of a will of lands made in the same room with testator, is *prima facie* an attestation in his presence, according to the statute of wills; an attestation not made in the same room, is *prima facie* not an attestation in his presence: but as, in the one case, the attestation is good if shown to have been made within the scope of testator's view from his actual position; so, in the other, it is not good, if it appear, that, in the actual relative situation of testator and witnesses, he could not possibly have seen the act of attestation, nor have so changed the situation as to have enabled him to see it, without aid from others, which was at hand, but was neither asked nor given. Neil v. Neil, 1 Leigh 6; Clarke v. Dunnavant, 10 Leigh 23.

Presence, in the sense in which it is used in the statute of wills, does not mean simply being together at the same time and place, and especially does it not mean the being together of animate and inanimate things or persons or of living, competent witnesses with a supposed testator who is asleep or unconscious. It means conscious presence. Tucker v. Sandidge, 85 Va. 570, 8 S. E. Rep. 650; Baldwin v. Baldwin, 81 Va. 405; Nock v. Nock, 10 Gratt. 115; Cheatham v. Hatcher, 30 Gratt. 62 *et seq.*

The witnesses to a will subscribe their names in another room from the testator, who, though lying on a bed is able to walk about, but the witnesses are directly within the range of his vision, so that he can see all their persons except the forearm and writing hand; these being hid from him by the body of the witness whilst he is subscribing his name; it may be inferred too that he may see the paper as it lies on the bureau or desk where the witnesses subscribe their names. *Held*, the witnesses subscribed their names in the presence of the testator, within the meaning of the statute. Nock v. Nock, 10 Gratt. 106.

"In *Sturdivant v. Birchett*, the will was subscribed by all the witnesses out of the presence of the testator; but they immediately return to his presence with the will. Their subscription was invalid until their return; and was made effectual by what then occurred, though they did not resubscribe the will." Parramore v. Taylor, 11 Gratt. 248.

Quære: Whether an attestation of a will out of the room in which the testator is lying, and out of his sight, but in a case in which the testator was able, and might have placed himself in a position to see the witnesses when they signed the paper is a valid attestation. A court of four judges equally divided upon the question. Moore v. Moore, 8 Gratt. 307.

In all of the cases above laid down, the legal force and import of the words "in the presence" of the testator as used in the statute of wills is discussed at length and many cases are reviewed. Especial attention might be paid, with profit, to the protracted discussions of this subject by JUDGE MONCURE in Nock v. Nock, 10 Gratt. 106; by LACY, J., in Baldwin v. Baldwin, 81 Va. 405; and by LEE and DANIEL, JJ., in the principal case. As to what is "in the presence" of a blind man, see Boyd v. Cook, 3 Leigh 32.

Mr. Minor [2 Min. Inst. (4th Ed.) 1018] says: "The case of *Sturdivant v. Birchett, 10 Gratt. 67*, introduces into this subject a novel construction, which if it be sustained by future decisions may go far to frustrate

bearing upon the attestation, involving the question already so often discussed as to the true construction and meaning of the terms "in the presence" of the testator, as used in the statute of wills, and what conjuncture of circumstances may or may not constitute such presence as is intended by the act.

That these terms do not in their legal signification necessarily imply that the testator and the witnesses shall be in the same room at the time of the attestation, is sufficiently established by the numerous cases in which an attestation in a different room from that which the testator remained, has been held good. Nor indeed, is it indispensable that they should be in the same house, as is shown by the case of 70 Casson v. *Dade, 1 Bro. C. C. 99, in which the testatrix signed the will in her carriage in the street, and it was then taken by the witnesses into an attorney's office, and there subscribed by them; the lady remaining in her carriage, from which, as it appeared, what passed within the office might have been seen. So it is equally clear that actual sight or inspection of the process of the witnesses signing their names, is not required; for all the cases agree that it is not necessary the testator should actually see the witnesses subscribe, but only that he may see if he will. Nor indeed is even the ability to see necessarily implied, because it is well settled that a blind man may make a will; for the faculty of sight in such a case a concurrence of other circumstances being substituted, which give adequate assurance that he is acquainted with the contents of the instrument, and intends to make the testamentary disposition which it contains. Boyd v. Cook, 3 Leigh 32; Longchamp v. Fish, 5 Bos. & Pul. 415.

In determining, therefore, the legal force and import of the word "presence," we are not to be restricted to the sense in which it is used in common and familiar parlance; but in order to decide whether it may be predicated in a legal sense of any particular case that the witnesses subscribed their names in the presence of the testator or otherwise, we should look to the whole character of the transaction and all the attendant circumstances. Whether the witnesses have attested in presence of the testator, in its enlarged and legal sense, is a fact for the consideration of the jury, under all the circumstances of the case. Pow. on Dev. 98; Croft v. Pawlet, Stra. R. 1109; Hands v. James, Com. R. 531.

Where the enacting words of a statute are plain, precise and unambiguous, even a positive declaration of the preamble will not be suffered to control them; but where an expression is used, which from its 71 nature *is somewhat vague and indefinite, to determine its meaning, resort may properly be had not only to the preamble, but also to the reason, spirit and policy of the law, as deduced from the nature and character of its provisions, though nowhere expressly declared upon its face; and such a construction should be adopted as shall, without doing violence to the terms which are employed, best promote its object and intention. 1 Kent. Com. 460 to 468.

It has been said by some of the judges in England, and repeated by several of the judges of this court, in construing the statute of wills, that the object and policy of the law is to protect the testator against the substitution of other persons as witnesses to the solemn act of the testamentary disposition of his property, in place of those in whom he confides and whom he has selected; and also against the imposition upon the testator or the witnesses of a supposititious will in lieu of that which he has in fact executed. And the idea is that these objects of the statute are effectively carried out by requiring the attestation to be under the immediate supervision and control of the testator, so that he may, at any moment during the process, arrest it if he will; and it is supposed that the knowledge of this on the part of the witnesses and of all others who are present, will sufficiently guaranty against fraud or foul practices. It will not be pretended, however, that this provision can furnish absolute security against the fraud of a different paper or different witnesses being imposed on the testator; and there can be little doubt that such a fraud will be best and most surely detected by looking to all the circumstances attending the transaction.

Now, in regard to the amount of security against fraud that may be furnished by different modes of attestation, I apprehend it will not be doubted that a recognition by the witnesses requested by the testator 72 *to attest his will, of their signatures written upon the instrument, as those of the subscribing witnesses, which recognition and acknowledgment is made by the

the precautions so zealously thrown around the making of wills." But the principal case has not been cited in any subsequent cases save Parramore v. Taylor, 11 Gratt. 248, Young v. Barner, 27 Gratt. 105, and in these, only in the manner laid down above.

In 2 Va. Law Reg. 471, the question is asked: "Can a subscribing witness acknowledge, in the testator's presence, his signature, previously made out of the testator's presence?" The answer is given as follows: "Yes, in Virginia, by statute before July 1, 1850. Sturdivant v. Birchett, 10 Gratt. 67, two judges dissenting. *Quære:* Now in Virginia, under statute taking effect July 1, 1850, whose phraseology is different from the former statute. The decision has been regretted. See 2 Min. Inst. 990." In Parramore v. Taylor, 11 Gratt. 220, 243, there is a comparison of the two statutes in question.

See also, on this subject, a note in 6 Va. Law Reg. 193, where there is a quotation of two pages, or more, from the case of Cunningham v. Cunningham (Minn.), 83 N. W. 58, in which there is an excellent discussion of the question "as to what attestation, not in the immediate view of the testator, will answer the requirements of the statute as to attestation 'in his presence.'"

witnesses within the immediate sight and hearing of the testator, and whilst they are within the reach of his arm, and in point of time immediately or within a minute or two after they had subscribed their names, though for the sake of convenience, in a different room, the testator having immediately before executed it as his will, after having heard its provisions read article by article, and approved them all, will furnish as perfect and complete a security against the frauds and imposition sought to be guarded against by the statute, as the actual manual operation of writing their names by the witnesses under the very eyes of the testator. The identity of the witnesses is equally well assured in both modes; while that of the paper is, in many cases, better ascertained by the former than it possibly could be if the attestation were within the view or range of vision of the testator: As for example, where the process of subscribing their names is performed by the witnesses in the same room with the testator, yet they happen to sit or stand at a desk with their backs to the testator, so that the paper itself and the act of writing upon it, cannot be seen because of the interposition of the bodies of the witnesses; or where the act of subscribing, though within the range of the vision of the testator, yet is at such a distance from him that it may be difficult or impossible for him to recognize either the paper itself or the writing upon it, especially if the testator be aged or infirm, or his sight impaired from any cause; or in the case of a short-sighted person requiring the aid of glasses, which happened not to be in use at the time. Certainly, no distinction can be drawn in favor of eyesight, so far as security against fraud is concerned, in preference to the recognition of their 73 signatures by *the witnesses to the testator himself under the circumstances supposed, and the return of the paper at once into his own hands. The former may furnish that moral control over the subject, explained by Judge Carr, in the case of Neil v. Neil, 1 Leigh 13. The latter affords that, and in the restitution of the paper, with their signatures upon it, and openly acknowledged by them, something besides, which even more perfectly completes the superintendence of the testator. It establishes such a connection between the testator, the will and the witnesses, as seems to preclude all danger of fraud or imposition, even more effectually than the former.

It is evident, that most or all of the judges, whose opinions have been reported upon the construction of the statute of wills, have proceeded upon the concessum that a consideration of the object and policy of the statutory requirements would lighten the path, and furnish a safe and proper rule for their construction. If, then, this object and policy be to guard against fraud, and if the mode of attestation sought to be maintained in this case, does establish such a connection between the testator, the will and the witnesses, as attains this object as effectually as would the actual ocular inspection of the very act of signing by the witnesses, or more so, and in effect excludes almost the possibility of fraud, I cannot perceive, in view of the liberal construction which has already, in different cases, been placed upon the terms "in the presence of the testator," how, in holding such an attestation to be good, we shall be extending the meaning of those terms any farther, or even as far as the courts have already gone.

I agree that it is not competent for the court to adopt another and different mode of attestation than that directed by the statute, and to hold it good and sufficient, though not conforming to but con- 74 flicting *with its terms, merely because in its opinion it is as well (or better) calculated to prevent fraud as that imported by the terms of the statute. But the question that we have to consider is, whether the mode of attestation adopted in this case is not in conformity to and fully embraced by the terms of the statute, when a fair and reasonable construction is placed upon them.

It is said by the court, in the case of Seguine v. Seguine, 2 Barb. Sup. Ct. R. 385, 393, that a literal compliance with the terms of the statute of wills is not necessary; that a substantial compliance is all that is required. And it is said in another case, with great force and correctness, that the only sure guide for the court is to look at the substance, sense and object of the law, and with the aid of these lights to endeavor to ascertain if there has been a substantial compliance with its provisions. Chief Justice Nelson, in Remsen v. Brinkerhoff, 26 Wend. R. 325, 332. The correctness of these remarks is fully vindicated by the course of the adjudications that have been made upon this statute from time to time; for it will be found that in interpreting its provisions the courts have exercised a reasonable and proper liberality for the purpose of sustaining the testamentary right intended to be thereby secured; and they have always evinced a strong disposition to sustain a will fairly made, and not suffer it to fail for a mere slip in form. At one time we see it was made a question whether the witnesses must not actually see the testator sign; and whether an acknowledgment by him of his signature would be good. Gryle v. Gryle, 2 Atk. R. 176; Cook v. Parsons, Finch's Prec. Ch. 185; Lea v. Libb, Carthew's R. 35. And in some cases it seems the testator would go over his name again with a pen: but after some discussion, it was settled that an acknowledgment by the testator to the witnesses, of his handwriting, would be sufficient. Stonehouse v. Evelyn, 3 P. Wms. 75 *251; Dormer v. Thurland, 2 P. Wms. 504; Grayson v. Atkinson, 2 Ves. sen. 454. The question then arose whether an acknowledgment by the testator that the instrument was his will would be sufficient to authorize the attestation by the witnesses, and make it a good will. It was

decided that it would be; and it was also held that the attesting witnesses need not be all present at the same time, but that they might attest at different times. Ellis v. Smith, 1 Ves. jr. 11; Westbeach v. Kennedy, 1 Ves. & Beame 362. In the case of Ellis v. Smith, the lord chancellor, in delivering his opinion, intimated that although the testator's acknowledgment would be sufficient where the will was signed by himself, yet it did not follow that his admission that another had signed for him would be good; and he says, "that consequence is not to be built on consequence in cases of this nature." Yet we see that the doubt raised by these remarks of Lord Hardwicke has been fully solved; for this court has decided that if the name of the testator have been signed by another person, an acknowledgment by him that the instrument is his act, is a recognition and ratification of the signature as having been made for him in his presence and by his direction. Rosser v. Franklin, 6 Gratt. 1, 25. It was also questioned whether if the witnesses did not see the testator sign and no acknowledgment was made by him that the subscription of his name is his signature, it would not be necessary that he should acknowledge the instrument to be his will; but it has been fully settled that it is not, and that it is sufficient if the testator acknowledge the act to be his, with a knowledge of the contents of the instrument and a design that it should be a testamentary disposition of his property, though the witnesses sign in entire ignorance of the nature of the instrument or of the purpose for which their names are written. White v. British Museum, 6 76 Bing. 310, 19 *Eng. C. L. R. 91; Wright v. Wright, 7 Bing. 457, 20 Eng. C. L. R. 197; Rosser v. Franklin, 6 Gratt. 1. Other instances might be cited of the liberality of the courts in construing the statute in support of wills, free from suspicion of any unfairness.

The statute provides that the will shall be signed by the testator, or by some other person in his presence and by his direction; and(if not olographic) shall be attested by two or more credible witnesses subscribing their names in his presence. No distinction can, however, be successfully maintained between the two forms of expression used in relation to the testator and the witnesses, respectively. Such a distinction was attempted in the case of Harrison v. Elvin, 43 Eng. C. L. R. 658, in which one witness signed his own name and then took hold of the hand of the other who could neither read nor write, and in that way wrote the name of the latter. It was argued that as the statute provided for the signing of the testator's name by another for him, whilst it said that the witnesses must subscribe their names, the name of a witness must be written by himself, and could not be written for him by another. The argument did not, however, prevail; for the court held that the name of the witness might well be subscribed by another for him, at his request. The same view was taken by this court, in the case of Jesse v. Parker, 6 Gratt. 57. Judge Allen, in delivering the opinion of the court, recognizes it as settled law that a subscribing witness may attest a will by making his mark, his name being written by another in his presence and at his request. But he adds, that the validity of such an attestation depends upon the signing of the name of the witness by his authority and in his presence, and not upon the fact of his making a mark or doing some manual act in connection with the signature. The making of a mark would furnish little if any means of verifying the signature, 77 *and the doing some manual act in connection with it would furnish no additional safeguard appearing on the body of the instrument, against those frauds which it was the object of the statute to prevent. Now, if a testator, whose name has been signed to his will by another person, shall, by simply acknowledging that the act is his, be held to recognize and ratify the signature as having been made for him in his presence and by his direction; or if it have been signed by himself, shall be held by such acknowledgment to recognize and ratify the signature; and if a witness to a will may, for the purpose of attesting, adopt and ratify the signature of his name written by another to the will, by his authority and in his presence, and such attestation shall be good itself, without the aid of a mark or any other manual act done by the witness in connection with the signature, it is difficult to perceive why the witness may not, by recognizing and acknowledging in the presence of the testator the signature of the name made immediately before by himself, though the manual act of writing the name were for convenience merely, done in another room, thereby perfect a good and valid attestation. Where the witness attests by adopting his signature written for him by another, the authenticity and efficacy to the act are in no sort increased by the testator's seeing that other write the witness's name, but must depend upon its being done for the witness in his presence and by his direction, and his adoption of the same as his own. And so, if his signature have been in fact written by himself, though not in the view of the testator, his acknowledgment and recognition of it as his own, at least under the circumstances disclosed in this case, immediately after and in close connection with the signing, within the range of the sight, the hearing and the touch of the testator, with the will and the names upon it in perfect view, and brought to his 78 immediate *attention, ought, as it seems to me, to have the same legal effect as the actual ability of the testator to have seen the manual act of the witnesses in putting their names to the paper, which it is contended alone will suffice. Certainly, the latter could have added nothing to the means of verification or the security against fraud.

The counsel for the appellee has, however, cited the case of Dunlop v. Dunlop, 10 Watts' R. 153, as maintaining that the subsequent recognition and ratification of his signature to a will even by the testator, will not give it validity, and that if his name have been written for him by another, a previous authority or direction so to do must be shown. It will be found, however, that the chief justice, in delivering the opinion of the court in that case, founds it upon the terms "express direction," used in the Pennsylvania statute; and which he says were employed for the very purpose of excluding entirely the doctrine of signing by construction. He treats the subject as res integra, regards the English decisions upon the statute of Charles in relation to the point as inapplicable by reason of the different terms of the Pennsylvania statute; and considers the terms "express direction" as necessarily importing something antecedent to the intended act, and as utterly excluding a subsequent ratification, which he says is the equivalent of authority by implication only. In our statute, however, the term used is by "direction" of the testator, not "express direction," and this court has fully adopted the English decisions recognizing the validity of a constructive signing, which are thus repudiated by Chief Justice Gibson. I will only refer to Dudleys v. Dudleys, 3 Leigh 436, and Rosser v. Franklin, before cited.

It is true our statute directs that the witnesses shall sign in the presence of the testator, while it does not in totidem verbis require that the testator shall sign in
79 *the presence of the witnesses. But it is difficult to infer that a difference in meaning was intended. The will must be in writing: it must be signed by the testator or some one for him in his presence and by his direction, and if not olographic, must be attested by two witnesses. These things are to be proven, and the subscribing witnesses must be called. They can, however, only prove that they attested; and they could only attest to what took place in their presence. In truth, it is impossible to explain the various adjudications that have been made affirming the validity of these constructive signings by the testator, by referring them to any supposed distinction between the force and effect of the terms used in the statute in reference to him and those in reference to the witnesses. The true explanation is to be found in the disposition of the courts, by a liberal and beneficial construction, to give effect to the testamentary right which it is the intention of the statute to protect and secure.

It will not be controverted at this day in Virginia, that a deed, will or other instrument of writing, will be sufficiently established by proof that the signature or the instrument was acknowledged by the party in presence of witnesses who were not present when the paper was signed, and who might be wholly unacquainted with the handwriting of the party. In Burwell v. Corbin, 1 Rand. 131, Judge Coalter says, that it was found by the courts that an acknowledgment of the handwriting of the signature to a will was as good, nay better, than resealing (which had previously been held sufficient), which at most could only be considered as a recognition of the name opposite to the seal; and that it was even better than drawing the pen over the name again, which had been thought might be a re-execution; that by doing these acts before different witnesses at different times it was considered that the testator had in fact signed before each witness. Judge
80 *Brooke says (p. 149), "If Burwell [the testator] had acknowledged the signature to be his, it would have been proof of the factum of signing, within the cases of Grayson v. Atkinson, and Ellis v. Smith, in which the question was whether the signing was proved according to the statute. Judge Roane says (p. 156), "an acknowledgment of a signature is only a signing in another form. In principle it is in truth a signing." And in the case of Doe v. Roe, 2 Barbour's R. 205, it is said that the acknowledgment of the signature is equivalent to a new signing of the instrument. Now it is difficult to perceive any good reason why a given act which when done by the testator in presence of the witnesses, shall be a good signing (in legal effect) of his name in their presence, yet when done by those witnesses in presence of the testator, shall yet not be a good signing of their names in his presence, though done immediately after and in close connection with the very writing of their names, and as part of one entire transaction, beginning with the execution of the paper as his will by the testator, and ending with the act in question.

It is contended, however, that the subsequent recognition and acknowledgment by the witnesses, relied on in this case, must be dissevered from the act of signing their names; that it constitutes no part of the res gestæ; and that as the act of subscribing by the witnesses was complete when they wrote their names, nothing subsequently done, short of a new subscription in the view of the testator, could give effect to the nugatory act of subscribing in a different room from that in which the testator lay. This idea of the completeness of the act of subscribing is, I think, not well founded. If it had been in the immediate presence of the testator, and had thus constituted itself a perfect attestation, there might be some plausibility in it; but the very fact that it was in itself a de-
81 fective attestation, *was the very reason for the necessity of some further act to cure the defect and make it legally sufficient. But even if it had been itself a good attestation, it did not necessarily determine the tissue of the res gestæ. In Parke v. Mears, 2 Bos. & Pul. 217, a bond had been executed and attested by one subscribing witness in one room, and in a few minutes after, it was attested by another subscribing witness in a different

room; the first subscribing witness remaining in the room in which the instrument had been executed. At the trial the second subscribing witness was called to prove the bond; and it was contended that his evidence was insufficient; that he was not present at the time of the execution, which had been completed by the attestation of the first witness before he was called on to attest; that his attesting subscription was nugatory, and that the other was the subscribing witness, who, according to the rule, must be called to prove the instrument. The court, however, thought the whole might be regarded as one transaction, and held the bond well proved. In the case of Swift v. Wiley, 1 B. Monr. 114, two of the witnesses had subscribed their names as such to the will in the presence of the testator, and at his request, but some hours before it was signed by the testator, at which time it was attested by a third witness, and the two who had subscribed their names before the will was signed by the testator, then again acknowledged their respective signatures as subscribing witnesses. Now, it might have been said here, that as the will was not yet signed by the testator when the first two subscribing witnesses wrote their names as such, their so subscribing was a nugatory act, and incapable of being ratified by any subsequent act: but the court thought otherwise. It said that it would have been a superfluous and puerile act of mechanical repetition for the two witnesses who had subscribed
82 before the will was *signed, to resubscribe their names, having once subscribed in presence of the testator and at his request, though the paper was then unsigned by him. And it added that were it material the subscription of the names of all three witnesses and of that of the testator might with obvious truth and propriety be considered as one series of acts essentially indivisible in point of time, all three witnesses being present with the testator at the consummation of the process, and all then attesting together. The principle of these cases has been recognized in the cases of Doe v. Roe, 2 Barb. Sup. Ct. R. 200; Seguine v. Seguine, Id. 385; and Rosser v. Franklin, 6 Gratt. 1; in all of which it is held that if the various acts constituting the execution and attestation of a will are done at the same interview, one act following another without interruption to the continuous chain of circumstances, they are to be considered as all done at the same time, and all constituting part of the res gestæ, and in effect making one transaction. And in this case, without extending this opinion, already too long, by a recapitulation of the various acts attending the execution and attestation of the will, I will only say that I regard the recognition and acknowledgment of their signatures by the witnesses to the testator, as properly constituting a part of the res gestæ, and to be taken in connection with all that preceded it, and the whole as constituting but one transaction.

Certain cases have been referred to by the counsel as authorities opposed to the validity of the attestation in this case. I will notice them very briefly.

One of these is the case of Edelen v. Hardy's lessee, 7 Har. & John. 61. But in that case the question did not arise, because the person who took the will into the room where the testator lay, after it had been subscribed by the witnesses, and told the testator that it had been signed by them, showing at the same time
83 *their handwriting, was not himself one of the number, and no act of recognition or acknowledgment was shown on the part of either of the three witnesses. Nor did the question arise in the case of Boldry v. Parris, 2 Cush. R. 433. There the signatures of the two witnesses who had subscribed out of the room were shown to the testator by the other witness who had signed before them, and it does not appear that either of the two was present or did or said anything in acknowledgment of his signature.

The cases of Ragland v. Huntingdon, 1 Ired. R. 561, and Graham v. Graham, 10 Id. 219, approach nearer to this case. But with all my respect for the learned court by which they were decided, I have yet been unable to concur in the opinion delivered in either case. I consider the first of these cases as strongly conflicting with the cases above cited from 2 Barbour and 6 Grattan, and also with the case of Pollock v. Glassell, 2 Gratt. 439. And it may be remarked of both that there was no distinct act of recognition by the witnesses of their signatures in the presence of the testator, which should be deemed equivalent to a resubscribing. In the case of Graham v. Graham, no allusion whatever is made to this question, nor is the effect of what the witnesses stated to the testator after the attestation discussed or considered.

Certain cases in the ecclesiastical courts of England have also been cited as disaffirming the validity of such an attestation as that we are considering. In relation to these I will content myself with saying that they are made upon the construction of the statute of Victoria I, ch. 26, which differs from the Virginia statute in several respects and which it is said was intended to repeal the decisions made by the courts on the statute of Charles the 2d. Very many of them are made upon motions to the court without full consideration, and they are not regarded as binding
84 *upon the court by which they are made. They certainly cannot be regarded as entitled to sufficient weight in this court to induce it to recede from the limits to which it has already gone in its interpretation of our statute, following the lights of the English decisions upon the statute of Charles, how much soever the effect of these may have been done away with by the statute of Victoria. So far as their reasoning and results receive the approbation of our own judgment, they should be followed, but no further.

The case of Neil v. Neil, 1 Leigh 6, has been frequently referred to in the course of the argument, and has been strongly relied on as conclusive against the validity of the attestation in this case. That was the case of an attestation of a will in the same room with the testator, and under different circumstances from those of the present case. But it is insisted that the reasoning which prevailed against the will in that case is a fortiori decisive against it in this. Of this case of Neil v. Neil, I am very free to say that my judgment never was satisfied either with the reasoning of the majority of the court by which it was decided, or with the conclusion at which they arrived; and if I were now called upon to pass upon precisely such a case as res integra, I should be for sustaining the validity of the will. But as it is, regarding it as having settled the law just as far as it went, but no farther, I am for adhering to it; and if just another such case were presented, I should adopt the maxim stare decisis for my rule, and should decide it in the same way. But it would be a matter of curious speculation at least to consider what would have been the decision in Neil v. Neil, if in addition to the facts which did appear in the case, it had also been proved, that immediately after the witnesses had subscribed their names to the will the testator had been turned over in his bed so as to bring the witnesses 85 and the will in his immediate *view, or the witnesses had gone around his bed to the other side, and there, in his immediate sight and hearing, and within reach of his arm, had owned their signatures as witnesses saying to him, so as to be heard and understood, "Mr. Neil, here is yur will witnessed," at the same time pointing with the finger to the names of the witnesses, and holding the will open before him with those names on the same page, and close to his own, and that he then took the paper into his own hands, examined it, closed the leaves, perhaps folded the sheet crosswise, made an enquiry as to his power over it, if he should confide it to a third person for safe keeping; and after receiving an answer that was satisfactory, remarked that it was his will and he wished it to stand, but on getting well he might wish to make some alteration in it, and then handed it to a friend for safe keeping; the testator being all the time in the possession of his faculties, and in his right mind and perfect senses. Can there be any reasonable doubt, if such had been the case made by the evidence, what the decision would then have been? Would not the court, without difficulty, have affirmed the validity of the will?

Whilst the counsel for the appellee claim upon the one hand that the authority of the several cases cited by them is directly opposed to the validity of the attestation in this case, they also upon the other, affirm that no case can be produced in which such an attestation has been held good. Almost the precise question here arose in the case of Risley v. Temple, Skinner 106, only about six years after the statute of 29 Charles 2d was passed; but it appears that no opinion was given on the point. The question was also alluded to in the case of Boldry v. Parris, 2 Cush. R. 433, but it did not properly arise in the case, and was not decided by the court. I have already referred to several cases, and especially that of 86 Rosser v. Franklin, 6 Gratt. *1, as settling principles which, as I think, tend very strongly to support the attestation in this case. But there is yet another case decided by this court, with which a decision adverse to the validity of the attestation under consideration would be, as I think, utterly irreconcilable. I refer to the case of Pollock v. Glassell, 2 Gratt. 439. That was the case of the execution of a testamentary paper by a married woman, by virtue of a power. It appeared that the testatrix had verbally stated to a lady friend, Miss S. S. Ashton, her wishes as to the disposition of her property after her death; and the lady, lest she should forget them, of her own accord, wrote the paper in question (Codicil F), "as a memorandum." At the foot of the paper she wrote the words "Written by S. S. Ashton for," intending to add the name of the testatrix, if the latter should be unable to sign her own name. When she mentioned the matter to the testatrix, the latter wrote her name to the paper herself, and when she was about to do so, Miss Ashton struck out with a pen the word "for," which followed her own name, and was intended to precede that of the testatrix, if it had been written by Miss Ashton. The testatrix requested another lady, Miss Ann R. Ashton, to witness the paper, which she did; and she then requested Miss S. S. Ashton to witness it; but she thought and so told the testatrix, that it was not necessary for her to sign the paper again, as her name was already then to it in the manner before stated; and she did not again subscribe it. Now here the name of the witness, Miss S. S. Ashton, was subscribed before the testatrix signed the paper herself; yet by reason of her recognition of her signature as that of a witness to the testatrix after the paper had been signed by the testatrix, the attestation was held good, and the validity of the paper sustained by the court.

It is said, however, that probably 87 when Miss S. S. *Ashton wrote the paper and the words "written by S. S. Ashton for," she did so in the presence of the testatrix; and although the paper was then unsigned by the testatrix, yet when signed and the signature of the witness adopted, it might be properly said to have been subscribed by the witness in the presence of the testatrix. But there is nothing in the case to show that Miss Ashton wrote the paper or the words "written by S. S. Ashton for" in the presence of the testatrix; and from the terms and manner of expression of the instrument, and the circumstances under which it was written by Miss Ashton, of her own accord, without being requested by the testatrix, I rather

infer the contrary. But if the fact were so, how would it strengthen the case? For whether written in the presence of the testatrix or not, the words and name of Miss Ashton were not written by her as a witness, for the purpose of attestation, but diverso intuitu for the purpose of denoting her agency in signing the name of the testatrix, if she should be unable to authenticate the paper by her own signature. There could be none of the virtue or qualities of an attestation of a will by a signing of the name to the paper for a totally different purpose, and at a time when the testatrix was utterly unconscious of any such act of attestation, and had not yet herself executed the paper.

It is also said that the question was not raised in the case of Pollock v. Glassell, either by the counsel or the court, but passed sub silentio, and that the objection to the codicil in question was placed on a totally different ground. The judges who sat in the case differed in regard to some of the other codicils, but they were unanimous in their opinion as to the validity of this: and it is not likely that if it could have been thought there was anything in the objection, it would have escaped their notice as well as that of the distinguished counsel who argued the cause.

88 *It has also been suggested by the counsel that Judge Baldwin himself could not have regarded this case as an authority upon this question, else he would have cited it in support of his views in the case of Moore v. Moore, 8 Gratt. 307. But it will be remarked that his opinion in this case is very short, and not a single authority is cited throughout. The explanation of this is given in what fell from Judge Moncure (who also sat in the case of Moore v. Moore), during the argument of this cause. He stated that the opinion of Judge Baldwin was hastily prepared by him, without citing any authorities, for the purpose of stating briefly his view of the case, and was not intended by him for publication in that form: That he accordingly withdrew it, intending to write it over at length, with care and deliberation, during the leisure of the vacation, a purpose which was frustrated by his subsequent illness and lamented death; but that had he done so, he (Judge Moncure) has no doubt he would have cited the case of Pollock v. Glassell, as he knows he did in fact rely upon it as an authority in support of his views.

The case of Moore v. Moore, 8 Gratt. 307, perhaps cannot be considered as an authority either way upon this question, as the four judges who sat in it were equally divided in opinion, though the will was sustained, such having been the decree of the court below. But it will be observed that there was no sufficient acknowledgment or recognition of their signatures by the witnesses after subscribing, found by the jury; and the character of the verdict which was a special one, forbade, as was said by Judge Daniel, any inferences or implications that might serve to raise the question.

But it is contended that even if a subsequent recognition of their signatures by the witnesses would be sufficient, there is no such recognition shown in this case, as only one of the witnesses, Crawford, acknowledged his, and that he could not

89 acknowledge the *signature of the other witness, Dr. Rives. But it must be remembered that the court is not passing upon a special verdict. The case is one of probat, and the court may draw from the evidence every inference and conclusion that could be drawn from it by a jury. Smith v. Jones, 6 Rand. 33; Boyd v. Cook, 3 Leigh 32; Dudleys v. Dudleys, Ibid. 436. There can be little doubt in this case that a jury would without any hesitation have inferred from the evidence a perfect recognition of his signature on the part of Dr. Rives, as well as a similar recognition of his on the part of Dr. Crawford. I think there is nothing in this objection.

Upon the whole, I think there has been a reasonable and substantial, if not a literal, compliance with the requirements of the statute shown in this case, sufficient for all practical purposes, and which in favor of the testamentary right ought to be sustained. To reject the will in such a case would be, as I think, to sacrifice substance to form, and the ends of justice to the means by which they are to be accomplished. But to avoid being misunderstood, I desire to say that in holding a subsequent recognition of his signature by a witness equivalent in legal meaning and effect to his actual signing, I contemplate a recognition under the facts disclosed in this case, and where it is immediately connected in point of time and circumstances with the whole body of the res gestæ. The remarks I have made on this point I do not intend to be understood as applying to the case of such a recognition at a subsequent period wholly unconnected with the occasion of the execution of the will by the testator and the subscribing of their names by the witnesses. It will be quite time enough to express an opinion on the question in such a case when it shall be presented for adjudication.

90 *I am of opinion to reverse the sentence of the Circuit court.

DANIEL, J. It appears that the manual act of subscribing their names to the will by the witnesses took place in a room different from that in which the testator was, and under such circumstances as to render it impossible that the testator could see the witnesses or the will at any moment of the transaction; and it also appears that the testator was so enfeebled by age and sickness as to render it extremely improbable that he had the physical ability to rise from his bed and place himself in a position to see the witnesses or what was going on: And the effort here to uphold the attestation is based on the facts which occurred after the witnesses returned into the testator's room; which are, that the witness Crawford, after

the will had been subscribed by himself and the other witness Rives, carried it back to the testator, and in the presence of Rives, said to the testator, "Mr. Sturdivant, here is your will witnessed," at the same time pointing his finger to the names of the witnesses, and holding the will open before the testator, the names of the witnesses being on the same page, close to his. He took the paper into his hands, and looked at it as if he was examining it, still holding it in the same position. The witnesses supposed he saw the names, as the paper was near enough to him for him to see it. The testator then closed the leaves, and as was thought by the witnesses, folded the leaves crosswise. Crawford then told him that as he was ill, he had better give the will to some one to keep for him. He asked whether, if he got well, he could take the will back again from the person to whom he gave it; and on being informed that he could, and that he could then burn it if it was not his will, he said that it was his will and he wished it to stand, but that he might thereafter, on getting well,
91 *wish to make some alterations in it. The testator then handed the will to Col. Philips, who was present, and who is named in the will as executor. The witness Crawford also stated that the testator was probably about 70 years old; and that he used his spectacles when he signed the will. He did not know whether the testator had his spectacles on when the will was brought back to him after it was witnessed, though he was inclined to think he had not.

The two witnesses (Crawford and Rives) both concur in stating that they were absent from the testator's room for the purpose of subscribing the will not more than a minute or two; and Crawford states that at first the witnesses were about to witness the will in the testator's room, but that they found it inconvenient; though he does not say why.

Conceding that these facts imply an acknowledgment by Rives as well as Crawford, of their signatures as witnesses, after their return into the room of the testator (as a majority of the court seem to entertain no serious doubt on that score), it becomes necessary to examine the question mainly discussed at the bar, viz: Whether in a case where the witnesses, for convenience, leave the room of the testator, and go out of his view into another room, to subscribe their names as witnesses to the will, and after subscribing their names, again return forthwith into the testator's room and immediate presence, and there acknowledge their signatures as witnesses, to the testator, and he approves the act, such acknowledgment brings the attestation within the true meaning of the requirement of the law, that the will be attested by the witnesses subscribing their names in the presence of the testator.

It is conceded that the precise question has never been fully presented and adjudicated in any of the English decisions on the statute of 29 Charles 2, from
92 *which ours is taken. The earliest case (and indeed the only one) which I have been able to find in the English reporters, in which the facts were such as to present the question, is very imperfectly reported. It is the case of Risley v. Temple, reported in Skinner 107, as tried in the 35th year of Charles 2, just six years after the passage of the act. Roberts, in his Treatise on Wills, 1st vol. 130, in speaking of such an acknowledgment and of the case just mentioned, says: "It seems not to have been judicially decided, whether an acknowledgment by a subscribing witness to the testator of his handwriting to the attestation would be sufficient. In the case of Risley v. Temple, the facts were, that the testator, lying sick in bed, made his will, and signed, sealed and published it in the presence of three witnesses; but being tired, ordered them to go and subscribe it in another room. They went into another room, out of the presence and sight of the testator, and subscribed their names, and then returned and owned their names to the testator, who looked upon the will and said 'they have done well.' But this point was not spoken to in the case, according to the report. It is very plain, however (he proceeds), that to hold such an acknowledgment sufficient would be in direct opposition to the words of the statute, which, though it does not by the 5th section require the signature of the testator himself to be in the presence of the witnesses, does yet expressly direct the subscription of the witnesses to be in the testator's presence. And it seems little to be doubted but that, agreeably to the greater regard for the words of the statute which now seems to prevail in our courts of justice, such an acknowledgment, by a subscribing witness, of his handwriting to the attestation, made to the testator, after making the subscription out of his sight and presence, would be deemed an insufficient compliance with the statute."

93 *In 8 Viner's Abr. 123, title Devise No. 7, the same statement of the case is given without comment, and without any further remarks on the subject; and in 10 Bacon's Abr. 497, library edition, the question is simply stated, with a reference to the passage from Roberts above quoted. I have examined the report of the case in Skinner, and find that it is correctly given by Roberts, and think it not improbable that the case must have gone off on some other question, as I can find no further history of it in any of the reporters.

Though the question has not been decided in any English case, as arising under the act of 29 Charles 2, we have an express adjudication by the ecclesiastical court upon a question of like character, arising on that portion of the 9th section of the 24th ch. 1 Victoria, declaring that the signature of the testator shall be made or acknowledged by him in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator.

In the case of Moore v. King, 7 Ecc. R. 429, the testator wrote a codicil to his will in the presence of his sister, and she at his request subscribed her name thereto in his presence. On the same day the medical attendant of the testator being present, the testator showed the will to him and said, "This is a codicil to my will, signed by myself and by my sister, as you will see at the bottom of the paper; you will oblige me if you will add your signatures, two witnesses being necessary." The second witness then subscribed his name to the will. The first witness, standing by his side at the time, said, pointing to her name signed at the bottom of the paper, "There is my signature you see; you had better place yours underneath." The case seems to have been fully argued, and it was insisted by the counsel, in support of the allegation, that as the common law 94 recognized three modes of *signing papers, viz: actual signature, signature by mark, and acknowledgment of a signature, there was no reason why the acknowledgment of a witness, to a will, of his signature should not be held to be a subscription of his name within the meaning of the statute. The court, however, held that though the first witness had subscribed her name in the presence of the testator, in the absence of the second witness, the subsequent acknowledgment of her signature in the presence of the testator and the second witness, cotemporaneous with the subscription of his name by the second witness, did not amount to a subscribing by two witnesses at the same time in the presence of the testator. That whilst the act permitted an acknowledgment of his signature by the testator, it gave no authority to the witnesses to acknowledge their subscriptions. In our own court we have had no adjudication of the question, unless the case of Pullock v. Glassell (to which I shall presently refer), can be so regarded; and the research of counsel and of the court has failed of finding but few cases in the courts of our sister states, in which the question has been made the subject of judicial examination.

The case of Boldry v. Parris, 2 Cush. R. 433, cited at the bar, cannot be regarded as authority either way; inasmuch as the court say that no such acknowledgment was shown by the facts as to make it necessary to decide, whether or not, if the witnesses had acknowledged their signatures (which had been made in another room), in the presence of the testatrix, that would have been a sufficient subscribing in her presence."

In the case of Graham v. Graham, 10 Ired. R. 219, the question was, I think, as distinctly raised by the facts as it is in the one before us. There the will was subscribed by the witnesses in another room, so situated as that their backs would have been seen by the testator, by turning his head and looking around the 95 *side of the door, though he could not see their faces or hands or the will, the view of which was obstructed by the partition. After the signing by the witnesses, they returned with the will into the room where the testator was, and informed him they had witnessed it, and he requested a person to take charge of it. Though it is not stated that the testator looked at the signatures, or made any remarks about what the witnesses had done, yet the direction to his friend to take charge of the will was a plain manifestation of his approval of the manner in which the witnesses had attested; and though the witnesses did not point to their signatures, as Crawford did here, yet their returning with the will, and informing the testator that they had witnessed it, was as plain an acknowledgment of their signatures as that inferred here in respect to Rives, who said nothing, and whose acknowledgment can only be implied from his not dissenting from the statement made by Crawford in his presence. If there be any case in which such an acknowledgment could be received by a court as a virtual compliance with the requirements of the act, the court, in the case of Graham v. Graham, might well have felt justified in departing from the letter of the law, and receiving the acknowledgment by the witnesses as a substitute for the actual subscribing in the presence of the testator. Yet neither in the instruction of the circuit judge to the jury, nor in the opinion of the chief justice in the appellate court, is the slightest allusion made to what occurred after the witnesses returned into the presence of the testator; notwithstanding the latter conceded that it was only by a rigid adherence to the requirements of the statute and the decisions upon it, that the subscribing by the witnesses in that case could be held as being out of the presence of the testator.

It is argued, that the decision of this court, in the case of Pollock v. Glassell, 2 Gratt. 439, in respect to 96 *one of the papers established as a codicil to the will of the testatrix in that case, involved the decision of the question now in controversy here. There, as it appears from the statement of the case, the testatrix, whilst she was ill, having expressed to her friend, Miss S. S. Ashton, her wishes as to the disposition of her property after her death, Miss Ashton, of her own accord, and lest she should forget them, made a written memorandum, and at the foot of it wrote the words "Written by S. S. Ashton for," intending to add the name of Mrs. Glassell if the latter should be unable to authenticate the paper by her own signature. When Miss Ashton mentioned it to Mrs. Glassell, the latter did write her name to it herself; and therefore, when she was about to sign it, Miss A. struck out with a pen the word "for," which at first followed her own name, and was intended to precede that of Mrs. Glassell, if it had been written by Miss A. Mrs. Glassell requested Miss A. R. Ashton to witness the paper, which she did; and then Mrs. G. requested Miss S. S. Ashton to witness it, who thought

and so told Mrs. G. that it was not necessary for her to sign the paper again, as her name was already then to it in the manner before stated, and therefore Miss S. S. Ashton did not subscribe the paper again. Mrs. G. said there ought to be two witnesses and a scroll, whereupon Miss S. S. Ashton annexed the scroll to Mrs. Glassell's signature. One of the questions in the case was, whether this paper was duly executed as a codicil to the will of Mrs. Glassell; the will and the codicil being both intended as in pursuance of a power vested in Mrs. G. by a deed of marriage settlement declaring that in case "she should make a will, the property, from and after her death, should be to the use of such person as should become entitled thereto by the gift or devise of the said Margaret C. (Mrs. Glassell), under her hand and seal, attested by two or more witnesses." The marriage settlement
97 *also contained a covenant on the part of her husband, John Glassell, that "she might dispose of certain property by deed or will or writing purporting to be her deed or will, notwithstanding the coverture." It was urged against the codicil, that the signature of Miss S. S. Ashton's name could not, under the circumstances, be treated as an attestation, or at least that it must be considered as a special attestation, confined to the fact that the paper was written by her. The court, however, held differently; and though there was division with respect to other questions in the case, the court were unanimous in holding that the paper in question was a valid codicil.

It will be seen from the statement of facts, that it does not show whether Miss S. S. Ashton wrote the paper and signed it in the presence of Mrs. Glassell, or elsewhere. Nor is anything said as to whether or not the other witness signed her name in the presence of Mrs. Glassell. A reference to the argument of counsel, to the line of authority cited and to the opinion of the court, will show that the question as to whether the name of Miss Ashton had at first been written in the presence of the testatrix, was one not spoken to, and not in the mind either of the counsel or of the court. It will be seen also that the question whether the codicil was subscribed by the witnesses in the presence of the testatrix, was one not necessarily arising in the case, as the settlement merely required that "the gift or devise should be under the hand and seal of Mrs. G. and attested by two witnesses."

I do not regard the case as any authority upon the question which we are now considering; and it is not a little remarkable that Judge Baldwin, who sat in the case and who delivered the opinion which was mainly adopted by the court, should have made no reference to it in the case of Moore v. Moore, if indeed he regarded it as authority for the proposition now
98 sought *to be established by it. In the case last mentioned, he relied, as we see from his opinion, 8 Gratt. 327, on the fact that the will, after being signed by the witnesses, was brought by them to the testator, and inspected and identified by him, and their attestation fully approved, as a strong and controlling feature not to be found in any other he had seen. And though this was a proposition about which there was a division of sentiment in the court, he cited no authority in support of it.*

Nor do I think that any aid in support of the will here can be drawn from the cases of Swift v. Wiley, 1 B. Monr. R. 114, and Rosser v. Franklin, 6 Gratt. 1. In each of these cases the witnesses did subscribe their names in the presence of the testator. In the first mentioned case, two of the witnesses subscribed their names in the presence of the testator and at his request, but before he had signed the will. Some hours afterwards the testator signed the will in the presence of the first two witnesses and of a third, who then subscribed his name likewise in the presence of the testator and of the first two witnesses, the latter still remaining with the testator, and again acknowledging their respective signatures as subscribing witnesses. The court said that all the statute required was, that the will should be signed by the testator; attested by two competent witnesses;
99 and subscribed also by the *witnesses in testator's presence. That neither the letter or spirit of the statute prescribed more; and that all these things had been indisputably proved in the case; and that if necessary, the subscription of the names of the three witnesses and that of the testator, might be considered as a continuous series of acts indivisible as to time: That it would have been superfluous for the first two witnesses to have subscribed their names; because they had once subscribed their names to the paper in the presence and at the request of the testator, which fact was recognized by him, as well as by themselves after his own name had been subscribed, and where the document thus recognized and identified was finally and conclusively published as his will. And in the case of Rosser v. Franklin two of the subscribing witnesses, Neighbours and Cralle, were dead; and from the testimony it appeared that Neighbours had written the name of the testatrix to the will at her request, and that he and Cralle had witnessed it by like request and in her presence.

**Note by the Judge.*—My impression with regard to JUDGE BALDWIN'S opinion in *Moore v. Moore*, is somewhat different from the facts which JUDGE LEE supposes to have occurred in reference to its preparation. The opinion, according to my recollection, was submitted in conference, as containing fully his views of the case. After seeing the written opinions of the other judges, he said that though his views of the case remained unaltered, he would add to his opinion some comments on the authorities cited, and would also refer to authority in support of his own positions. I have no recollection, however, that in any comparison of opinions, any reference was made either by himself, or any other members of the court, to the case of *Pollock v. Glassell*, as authority in the case of *Moore v. Moore*.

The third witness Driskell was examined, and stated that he witnessed the will by the request of the testatrix and in her presence, and also in the presence of Neighbours and Cralle, who had previously witnessed it, but that he made his mark to his name, which had been written for him before the testatrix made hers; and that after he had made his mark, he handed the pen to her, and she turned to Neighbours and said, "As you have written my name, I will make my mark;" and that she then made her mark to her name, which had been written by Neighbours. The court said, that inasmuch as in the absence of proof to the contrary, it ought to be presumed that the attestation by the two deceased witnesses was regular, and as the witness Driskell seemed to have but an indistinct memory of the order in which the signing and attestation took place; and the paper had
100 been admitted to *probat by the court below, which had the best opportunity of knowing the weight to be attached to the testimony of Driskell, it would be inferred, if necessary, that the testatrix made her mark before the subscription of the witnesses. Judge Baldwin, who delivered the opinion, concludes by saying that "The fact, whether, in the order of time, the testatrix made her mark before or after the subscription of the witnesses, was, under the circumstances, in nowise material, in so much as the whole transaction must be regarded as one continuous, uninterrupted act, conducted and completed within a few minutes, while all concerned in it continued present, and during the unbroken supervising attesting attention of the subscribing witnesses."

These two cases, instead of furnishing authority to show that the subscribing by the witnesses, in the presence of the testator, may be dispensed with, or substituted by an after acknowledgment by them, are founded, each, on a course of reasoning manifesting the controlling weight and influence attached by the courts to that important requirement of the act. And indeed it is difficult to conceive how any such decision sanctioning a change as to the order of time in which the signing by the testator and the subscribing by the witnesses usually and naturally occur, can be pleaded as a warrant for wholly dispensing with another essential element of the attestation, which from its very nature must remain unaltered, no matter what may be, in legal intendment, the order in point of time of the events just named.

To make the cases of Swift v. Wiley and Rosser v. Franklin bear in favor of the will here, one of the most important features in each case would have to be changed. If the witnesses in those cases had been out of the presence of the testators instead of in their presence, when the manual act of subscribing by the witnesses took place, and the wills had been still sustained,
101 *then such decisions would have been strong if not controlling authority in the case in hand. Make this change, and these cases then become assimilated in features to that of Ragland v. Huntingdon, 1 Ired. R. 561. There, one of the subscribing witnesses prepared the will by the request of the testator, and subscribed his own name to it as a witness out of the presence of the testator, and then read the will to the testator and told him he had signed as a witness; and the testator approved what was done, and signed the will; and the other witness then signed in the presence of the testator. But in that case the decision was the other way, the court holding that there had not been a signing by both witnesses in the presence of the testator, as required by the statute: And the reasoning of the judges, in Swift v. Wiley and Rosser v. Franklin, justify us in supposing it not improbable, that the wills in each of those cases would have met with a similar fate if the witnesses had subscribed their names out of the presence of the testators.

Nor do I think that the cases deciding that the acknowledgment by the testator of his signature to the will, is sufficient proof of signing within the meaning of the act, justify us in saying that an acknowledgment by the witnesses of their signatures is equivalent to the subscribing of their names in the presence of the testator. Though the first proposition is now well settled, it was not established without much dissent expressed on the part of some of the most learned of the English judges.

In the case of Ellis v. Smith, 1 Ves. R. 11, all of the judges who sat in the case, Lord Hardwicke, Parker, chief baron, Willis, chief justice, and Sir John Strange, master of the rolls, delivered separate opinions; and they each declared, that if the question had been, res integra, they should have doubted whether such an acknowledgment by the testator of his signature was a proper execution within the meaning of the statute.

102 *And in the case of Stonehouse v. Evelyn, 3 P. Wms. 252, in which the court held that such acknowledgment by the testator was sufficient without assigning any reason for the opinion, the reporter, after stating the decision, proceeds to say that such decision was in accordance with the practice; and that it was remarkable that the statute did not say that the testator shall sign in the presence of the witnesses, but requires these three things: First, that the will should be in writing; 2dly, that it should be signed by the testator; and 3dly, that it should be subscribed by the witnesses in the presence of the testator. Thus as I infer, justifying the action of the court in that case, on the ground that the words of the statute required the will to be subscribed by the witnesses in the presence of the testator, and did not require him to sign in presence of the witnesses.

Judges might well consent to yield to the precedents setting up the acknowledgment of the testator in place of his signing before the witnesses, seeing this marked difference in the words applicable to the

signing by the testator and the subscribing by the witnesses; and trusting to the security that would be left in the clause requiring that the will should be subscribed by the witnesses in the presence of the testator. These precedents have in fact, to no inconsiderable extent, found their justification with the profession in the very distinction which they are now invoked as authority for obliterating and destroying. And instead of their furnishing reasons why we should dispense with the remaining safeguards provided by the act, the very fact that the decisions have now settled the law too firmly to be altered, with respect to the acknowledgment of his signature by the testator, is of itself a strong appeal to the court to see in all cases that the will has been in fact subscribed by the witnesses in the presence of the testator.

To dispense with that requirement
103 now, is to strike *down the remaining shield provided by the statute, and to leave the ignorant and infirm with little or nothing of that protection which the ceremonies required by the act were designed to place around their most important acts. But it cannot I presume be contended that we ought, in taking the acknowledgment of the witnesses to the testator, of having subscribed their names, in place of proof that they did subscribe in his presence, to go farther than the courts have gone in taking the testator's acknowledgment of his signature before the witnesses, in place of positive proof, by the witnesses, of his signing: If indeed any decision with respect to the legal effect of the acknowledgment by the testator of his will, the thing to be proved, can by analogy be made to apply at all to the acknowledgments by the witnesses who are to prove it. To what extent, then, has this court gone in substituting such acknowledgments by the testator for direct proof by the attesting witnesses, of his execution of the will. Judge Roane, in the case of Burwell v. Corbin, 1 Rand. 156, does indeed say that "an acknowledgment of a signature is only a signing in another form. In principle, it is in truth a signing." But in neither of the cases of Smith v. Jones, 6 Rand. 33, Dudleys v. Dudleys, 3 Leigh 436, or Clarke v. Dunnavant, 10 Leigh 13, all of which were cases in which the testator's name had been signed to the will by another person, do I understand the court as holding that the acknowledgment by the testator of the signature or of the will amounted to more than proof from which the inference followed that the will had been signed for him by his request and in his presence. None of these cases go to the extent of declaring that an acknowledgment which negatives a signing for him in his presence, shall be taken as conclusive proof that the will was in fact or in legal effect signed by another for him in his presence.

Let us suppose a case, then, where,
104 there being a *signature to the will, the testator acknowledges it before the attesting witnesses, who, upon their examination, depose to such acknowledgment, but also state that in fact the testator's name was signed to the will by one of them not in the presence of the testator. Are we bound to infer a compliance with the statute against the positive proof to the contrary? The question was decided in the negative in the case of Dunlop v. Dunlop, 10 Watts' R. 153. It is true that the Pennsylvania act requires that the will shall be signed by the testator, or by some person for him in his presence and with his express direction; whilst ours says that it must be signed by him, or by some other person in his presence and by his direction. I cannot perceive any such difference in the terms employed in the two acts, "with his express direction," "and by his direction," as to call for a different decision in a case arising under our act of 1823. And whilst the strong and pointed language of the act, "express direction," was used by the judge as a persuasive argument, the general principles announced plainly cover a case arising under our act.

If I am correct in supposing that the decisions of our court do not go to the extent of holding the acknowledgment of the will by the testator, when his name has been signed by another, as proof of execution, which may not be contradicted by the true facts of the case, the analogy which is sought to be drawn from those decisions, in aid of the attestation here, necessarily falls to the ground: For whilst the witnesses here make a statement from which we imply their acknowledgment to the testator of their subscription, they at the same time expressly prove that they did in fact subscribe their names out of the testator's presence. Nor is any progress made, in the argument on the other side, by showing that an attesting witness may be a marksman, and that he may attest by pro-
105 curing another to *write his name for him; and by saying, that as he may adopt his name written for him by another, a fortiori, he may adopt it when written by himself; the answer being, that whether the witness gets another to write his name for him or writes it himself, the act must still in each case be done in the presence of the testator.

I think that the sentence of the Circuit court ought to be affirmed; but a majority of the court being of a different opinion, it must be reversed.

ALLEN, J., concurred with Daniel, J.

MONCURE and SAMUELS, Js., concurred in the opinion of Lee, J.

Judgment reversed.

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106 *Nock v. Nock's Ex'ors.

April Term, 1853, Richmond.

1. **Wills—Signing of Testator's Name in His Presence—When Inferred.**—From what circumstances it may be inferred that the name of testator was written in his presence, and before his acknowledgment of the paper as his will.

2. **Same—Attestation—Presence of Testator.***—The witnesses to a will subscribe their name in another room from the testator, who, though lying on a bed, is able to walk about; but the witnesses are directly within the range of his vision, so that he can see all their persons except the forearm and writing hand: these being hid from him by the body of the witness whilst he is subscribing his name; it may be inferred too that he may see the paper as it lies on the bureau or desk where the witnesses subscribe their names. HELD: The witnesses subscribed their names in the presence of the testator, within the meaning of the statute.

At the October term 1851 of the Circuit court of Accomack county, a paper purporting to be the will of George Nock deceased, was propounded for probat by the executors therein named; when Catharine Nock, the sister and heir at law of the said Nock, appeared and opposed the admission of the paper to probat. The only question of law in the case, was whether the paper was duly attested in the presence of the testator. Upon that question the testimony is fully stated in the opinions of Judges Daniel and Moncure. The paper was admitted to probat in the Circuit court. And thereupon, Catharine Nock applied for and obtained an appeal to this court.

R. T. Daniel, for the appellant.
Patton, for the appellees.

MONCURE, J. This is an appeal from a sentence of the Circuit court of Accomack, admitting to probat a paper purporting to be the will of George Nock, who 107 *died unmarried and without issue, on the 6th of October 1851, leaving a large estate. His only heir at law was his sister, Catharine Nock, whose only children were two daughters; one of them married to Samuel M. Turlington and the other to Richard S. Rew; and each of them having several children. His only devisees and legatees were three of the children of his niece, Mrs. Turlington, to wit: John, Samuel and Ann: The bulk of his estate being left to John and Samuel, and a negro girl only to Ann. John Arlington, the draftsman of the will, and Samuel M. Turlington, were nominated sole executors, and propounded the will for probat; and Catharine Nock, the heir at law, contested it, and has appealed from the sentence.

The counsel for the appellant contended, in opposition to the will, that it was executed by the testator just at the close of his life, when both mind and body were so weakened and perverted by intemperance that even if he was of clear, testable capacity, he was the easy subject of impressions improperly made upon him. That the evidence strongly tends to show clandestinity and unfairness on the part of the draftsman of the will, and of the father of the beneficiaries. That two of the subscribing witnesses, Arlington and Savage, gave false testimony, and are not credible; and the other, Dr. Harmanson, though unimpeachable on the score of integrity and intelligence, does not prove the due execution and attestation of the will. That there is no proof that the contents of it were known to the testator when it was executed. That the circumstances attending its execution, if they do not prove conclusively imposition and practice on the testator, are of a character to impress on the court the duty of the closest scrutiny into all the ceremonial of a regular, formal and legal execution of the instrument. And that, conceding the truth and consistency of all the testimony, 108 the signature of the testator is *not authenticated as the law requires, and the will was not duly attested.

An immense mass of testimony was taken in the case, and forms a part of the record; which I do not deem it necessary, and it would take too much time, to review in detail. The will was executed and attested on the day of the testator's death, about six hours before that event took place, but had been prepared on a former day. His last sickness was of short duration; having commenced but a day or two before his death. He was able to walk about the house, and did do so on the day of his death, both before and after the attestation of his will. He was not an old man, being about fifty-five years of age. None of the testimony tends to show that he was ever, to the moment of his death, of unsound mind. Dr. Harmanson, his attending physician, and one of the attesting witnesses, proves that he arrived at his house on the day of his death, a little after 11 o'clock A. M. and remained there till 4 P. M. That the will was executed about an hour and a half after his arrival. That the testator was of sane mind, and during the whole time he saw him, spoke and acted rationally; and when he acknowledged his will, seemed to be perfectly conscious and sensible of what he was about: and the doctor states the purport of the conversation that occurred between him and the testator, which fully confirms the opinion of the former as to the state of the latter's mind. The testator was a man of intemperate habits, and frequently drank to excess at public places, but was usually sober at home; though for some time before his death he had been engaged in distilling peach brandy, and seems to have been in the daily habit of drinking toddy or grog. The doctor thought when he arrived that the testator had been drinking, but would not have been led to that conclusion by anything that he 109 did or said, except his asking *for something to drink. He was apparently excited, and was nervous; and this nervousness, the doctor supposed, had been brought about by continued excessive use of ardent spirits. But he thought the testator's mind was sufficiently calm and composed for the purpose of making a will. The testator was an industrious, thriving man, and at all times careful of his property. It does not appear that he was ever in a condition, from drunkenness or other-

*Wills—Attestation—Presence of Testator.—See Sturdivant v. Birchett, and *foot-note, ante*, p. 67.

wise, to be defrauded or imposed upon. Nor does it appear that the draftsman of the will, the father of the beneficiaries, or any other person for them, ever made any attempt to defraud or impose upon him, or any suggestion to him in regard to the disposition made of his property by his will; or ever possessed, or attempted to exert, any influence over him. Nor does it appear that there was any clandestinity or unfairness in the preparation or the execution of the will; or that the testator was not perfectly conscious of its contents, and did not voluntarily and deliberately dictate them. On the contrary, it appeared that he had become offended (whether justly or not is immaterial) with his sister Mrs. Nock, and her son in law, Mr. Rew, especially the latter; and had formed a settled purpose, declared on many different occasions, and to many different persons, during the last year, and especially the last week, of his life, to give none of his property to them or the children of Mr. Rew; but to dispose of it in the manner in which he disposed of it by his will. It was proved that Arlington is a young man of good character, and ordinary intelligence and education; and Savage is an ignorant, and illiterate man; and no attempt was made to impeach the character of either of them. It did not appear, nor was any attempt made, (except by a question propounded to Savage in regard to himself,) to show that either of them had any interest in the establishment 110 of the will, or was *in any way connected with the beneficiaries. To convict them of fraud and perjury in the transaction, reliance is placed, alone, on the supposed inconsistency and contradictory character of their statements with themselves, and each other, and with the other testimony in the case. This intrinsic evidence of their guilt should certainly be very plain and strong to convict them; and ought not to have that effect, if their supposed inconsistencies and contradictions can be explained and reconciled in any rational way. I think they have been so explained and reconciled in the opinion of the court below; which, I think, is warranted by the evidence; and were I called upon to decide this case originally, upon the evidence as it is written, without the advantage of seeing the witnesses, and hearing them speak, I would come to the same conclusion that he did. But we have to decide this case on an appeal from the decision of a learned judge who saw and heard the witnesses testify, and certifies their evidence in such language as this: "There was nothing in the manner of the witnesses, in their relations to the parties in interest or on the record, or in their connection with this cause, which has excited in my mind the slightest distrust of their truthfulness. Nor was there anything in the matter to which they testified on any important point to which I do not give full credit."—"I take pleasure in saying that both the manner of the witnesses and their testimony have made an impression upon my mind very favorable to their characters. The subscribing witnesses to the will, and most of the other witnesses, were examined separate and apart from each other, and in all points which I regard as material, there is a remarkable consistency in their statements." This court, on a mere question of credibility of witnesses, will always presume that the inferior courts, which saw and heard the 111 witnesses examined, decided *correctly. Dudleys v. Dudleys, 3 Leigh 436; Jesse v. Parker, 6 Gratt. 57. Therefore, even if I doubted, which I do not, the correctness of the opinion of the court below as to the credibility of the evidence, I would follow it rather than my own.

Conceding then the truth of all the testimony, it becomes unnecessary to decide whether, if that of Arlington and Savage were rejected as incredible, Dr. Harmanson's alone would sustain the will: and it is affirmatively and positively proved, that Saturday, the 4th of October, two days before the testator's death, when he was very little if at all indisposed, he sent for Arlington to write his will, who accordingly came, and alone with the testator in a room upstairs, prepared it according to his dictation, and read it twice over to him, he being then sober and rational; that it was not then executed and attested, because there were not witnesses enough present who could write their names, but he requested Arlington to bring it on the succeeding Monday for the purpose of execution and attestation; that Arlington accordingly brought it to the testator's house on Monday; when, after ascertaining from the doctor that the testator (who was then very sick, but had on Arlington's arrival enquired for the will, and expressed his desire to have it executed,) was in a situation to make a will, he presented it to him for execution, and it was accordingly executed and attested, with a full knowledge of its contents on the part of the testator, and an unbiased intention to do what he did. It may well therefore be said, in the emphatic language of the court below, "that the whole transaction, from the beginning to the end of it, was entirely fair and bona fide; and if, by any slip, this paper has not been so authenticated as to be valid as the will of George Nock, his true will, his real, settled, and well settled and determined wishes in regard to the disposition of his property will be defeated." Let 112 *us now see whether there was any such slip; and proceed to consider, what are called, by the learned counsel for the appellant, the two legal questions which arise upon the execution of the will.

I. Whether it was signed or acknowledged by the testator, in the presence of at least two competent witnesses present at the same time.

A court of probat occupies the place of a jury as to questions of fact, and its province is, like that of a jury, to draw all just inferences from the evidence. Smith v. Jones, 6 Rand. 33; Boyd v. Cook, 3 Leigh 32; Dudleys v. Dudleys, Id. 436; Clarke v.

Dunnavant, 10 Id. 13. Every reasonable presumption ought to be made by a jury or court of probat in favor of a will, when there is no doubt of the testator's intention. Bond v. Seawell, 3 Burr. 1773; Smith v. Jones, 6 Rand. 33. Applying these principles to the question under consideration, there can be no difficulty in its solution. If the evidence does not positively prove that the will was both signed and acknowledged by the testator in the presence of the witnesses, it at least proves facts from which a court of probat ought to infer that it was so signed and acknowledged; or proves that the testator made his mark, and acknowledged the will, in the presence of the witnesses, from which a court of probat ought to infer that the will when acknowledged, had been signed by the testator, or some other person in his presence and by his direction. Dr. Harmanson proves that the paper was handed to Mr. Nock for his signature; he took the pen in his hand, as witness supposed to make his signature, but remarked to Mr. Arlington, "Oh, I can't write; do you write it for me." Arlington then aided him in making a cross; testator making one mark, and Arlington the other. Witness then took the will in his hand and said, "Mr. Nock, is this your will and testament?" He replied, "It is, sir." Mr. Arlington then taking hold of the
113 *will with the witness, and holding it to Mr. Nock, said, "You acknowledge it as such?" He replied, "Certainly, certainly, I do." Witness does not recollect seeing Arlington sign the testator's name, nor whether it was to the will when it was acknowledged. Arlington proves that the testator requested him in the presence of the witnesses to write his name for him, and he made a cross mark. He does not recollect where he signed the name. He might have signed it on his knee, in the room where the testator lay; or he might have signed it at the secretary in the adjoining room. He is certain that he signed it in the one place or the other. He first wrote the name, and after testator had crossed the mark, witness wrote "his acknowledgment." Savage being a marksman, his evidence is of little importance on this branch of the subject. I think the evidence above stated fairly shows that the will was both signed and acknowledged at the same time. But at all events, it shows that the signature of the testator was to the will when it was acknowledged; for Arlington proves it was made in the order of time before the mark, and all the witnesses prove that the mark was made when the will was acknowledged. If the signature had not been to the will when it was acknowledged and attested, Dr. Harmanson would have observed so important an omission. As Judge Cabell said, in Dudleys v. Dudleys, 3 Leigh 443, "It is not usual for men to acknowledge papers, either as deeds or wills, and call on others to attest them, before they are signed. Such a thing may happen; and when it is proved to have happened, the acknowledgment and attestation will be disregarded. But, in the absence of all proof to the contrary, the acknowledgment and attestation give rise to an irresistible inference that the instrument had been previously signed. A contrary course would defeat a vast number of wills; for it may often happen, and frequently does happen,
114 *that a witness not only does not remember to have seen the signature, but he does not remember the acknowledgment or the attestation." If the signature of the testator was to the will when it was acknowledged, it is unimportant whether it was put there at that time or before. The mark was made at that time, which made the signature, if then there, that of the testator, by adoption; and at all events it may be said, in the language of the same judge, that "the acknowledgment is a ratification of the signature; and from that ratification we may fairly infer, that the signature was made in his presence and by his direction." I deem it unnecessary to enquire what would have been the effect, if the name of the testator had been signed in the order of time after the acknowledgment and attestation, and on the secretary in the adjoining room where the will was subscribed by the witnesses, as the evidence presents no such case.

This is a much stronger case in favor of the will than that of White v. The British Museum, 19 Eng. C. L. R. 91, in which the will was established. There it was found, in a special verdict, that none of the witnesses saw the testator's signature; though it was also found, that the will was signed by the testator before it was signed by the witnesses. There was no room for inference on the subject. Here, there is not only room for inference, but it is almost certain, that the witnesses saw the signature when the will was acknowledged, but have forgotten the fact, as it made little or no impression on their memories. There is no more necessity under the present statute of wills than under the former, that the witnesses should see the signature of the testator at the time of the acknowledgment of his will; much less, that they should always remember the fact of their having seen it. If there be any difference in the phraseology of the two statutes in this respect, such
115 necessity would seem to *be less required by the terms of the present than the former. The new statute expressly authorizes the will to be acknowledged, and drops the word "attested," contained in the old; and it also expressly dispenses with the necessity of a form of attestation. It differs from the statute, 1 Vict. ch. 26, § 9, which requires the "signature," not the "will," to be acknowledged; and retains the word "attest," as well as "subscribe." It was certainly never intended, by the framers of our new statute, to require the subscribing witnesses to prove that they saw the signature of the testator at the time of the acknowledgment of the will. That would be to make the validity of wills "depend upon the memory and good

faith of a witness, and not upon reasonable proof that all the requirements of the statute had in fact been complied with." Jesse v. Parker, 6 Gratt. 64; Clarke v. Dunnavant, 10 Leigh 13. Let us now consider the remaining question in the case; which is,

II. Whether the witnesses subscribed the will in the presence of the testator.

The counsel for the appellant contended, that "upon the proof it does not appear that the testator was conscious that the act of attestation was going on at all." If this were so, the will was certainly not attested in the presence of the testator, within the meaning of the statute; for it must be a conscious presence on his part. But is this the fact? Conceding the sanity of the testator at the time of the attestation, which is fully proved, the facts stated by Dr. Harmanson, taken alone, show that the testator made his mark and acknowledged the will in the presence of the witnesses, in order that they might attest it, and must have been conscious of the act of attestation at the time it was going on. But regarding Arlington and Savage as credible, no question could or would be raised on the subject.

116 *The facts in regard to the physical condition of the testator, and the relative position of himself and the witnesses at the time of the subscription of the will by the former, are as follows: He was taken sick on Sunday, and died the following Monday night. According to Dr. Harmanson, his disease was inflammation of the throat. He was weak and very sick, but had sufficient strength to rise from his bed. Shortly after the doctor arrived, he got up and went into the adjoining room to get something to drink. According to Arlington, he was feeble that day from disease, but not so feeble as might be supposed, for one dying so short a time afterwards. He was strong, walking the floor both before and after the execution of the will. He was in the porch about ten minutes before; and was in the room in which the will was subscribed by the witnesses, walking the floor, after the will was executed and attested. There are two rooms to the house, the one called the little room and the other the big room; which were separated by a mere partition wall, in which there was a door connecting the two rooms. When the will was acknowledged and attested, the testator was lying on his back on a trundle bed in the little room. The bedstead was about a foot high, and on it was a feather bed of ordinary size. The testator had under his head three or four pillows and a bolster. When he acknowledged his will to the witnesses, two of them, Dr. Harmanson and Arlington, had it in their hands; and Dr. H. says, "There being no writing desk or table in the room where he was lying, I stepped into the adjoining room, carrying the will in my hand, and accompanied by Mr. Arlington, and I think Mr. Savage, and there signed the will, or witnessed it, on a bureau or secretary."—"I then gave the pen to Mr. Arlington, and retired to the room where Mr. Nock was lying; left Mr. Arlington, and, I believe, Mr. Savage in the room, with the will

117 in their *possession. Do not recollect of seeing them sign the will, and did not see" it afterwards except in the courthouse. The doctor left the will on the bureau, where he had signed it, and Arlington and Savage immediately signed their names, each standing in the same place in which Dr. H. had stood; and Arlington signing the name of Savage at his request, who made his mark. Arlington says, that after the will was attested, he carried it to the testator, who, in the presence of the witnesses, acknowledged it as his last will and testament, and requested Arlington to keep it: though of that fact Dr. H. has no recollection. When the witnesses subscribed their names, the door between the two rooms was open; and the testator, as he lay on the bed, could see the entire persons of the witnesses except their forearms and writing hands; which, and the will, he could not see, because the witnesses, in fronting the bureau to sign their names, stood with their backs towards the testator. The distance from the bed to the bureau was sixteen or seventeen feet.

These, I believe, are all the material facts on which the question under consideration depends: And that question in effect is, Whether a will (everything being fair and bona fide), is subscribed by witnesses in the presence of the testator, when they are in full view of each other, and but sixteen or seventeen feet apart; when the table or other thing on which the will is signed is also in the testator's view; and when he is mentally competent to supervise the transaction, is conscious of what is going on, and is physically able to walk about; but when, in the actual position in which he chose to remain at the instant of the signing, he was prevented by the bodies of the witnesses from seeing their forearms and writing hands, and the paper itself?

The statute uses the word presence, but has not attempted to define it. Its

118 meaning depends upon *the circumstances of each particular case; and the duty of ascertaining it devolves on the court or jury which has to decide the case; their guides being reason and common sense, controlled only by authoritative adjudications. It is a word of which every man has something like a just idea, but which no man can accurately define. In fact, it implies an area which has no metes and bounds; but is contracted or enlarged according as the attestation occurs, as it certainly may, "in a small chamber, or a spacious hall, a public street or an open field." To relieve the mind from the labor of ascertaining the meaning of the word in its application to particular cases, courts have endeavored to give at least a partial definition; and accordingly, at a very early period after the enactment of the statute of 29th Charles 2, it was determined, as a general rule, that an attestation in the same room with the testator, and at his request, is an

attestation in his presence; whether or not, the will or the witnesses were visible to him, or in the range of his vision, at the time of attestation: clandestinity or other fraud in the attestation, or mental incompetency of the testator at the time, formed of course, an exception to the rule. No other exception, so far as I know or remember, has ever been recognized to this general rule, save that which was established by this court in the case of Neil v. Neil, 1 Leigh 6: which case was the first of its kind, and yet stands by itself; having, I believe, been recognized as law nowhere else than in Virginia, but having been repudiated elsewhere. Orndorff v. Hummer, 12 B. Monr. R. 619. See also Newton v. Clark, 7 Eng. Ecc. R. 125. Had I been a member of the court when that case was decided, I would have concurred with the minority, Judges Brooke and Carr, and with the judges of the courts below, common law and chancery, in sustaining the will. Still, I regard the case as a
119 binding authority, *and the rule of stare decisis would induce me to follow it as closely, in a like case, as if it had my entire approbation. Its effect has been to modify in this state, the general rule, and add thereto this proviso, that if the testator be physically unable to change his position the witnesses must make their subscriptions within the range of his vision. I have no fault to find with the general rule, which seems to have much reason in it. The four walls of a room, whatever may be its size, so completely enclose its area and exclude all improper interference from without, that whatever may be done within them may generally be said to be done in the presence of all who may be therein. But we must be careful not to be misled by this general rule, and mistake the evidence of the thing for the thing itself. It shows that when a will is attested in a certain situation in regard to the testator, it is done in his presence; not that it can in no other situation, and under no other circumstances be done in his presence. It is partial, not complete or exclusive, in its nature. We must look to the reason of it. The word room does not occur in the statute; nor does the word sight. Presence is the only word there used; and where it exists sight is unnecessary, and the statute is satisfied. A blind man can make a will; which of course he could not do if sight were necessary. Though a thing cannot be done in the sight, it may be done in the presence, of a blind man; and therefore a blind man may make a will. Proximity and consciousness may create presence. A room ex vi termini denotes such proximity as is required to constitute presence: but there may be such proximity, as well without as within a room. And wherever that proximity exists and presence is created, it has the same effect as if the transaction occurred in the same room, and sight becomes unnecessary. When a testator is in one of two adjoining rooms, of which the
120 door of communication *is closed, what is done in the room is done in his presence, and what is done in the adjoining room is done out of his presence. But throw open the door, and place the witnesses and the table on which they are attesting the will in the adjoining room, directly before the testator, and they are in his presence. The moment the range of vision becomes unobstructed, the distinction between the same room and different rooms ceases; the partition wall is broken down, and the two rooms are turned into one. The power to see, and actual sight, are then equivalent and convertible terms. It would be strange indeed, if there should be any real difference in such a case between the same room and adjoining rooms; and the apparent difference can only be created by a misconception produced by the general rule of which I have been speaking. Suppose that the distance between the testator and the witnesses, as in this case, is but sixteen or seventeen feet; less than the length of an ordinary room. Why should it make any difference whether they are in the same or different rooms? If they were in the same room, the attestation would be good. And why not, if they are in different rooms? Prima facie, it is said, if the attestation be in the same room, it is in the presence; otherwise not. But proximity, and the removal of the obstruction to the range of vision, repel this prima facie effect in the latter case. Suppose the transaction had occurred under an arbor, or in an open field: such proximity would imply presence, and the attestation would be good. Why is it not at least as good when it occurs in an adjoining room of the same house? Has not the testator the same safeguards against fraud and imposition as if it had occurred in the same room? Has he not the same supervising control over the attestation in the one case as the other? Can he not, in one case as much as in the other, see that those who attest the will are the per-
121 sons in whom he confides, *and that a false paper is not surreptitiously imposed on the witnesses? But what limits can be put upon such a doctrine as is contended for, and to what extent would it carry us? Suppose the testator is in perfect health, and sitting in one room just at the open door, and the witnesses are sitting in the adjoining room, just at the same door, and within a foot of the testator, but accidentally with their backs towards him: will they be considered as not in his presence, merely because, in the actual position in which he happens to be, he cannot see their forearms and writing hands, and the paper itself? The statute says nothing about forearms, or writing hands, or seeing the will itself. It requires the witnesses to subscribe their names in the testator's presence. He cannot, in the nature of things, see their whole persons at the same time. They are in his presence, whether their backs or their faces be towards him. And if, being in his presence, they subscribe their names, the statute is literally complied with. There is not even a slip of form, and

the attestation is good. If he does not choose to see, when he can so easily see, the forearms and writing hands and paper itself, and when he sees and hears that the attestation is going on, it is the same thing as if he had actually seen them.

The fact is, that the general rule before referred to is not better established than another, which is, that if the attestation be in an adjoining room, and in the range of the testator's vision, it is in his presence: And in no case, English or American, before or since the revolution, from the leading case of Shires v. Glasscock, down, unless it be a case recently decided in North Carolina, of which I will presently have occasion to speak, has this rule been so far modified as to require, not only the witnesses themselves, but their forearms and writing hands and the paper itself, to be in the range of the testator's vision
122 at the instant *of the attestation.

And in the cases in which the attestation was not in the same room, it has been considered as done in his presence, if he was in a position from which he might, if he chose, see the witnesses subscribe without changing his situation. That fact being ascertained, the enquiry has not been prosecuted further to ascertain whether the witnesses, in sitting down or standing at the table to write their names, had their backs or faces toward the testator. Had such an enquiry been deemed material, can it be believed that it would not have been made in some case during the long interval of more than one hundred and seventy years which has elapsed since the enactment of the statute of Charles 2d?

In the leading case of Shires v. Glasscock, 2 Salk. R. 688, decided about eleven years after the making of the statute, "when," in the language of Buller, J., "the reason and meaning of the clause in question were exactly known," Sir George Shires being very ill in bed, the witnesses withdrew into a gallery, seven yards distant, between which and the chamber, where the testator lay, there was a lobby with glass doors, and the glass broken in some places. Here they subscribed the will. It was proved that the testator, from the bed where he lay, might have seen the table in the gallery on which the witnesses subscribed, through the lobby and the broken glass window. The will was established on this proof; and it was not deemed material to enquire in what way the witnesses sat down to the table, nor whether they had their faces or backs towards the testator. In the case of Davy v. Smith, 3 Salk. R. 395, a passage intervened between the two rooms; the same enquiry was deemed immaterial, it being proved that the attestation was at a table in one of the rooms, and the testator lay in bed in the other. The same observations may be made in regard to Casson v. Dade, 1 Bro.
123 C. C. 99, in *which a lady's will was attested in an attorney's office while she sat in her carriage, which happened accidentally to stand at a window through which, as was proved by a person in the carriage, she might see what passed within. In Doe v. Manifold, 1 Maul. & Selw. 294, which was much relied on by the counsel for the appellants in Neil v. Neil, and which perhaps goes further than any English case, except some recent cases in the ecclesiastical courts, against the validity of attestation in a different room from the testator and out of the range of his vision, the two rooms were separated by a passage into which the door of each of them opened. The testator lay in bed in one of them, and it seems was so sick as to be unable to leave his bed without assistance. The witnesses wrote their attestation at a table before the fire-place in the other room, and the doors of both rooms were open. The jury found that a person in the bed room might, by inclining his body and advancing his head into the passage, have seen the witnesses attest the will, but that the testator was not in such a situation in the room that he might have done so. The will was held not duly attested. Lord Ellenborough, C. J., after referring to Casson v. Dade, and saying that, in favor of attestation, it is presumed that if the testator might see, he did see, proceeds to say: "But I am afraid that if we get beyond the rule which requires that the witnesses should be actually within the reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence; as to which the rule is, that where the devisor cannot by possibility see the act doing, that is out of his presence. If the jury had not negatived the testator's being in a situation that he might have seen the attestation, I should have great doubts on this case." What would his lordship have said, if the jury found that the witnesses and the table at which they
124 attested *were in full view of the testator and only seventeen feet from him, and that he was conscious of what was going on, and able to walk to them if he had chosen; but that, in the position in which he then was and chose to remain, he could not see their forearms and writing hands and the will, at the instance of attestation? What he did say sufficiently answers this question. Similar observations may be made in regard to the case of Tod v. Winchelsea, 3 Cond. Eng. Ch. R. 474, and 12 Eng. C. L. R. 227; which, with the other cases cited and commented on, show that when the testator can see the witnesses when they are attesting in an adjoining room, the attestation is in his presence.

The case of Graham v. Graham, 10 Ired. R. 219, decided by the Supreme court of North Carolina in 1849, was cited and much relied on by the counsel for the appellant, and is the only case I have ever seen or heard of, which can be said to decide, if that can, that whenever the attestation is out of the room in which the testator is, he must be able, without changing his position, to see the will at the instant of the attestation. If that case could be said so to decide, I would only say that while I have great respect for the court that decided

it, I am yet of a different opinion. But it cannot, and is a very different case from this. There the testator was lying in bed very sick in one room, and the witnesses signed their names at a chest in another. There was a door open between the two rooms. The bed stood by the partition between them, and two or three feet from the door; and the chest stood against the other side of the partition and nearly opposite to the bed; so that the testator, as he was lying in bed, could, by turning his head and looking around the side of the door, see the backs of the witnesses as they sat at the chest writing, but could not see their faces, arms or hands, or the paper on which they wrote; a view of those being obstructed by the *partition. The court below directed the jury, "that, though the testator could have seen enough of the persons of the witnesses while they were subscribing the will, to enable him to recognize them, yet if he could not have seen what was going on whilst they were in the act of attestation, the paper was not properly executed and attested." Ruffin, C. J., in the Supreme court said, "The rule laid down by his honor seems to be a very rigid construction of the terms 'in his presence,' which are used in the act; but it is in conformity with the cases hitherto decided on this subject, and we believe with the policy and meaning of the statute." The only cases referred to by him are Shires v. Glasscock, Davy v. Smith, Casson v. Dade, and Doe v. Manifold, on which I have commented already. There are passages in his opinion, which, taken in the abstract, might seem to support the position contended for; but taken in connection with the facts of the case and the authorities relied on, do not. In that case, the witnesses were not in the range of the testator's vision when they were signing their names. He could see no part of them from the position in which he then was; nor without a considerable change in his position on the bed, and looking around the side of the door, which was two or three feet from the bed; and then could only see the backs of the witnesses, and could not see what was going on. The court below decided that the paper was not properly attested; and even this, the chief justice said, seemed to be a very rigid construction of the terms "in his presence." What would he have said if the facts had been the same as in this case?

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Here, the testator acknowledged his will before the witnesses, handed it to one of them, who, attended by the others, bore it off to the nearest convenient place, where they signed it in immediate succession; and the last who signed it bore it back to the testator. The continuity of the transaction was unbroken for an *instant; and during the whole of it the will and witnesses were fully in his view; except that while they were engaged in the act of signing, he could not see their forearms and writing hands or the will itself without changing his position; which, however, he was able to do. It is probable, from the elevation of his head, that he could see the will on the bureau during the brief intervals of the signing by the witnesses. If, as was said by Judge Cabell, in Neil v. Neil, the object of the statute is to enable the testator to see that those who attest the will are the persons in whom he confides, and to prevent a false paper from being surreptitiously imposed on the witnesses, surely that object was fully attained in this case.

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The will was signed and acknowledged by the testator, and subscribed by the witnesses, at one and the same time, and in the presence of each other. It is therefore unnecessary to decide in this case, whether the statute requires the witnesses to be present at the same time, as well when they subscribed the will, as when it is signed or acknowledged by the testator.

I am for affirming the sentence.

DANIEL, J. Concurring, as I do, in the opinion expressed by the judge of the Circuit court, that the credit of the witnesses to the execution of the will has not been successfully assailed, I do not see that any question arises as to whether the requirements of the Code, in respect to the signature of the will and the acknowledgment on the part of the testator, have been fully complied with. Nor can I see that the testimony presents any doubt as to the capacity of the testator to make a will. In the view which I have taken of the testimony, the only question demanding the serious consideration of this court is, whether or not the will has been duly attested by the witnesses in the presence of the testator.

The witness Arlington, on his examination in chief, *stated that he was satisfied that he subscribed his name as a witness in the presence of the testator; that at first he had thought he had not; but since he had made an examination of the house and of the bed on which the testator was lying, he was satisfied that the testator could have seen him if he had looked; though he did not know whether the testator looked or not; that he subscribed his name as a witness at the request of the testator, and in the presence of the other subscribing witnesses; and that the testator acknowledged the paper as his last will and testament in his (the witness's presence and in the presence of the other witnesses.

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On his cross examination, he gave a very minute description of the bed on which the testator lay; of his position in the bed; of the desk on which the will was written; and of the relative situations of the testator, the witnesses and the will, during the transaction of the attestation. He stated that there were two rooms to the house; that the testator was lying in one room, and that the will was attested in the other; that there was a door in the partition wall of the two rooms (which door, it was shown by another witness,

was some three feet in width), and that the door was open; that the testator was lying on his back with his face upwards, in a trundle bed, with his head raised by three pillows; that the bedstead was ten or twelve inches in height, and the bed on it of the ordinary size for such a bedstead; that the will was subscribed by the witnesses upon a secretary, which was about or nearly as high as a man's breast; that a straight line drawn from the testator's head to the secretary would pass through the open door, so that the testator from where he was lying and the witnesses from where they were whilst attesting the will, might mutually have seen each other, if they had chosen to look; that the testator might readily see the secretary and the witnesses, 128 *by simply turning his head; and that the testator had sufficient strength to have changed his position in the bed or to have risen from it, if he had pleased to do so; that he had been in fact walking about in the porch about ten minutes before the execution of the will, and that he walked about in one of the rooms after the will was attested.

On further cross examination, he stated that at the time of subscribing their names, the backs of the witnesses were turned to the testator, and he was satisfied that the testator could not see the writing hands of either of the witnesses as they severally subscribed their names; but could not say whether the testator could or could not see the will when "witnessed by the witnesses." In reply to a question whether the testator had requested him and the other witnesses to attest the paper as his last will and testament, he answered, "He requested me to attest his will and Dr. Harmanson; I can't say as to Savage. We were all standing round the bed, and he told us to go and witness his will." He also stated that he subscribed the name of Savage to the will, by his request, and in his presence. And in reply to a question whether the testator offered to go with the witnesses, when they left the room to attest the will, he answered, "Not that I recollect; the doctor told him to lie still."

The witness Savage stated, in substance, that after the testator had acknowledged the will, he requested all the persons present, viz: himself (the witness), Arlington and Harmanson, without naming them in particular, to witness it: and that they did witness it in the manner and under the circumstances detailed by Arlington. That his name was subscribed for him by Arlington, in his presence and by his request, and that he then made his mark to it. That he thus witnessed it in the presence of the other witnesses, and that he saw the other witnesses, Arlington and Harmanson, 129 *subscribe their names severally as witnesses. That all of them witnessed the will on the secretary nearly about the same place, and as nearly as could be at the same time. That the door of the two rooms remained open during the attestation; that he could have seen the testator from the place he occupied whilst attesting, if he had been so minded; and that the testator could have seem him, without doing more than turning his head in the bed. He further stated, that when the witnesses were about to leave the room for the purpose of attesting the will, the testator raised himself up, as if about to go into the other room with the witnesses; but that he again resumed his position in the bed on the doctor's telling him that he did not wish him to get up, and that he wanted to get him into a perspiration, and to get him to sleep. Dr. Harmanson, the other subscribing witness, who attended the testator in his last illness as his physician, stated in substance, that just before attesting the will he took it in his hand and asked the testator if it was his last will and testament? To which the testator replied, that it was. That Arlington then asked the testator if he acknowledged the paper as his will? To which he replied, that he did. That there being no writing desk or table in the room where the testator was lying, he stepped into the adjoining room, carrying the will in his hand, and accompanied by Arlington, and as he thought, Savage, and there signed the will, or witnessed it, on a secretary or bureau, having first laid the will upon it; that he then gave the pen to Arlington, and returned to the room where the testator was lying, leaving Arlington, and, as he believed, Savage in the room, with the will in their possession; that he could not recollect whether the names of Savage and Arlington were subscribed to the will when he attested or not, and that he could not undertake to state positively whether 130 they subscribed *their names whilst he was in the room or not; that he was much occupied with his patient, and desirous of returning to him as soon as he could, after subscribing his name as a witness; and that he did not see either Arlington or Savage move the will from the position it occupied on the secretary at the time he subscribed his name; that he thought the door between the rooms was open; that the testator, when he left the room in which he was, was lying on the trundle bed with his face up and his head elevated by three or four pillows and a bolster; that the secretary was most probably about four feet high, four or five feet long, and about two feet broad; that the secretary was so placed in reference to the door and the position of the testator in bed, that the testator might, by simply turning his head, see through the open door about one-half in length of the secretary; that it was near the middle of the half that was thus exposed to the testator's view, at which he signed his name as a witness, and that his person could not conceal from the testator the whole of that portion which would otherwise be so exposed to testator's view; that he subscribed his name to the will as it was lying on the top of the secretary or bureau, with his back to the testator; that the testator might have seen the whole of his person whilst he was so attesting the

will, with the exception of his forearm and writing hand, which he could not see; and that he did not think that the testator could see the will whilst he was in the act of subscribing his name as a witness.

The distance, from the trundle bed where the testator was lying to the desk or bureau where the will was attested, is represented by this witness as from fifteen to twenty feet, and by Arlington as sixteen or seventeen feet.

Two other witnesses, Hannon, on the part of the propounders of the will, and
131 White, on the part of *the contestant, were examined, each of whom gave the position and dimensions of the two rooms, the location of the door, its size, and its distance from the supposed position of the bed at the time of the transaction, and from the desk. I do not think, however, that either of them discloses anything to vary the conclusions to be drawn from the testimony of Arlington and Harmanson, as to the probable ability of the testator to see, if he looked, the attestation of the will. Hannon states the height of the trundle bed to be by measurement, eleven inches, but says that he omitted to measure the height of the desk; whilst White states the length of the desk or bureau to be three feet and eleven inches, and its width two feet and three-quarters of an inch. He does not state, however, the height either of the bed or of the desk.

The foregoing constitutes, I believe, all the testimony which throws any light on the act of attestation, and the ability of the testator to see it. It is clear, that the testator might have seen the person of each witness whilst in the act of attestation, with the exception of the writing hand; but that the will and the writing hand of each witness were out of his view at the several moments of time that the witnesses respectively subscribed their names. It is also clear, that the question whether the testator could see the will in the intervals of time between the moments when the witnesses were respectively occupied in writing their names, turns on circumstances other than that of the testator and the witnesses being in different rooms; inasmuch as it is shown by Harmanson that the will was placed on that half of the desk which was within the range of the testator's vision. In this state of things, whether the testator could see the will or not, in the intervals just mentioned, would depend on the distance of the will from the position he occupied in the
132 bed, and the shape of the top of *the bureau or desk, or its height, as compared with the elevation of the testator's head. The height of the piece of furniture on which the will was attested is estimated by Harmanson, as we have before stated, at four feet; and it is indifferently styled by the witnesses, a writing desk, a secretary or bureau. If it was a bureau with a level horizontal top, it might be doubtful whether the head of the testator was so raised by the pillows and bolster as to enable him to see the will. If, on the other hand, it was a writing desk, made, as they often are, with the top so inclined as to make it lower in front than in the rear, there would be no difficulty in supposing that the testator, at the distance he was from it, and in the position which he occupied, might have been able to see the will upon it: and, in the absence of testimony negativing such a supposition, I do not think that it is unreasonable to infer from the evidence, that the ability of the testator to see the will during the attestation was merely suspended by the witnesses having to turn their backs to the testator as they were subscribing their names, and thus interposing their persons between the testator and the will. Such an inference in favor of a will which has been sustained by the learned judge of the Circuit court, and about the formal attestation of which he expresses no doubt in his opinion placed in the record, is by no means so strong as that which was drawn by the jury in favor of the devise in the case of Tod v. The Earl of Winchelsea, 12 Eng. C. L. R. 227.

In this view of the case, it is manifest that if there was any incapacity in the testator to see anything essential to the validity of the attestation, such incapacity was not due to the fact that he was not in the same room with the witnesses; and the reason of the rule which presumes him unable to see what is done in a different room, and declares the attestation in a
133 *different room to be prima facie bad, is of course taken away. The presumption in favor of a will subscribed by the witnesses in the same room with the testator, and against one attested in a different room, like other presumptions, must yield to positive proof. For as was said by Judge Cabell, in the case of Neil v. Neil, 1 Leigh 28, "Presence is not synonymous with being in the same room with the testator; for a man may be so situated as to see to what is passing in another room as accurately as if it were in the same room; and he may be so situated as to be as incapable of seeing what is transacting in the same room as if it were in a different room."—"An attestation out of the room of the testator, but proved to be within the scope of his vision, become good as being in his presence; and an attestation in the same room, but proved to be out of the scope of his vision, becomes bad as not being in his presence."

Placing this case, therefore, on the same footing that it would have occupied had the attestation taken place in the same room, can we say that it has not been attested in the testator's presence? I think not. I cannot think, when the testator is so situated with respect to the witnesses and the will in the same room with him, as that he may otherwise see all that is passing with respect to the attestation, that the mere interruption of his view of the will caused by the fact that the table or desk on which the will is placed is so situated as to make it convenient or necessary for the witnesses that they should sit or stand with their backs

to the testator at the moment of subscribing their names, would justify us in holding, that the will was not attested in the testator's presence. I could not so decide without being prepared to go still further, and to say, that even when the witnesses were sitting face to face with the testator, with the table and will in full view, the 134 casual interposition of the *person of a physician, nurse or other attendant, between the testator and the will at the moment when a witness subscribed his name, would defeat the will.

The counsel for the contestant has argued to show that we cannot sustain the will here without going counter to the course of the majority of the court in the case of Neil v. Neil, to the opinions of the president of the court and of myself expressed in the case of Moore v. Moore, 8 Gratt. 307, and also to the decision of the Supreme court of North Carolina in the case of Graham v. Graham, 10 Ired. R. 219. Each of these cases is very different from the one before us. In Neil v. Neil, the will, though attested in the same room, was subscribed by the witnesses at a time when the testator was lying in his bed with his back turned to them, and so weak that he could not change his situation without aid, which was not furnished; so that in fact he did not see and could not see the witnesses or the table, or the will, or anything that was passing relative to the transaction. And in Moore v. Moore, the attestation was in another room, wholly out of the view of the testator; and though he had strength sufficient to have enabled him to change his situation in bed so as to see the witnesses, it was expressly found by the verdict in the case, that he made no such change. And in the case of Graham v. Graham, which was also a case of attestation in a different room, the statement of the case shows, that though the door in the partition wall was open, and the testator so situated in his bed with respect to the door and the witnesses, that he could, by turning his head and looking around the side of the door, see the backs of the witnesses as they sat at the chest writing, yet he could not see their faces, arms or hands, or the paper on which they wrote; a view of those being obstructed by the partition.

The Circuit court instructed the 135 jury, that though *the testator could have seen enough of the persons of the witnesses while they were subscribing the will, to enable him to recognize them, yet if he could not have seen what was going on whilst they were in the act of attestation, the paper was not properly attested; and the jury found against the will: and from a judgment accordingly, an appeal was taken.

I concur in the opinion of the chief justice, that the Circuit court had given a rigid construction of the terms of the act; though I also think that it was in strict conformity with the cases hitherto decided, and with the policy and meaning of the act. In that case, one of the great objects of the act in requiring the will to be attested in the presence of the testator, viz: to prevent a false paper from being surreptitiously imposed on the witnesses, might have been as easily defeated as if no part of the witnesses could have been seen, or the door had in fact been closed. The testator saw nothing and could see nothing that was passing during the transaction. He could at no time of the attestation see either the faces of the witnesses, their arms, the paper to be subscribed, or the subscribing hands; and he was prevented from seeing them by reason of the attestation being had in another room; the obstruction of his view in the particulars mentioned, being caused by the partition wall of the two rooms. Whilst in the case before us, the power of the testator to command, supervise and control the attestation, and to detect and defeat any effort at imposition, was the same as if the attestation had taken place in the same room; and the temporary interruption in the view of what was going on, was caused by the fact that the witnesses in standing or sitting at the desk, had to have their backs to the testator whilst engaged in subscribing their names.

It is true, that Judge Cabell in the case of Neil v. Neil, says, that the object of 136 the law can only be *effected by the testator's being in such a situation in relation to the will and the witnesses, that he may, if he will, see from that situation, both the will and the witnesses in the act of attestation; and that this capacity in the testator is the true test of presence. I do not think that in saying so he gave any new definition of the term, or declared any new tests of the presence of the testator. He only expressed with more clearness and precision, what had already been decided in the case of Shires v. Glasscock, 2 Salk. R. 688; Davy v. Smith, 3 Salk. R. 395; and Casson v. Dade, 1 Bro. C. C. 99. For I cannot perceive how it can be said, that the "signing was in view of the testator," as was said in the first of these cases; or that "the testator had the power to see the witnesses and what was done," as was said in the second; or that the testatrix "might see what was passing," as was said in the last, without necessarily implying the ability to see the witnesses and the will. The different expressions used in all these cases mean, I think, the same thing. The rule to be deduced from them must, however, have a fair and reasonable construction. The term "presence" is vague; and it is difficult to define it with precision. Define it as we may, or adopt what rules we may for testing it, a literal adherence, in all cases, to the language employed may sometimes lead to the ruling out of wills the attestations of which conform with the true intent and meaning of the statute. And where the testimony establishes such a relation between the testator and the witnesses and the will, whilst the act of subscribing by the witnesses is going on, as that there may be inferred therefrom a power on the part of the testator to see

the witnesses and the space immediately around and about them, whilst they are engaged in subscribing their names, and a consequent consciousness on the part 137 of the testator of a present *and abiding capacity to control the whole transactions and a like consciousness on the part of the witnesses that they and what they are doing are thus under the immediate supervising attention and command of the testator, it would, I think, be going too far to say, that the mere interruption of the testator's view of the will, by the interposition of the persons of the witnesses between it and the testator, as they severally stand or sit at a desk in the moment of subscribing the will, should characterize the attestation as one not made in the presence of the testator.

Giving to the provisions of the act a fair interpretation, I think we may, without any departure from precedents and the reasons on which they are founded, say that the act of subscribing their names by the witnesses in this case, was done, virtually and substantially, in the presence of the testator.

The sentence of the Circuit court must be affirmed.

ALLEN, J., concurred in the opinion of Daniel, J.

LEE and SAMUELS, Js., concurred in the opinion of Moncure, J.

Judgment affirmed.

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138 *Reeves v. Dickey.

July Term, 1853, Lewisburg.

1. **Real Estate—Sale of Absolute Interest by Owner of Conditional Interest.**—A party having made a purchase of three-sixteenths of a tract of land, upon the condition that a certain ore upon it proved to be good silver ore, afterwards sold one-sixteenth of the land absolutely, the purchaser knowing the terms of his purchase. The sale is a valid sale.
2. **Same—Same.**—The state of the vendor's title being known to the purchaser, and the legal title being in fact outstanding, the vendor is entitled to a reasonable time in which to perfect the title.
3. **Costs—Allowance of—Judgment for Purchase Money Enjoined.***—A purchaser coming into equity to enjoin a judgment for the purchase money of land, though the title is afterwards perfected, is entitled to his costs: and the injunction is to be dissolved without damages.

***Costs—Allowance of—Judgment for Purchase Money Enjoined.**—Though a plaintiff coming properly into court to enjoin a judgment on account of defects in the title of the land for the purchase of which the debt was contracted, is entitled, upon the removal of the objections, to have the injunction dissolved without damages, and to have his costs; yet if he had another case depending where the same questions were pending, and where he could have had the relief asked for, by a proceeding in that case, he will not be allowed his costs. Young v. McClung, 9 Gratt. 836.

See generally, monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

In April 1847 James Dickey applied for and obtained from the Circuit court of Grayson county, an injunction to a judgment for six hundred dollars, with interest and costs, recovered against him by Jesse A. Reeves. In his bill he charged that the note on which the judgment was recovered, was given for the price of one-sixteenth of a tract of seventy-five acres of land in the county of Grayson, on which it was represented there was a silver mine. That before his purchase Reeves represented to the plaintiff that the ore on the land had been tested, and had been ascertained to be silver ore. That the plaintiff had made no experiment himself, and knew nothing of the quality of the ore, or what kind of ore it was; but relied wholly on the representations of Reeves. That after his purchase the plaintiff and others who had an interest in the mine, proceeded to search for ore, and to make some experiments; but they could find no silver ore; and that the ore found on the land had been tested and ascertained to be iron. That it was 139 untrue as stated *by Reeves, that the ore had been tested and ascertained to be silver, prior to plaintiff's purchase, and that said representation was fraudulent.

The plaintiff further stated that the land on which this silver mine was supposed to be, was held in the early part of the year 1845, by Richard Billings, by virtue of a title bond executed to him by Charles Doughten. That after the pretended discovery of the silver ore, Billings commenced to sell interest in the said mine to various persons; and amongst others, he sold to Jesse A. Reeves one-fourth of the whole interest in the mine. That this contract was conditional that if the ore upon the land proved to be good silver ore, he was to pay to Billings five hundred dollars; but if the ore did not prove to be silver the contract was to be void. That afterwards, in the month of March 1845, Reeves sold to the plaintiff one-fourth part of his interest for six hundred dollars, for the payment of which the plaintiff executed his bond payable in six months. That after the experiments made as before stated, by the parties having an interest in the mine, the plaintiff determined to make a further experiment, and for that purpose went upon the land where the mine was represented to be, when Billings refused to permit him to work upon it, he being in possession of the land and alleging that those, and among them Reeves, who had purchased from him an interest in the mine, had refused to pay him. That Reeves, as plaintiff had understood and believed, had not paid any part of the purchase money, but had refused to do so. That he could not make a sufficient title to the interest he had sold the plaintiff. That he had not acquired the legal title to any part of the land. That Doughten and Billings were not vested with the title; but that it was outstanding in another person, upon whom there was no obligation to convey it to any one; so that if the ore in

the mine was really silver, the plaintiff was advised that under his contract with
140 Reeves, *he ought not to be compelled to pay the purchase money until the title was secured to him.

Reeves answered the bill. He admitted the facts as to Billings' title to the land under a title bond from Doughten; and that he had purchased from Billings upon the condition stated in the bill. But he denied that the plaintiff relied wholly on his representations in reference to the mine and the quality of the ore; or that he had made any such representations to the plaintiff as he stated in his bill; and he alleged that before the plaintiff purchased he had an experiment made with the ore. He further stated that the plaintiff knew, before his purchase, the terms on which defendant had purchased from Billings; and that he knew further, that after he had agreed to purchase, defendant had agreed to pay Billings. That plaintiff had endeavored to prevent Billings from fulfilling his agreement with the defendant, and had procured him to forbid plaintiff's working the mine that he might have an excuse for putting such a charge in his bill. The plaintiff knew the condition of the title when he purchased; and in fact there was no difficulty about it, as defendant hoped would fully appear.

The testimony in the cause showed that Dickey did, before his purchase, test the ore; and there was a total absence of any proof that Reeves made any representations to him as to the character or quality of the ore. Whilst the cause was pending, Doughten executed a deed by which he conveyed the land to Billings; and Billings conveyed to Reeves.

The deposition of Jesse Austin was taken, and he stated, that he claimed a part of the land sold by Doughten to Billings; and he stated further, that he had executed a bond to Reeves and others, by which he had bound himself that if any part of the mineral was on his land they should have it on the same terms on which they were to get it from Billings.

In 1849 the cause came on to be
141 heard, when the *court perpetuated the injunction; whereupon Reeves obtained an appeal to this court.

Floyd, for the appellant.
B. R. Johnston, for the appellee.

MONCURE, J. This is an appeal from a decree perpetually enjoining a judgment on a bond given for the purchase money of one-sixteenth of the mines and minerals in a certain tract of land. Relief is sought against the judgment on the grounds, first, of fraud in making the sale; and secondly, of want of title. Let us see whether and how far such relief should be granted.

First. On the ground of fraud. The appellee has wholly failed to prove that the appellant was guilty of any fraud in making the sale. I have carefully examined and considered the evidence in the case, and am of opinion that so far from sustaining the allegations of fraud contained in the bill, it proves the contrary. I deem it unnecessary to review the evidence in detail.

But it is argued by the counsel for the appellee, that the appellant had only a conditional interest in the mine, and, in selling an absolute interest, sold what was not his; and was therefore guilty of a fraud. A sufficient answer to this argument is, that the appellee made the purchase with full knowledge of the nature of the appellant's interest: and it is difficult to conceive how, in such a case, a vendor can be guilty of fraud in selling a greater interest than he has. The fact no doubt is, that the appellant, in the view of the parties, substantially had the interest which he sold. That interest was his if the mine was of any value; and if of no value, the matter was of no real importance. The material difference between Billings' contract with him and his with the appellee was, that by the former the purchase money was
142 to *be paid conditionally, whereas by the latter it was to be paid absolutely. It was certainly competent for the appellant, having purchased an interest for a sum of money payable conditionally, to sell it for a sum payable absolutely. The interest being his, however acquired, could lawfully be sold on such terms as might be agreed on between him and the purchaser. In selling an absolute, when he had only a conditional interest, he may have sold what, formally, was not his. But he did not thereby deceive the purchaser, nor do any injustice to Billings, who was probably privy to the sale, and at all events would be willing to ratify it on receiving the purchase money which the appellant had stipulated to pay him. To obtain the ratification of Billings, the appellant had only to dispense with the condition annexed, for his benefit, to his purchase, and make it absolute. Indeed, he might make his purchase absolute by admitting for that purpose that the mine was valuable. And he would be benefited by doing so, even if it were necessary for him to pay for the three-sixteenths purchased of Billings, to insure the sale of one-sixteenth to the appellee.

Secondly. As to the want of title. The appellee knew at the time of his purchase, that Billings held the land by a mere title bond from Doughten; for the fact is recited in his contract. But he avers in his bill that neither Billings nor Doughten is vested with the title; and that it is outstanding in another person, upon whom there is no obligation to convey it. The name of that person is not stated in the bill. But it appears from the evidence that Jesse Austin claims a part of the land, and has recently brought an action of trespass against Billings. When the claim was first asserted, does not appear; though it probably was not until after the sale to the appellee. The fact, however, is not material. Before the claim was asserted Austin purchased from Billings an interest in the mine;
143 and *he has since given his bond to

the appellant and others to sell to them on the same terms on which they had purchased from Billings, if any part of the minerals should be on any part of his land. Therefore, if it should turn out that Austin is entitled to any part of the land included in the bounds of the tract sold by Doughten to Billings, the appellant would have the same right to perfect his title to one-sixteenth of the minerals on that part as on the residue of the tract. At all events, the appellant having been guilty of no fraud in making the sale, and there being no just ground for rescinding it, he ought to have a reasonable opportunity of perfecting the title if it be defective. He conveyed the interest to the appellee at the time of the sale, who has since, in effect, been in the enjoyment of it, and explored and worked the mine. It is true he says in his bill, that he had recently determined to make a further experiment, and went for that purpose to the land, when Billings forbid and refused to permit him to work upon it. But it is proved that this was by the procurement of the appellee, and a mere contrivance to avoid the sale and evade the payment of the purchase money. It appears, from exhibits filed in the cause and copied into the record, that since the suit was instituted Doughten has conveyed the land to Billings; and the latter has conveyed one-sixteenth of the mines and minerals on the land to the appellant. So that it is probable the title is either already perfect, or may be made so by a release from Austin, if he has any right to any part of the land. But the appellee ought not to be compelled to pay the purchase money without having a good title.

I therefore think the decree should be reversed, and the cause remanded, with directions to the Circuit court to ascertain whether a good title has been or can be made; and if it has been, or can and shall, in a reasonable time, be made, to
144 dissolve the injunction; *otherwise, to perpetuate it. But as the appellee had not received a good title when the bill was filed, and therefore rightfully came into a court of equity to enjoin the judgment, he should recover his costs in the Circuit court, in any event, and should pay no damages in case the injunction should be dissolved.

The other judges concurred in the opinion of Judge Moncure.

The decree was as follows:

The court is of opinion, that the contract of sale in the proceedings mentioned, between the appellant and appellee, was fairly made without any fraud or misrepresentation; and there is no just ground for rescinding it: That the Circuit court ought to have ascertained, by reference to a commissioner or otherwise, whether a good title had been or could be made by the appellant to the appellee, to one-sixteenth of the mines and minerals which may be on the tract of land referred to in the said contract; and ought to have dissolved the injunction, if such title had been, or could and should in a reasonable time be made; or to have perpetuated it if otherwise: and that therefore the said decree is erroneous. Therefore the same is reversed with costs; and the cause is remanded to be further proceeded in according to the foregoing opinion. But as the appellee had not received a good title when his bill was filed, and therefore rightfully came into a court of equity to enjoin the judgment, he should recover his costs in the Circuit court, in any event, and should pay no damages in case the injunction should be dissolved.

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145 *Currin & als. v. Spraull & als.

July Term, 1853, Lewisburg.

1. **Chancery Jurisdiction—Partition of Land—Question of Title.***—Upon a bill for a partition of land, if the title of the plaintiffs is doubtful, the court prior to

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***Chancery Jurisdiction—Partition of Land—Question of Title.**—Prior to the act, Code 1849, ch. 124, sec. 1, p. 526 (Code 1887, sec. 2562), in order to entitle the plaintiff to equitable relief in respect to partition, he must show a clear *legal title*. A court of equity could not decide on the simple question of title to land. Wiseley v. Findlay, 3 Rand. 361, 371, 15 Am. Dec. 712; Stuart v. Coalter, 4 Rand. 74; Straughan v. Wright, 4 Rand. 493.

But, by the act cited above, it was enacted that in suits for partition a court of equity "may take cognizance of all questions of law affecting the legal title, that may arise in any proceeding." See Bradley v. Zehmer, 82 Va. 685; Fry v. Payne, 82 Va. 759, 1 S. E. Rep. 197; Hudson v. Putney, 14 W. Va. 574; Arnold v. Arnold, 11 W. Va. 455; Moore v. Harper, 27 W. Va. 368. See also, 2 Min. Inst. (4th Ed.) 484.

In Pillow v. Southwest, etc., Co., 92 Va. 148, 23 S. E. Rep. 32, the court said: "Before the enactment of the statute in question (Va. Code 1887, sec. 2562), great delay and many difficulties frequently arose in suits for partition where questions of title were involved, and, to obviate these delays and difficulties, the statute was passed which authorizes a court of equity in suits for partition to decide all questions of law which may arise in such cases. Of course a partition suit cannot be made a substitute for an action of ejectment; and if the defendant in such suit does not claim under any one who was a joint owner, such as a coparcener, joint tenant, or tenant in common with the complainant, or those under whom he claims, then it is clear that such suit would not be proper; but if the defendant does claim under one who was a joint owner with the complainant, or those under whom he claims, the defendant cannot defeat the right of the complainants to have their legal rights settled in a suit for partition by merely alleging and proving that he denies the rights of the complainant, and holds adversely to him. If the jurisdiction of the circuit court could be defeated in this manner, the statute would be of little value, and would fail to attain the chief object for which it was passed. 2 Minor's Inst. (Last Ed.) 485; *Currin v. Spraull, 10 Gratt. 147, 148;* Davis v. Tebbs, 81 Va. 600; Bradley v. Zehmer, 82 Va. 685; Fry v. Payne, 82 Va. 759, 1 S. E. Rep. 197."

Federal Courts—Equity Jurisdiction—Partition.—"A federal court of equity cannot entertain a suit for partition of lands where the plaintiff's title is denied,

the act. Code. ch. 124, § 1, p. 526, should have sent the parties to law to try their title.

2. Same—Same—Same.—The Court of appeals having reversed the decree and sent the cause back, the Circuit court has authority now under the act to try the question of title.† And after allowing the parties a reasonable time for trial, should proceed to decide the question, observing the general rules of practice in courts of equity for the purpose of ascertaining facts, either by a jury or otherwise, as may be most proper.‡

The case is fully stated in the opinion of Judge Samuels.

B. R. Johnston, Staples and Floyd, for the appellants.

J. B. Logan, for the appellees.

SAMUELS, J. This is an appeal from a decree pronounced by the Circuit Superior court of law and chancery for Montgomery county, in a suit wherein Robert H. Spraull and wife and others were complainants, and James C. Currin and others were de-
146 fendants. *The bill alleged that Rhoda Currin, Matilda L. Miller and Lucinda Robinson derived by descent from James Charlton, their father, a tract of land containing four hundred and seventy-seven acres. That Lucinda Robinson died intestate; and that her interest in this land descended to her children, who are some of the complainants. That Matilda L. Miller sold her interest in the land to Waddy G. Currin; but that no conveyance thereof had been made, so far as complainants were informed. That, for a time Rhoda Currin had the exclusive use and enjoyment of the whole tract; and that afterwards she and Waddy G. Currin used and enjoyed the same; and that no account of rents and profits was rendered by them, or either of them.

The defendants to the original bill were Rhoda Currin, Matilda L. Miller and Waddy G. Currin. James C. Currin, on his petition, was subsequently made a party and filed an answer, in which, amongst other things, he denied the right of complainants to have partition of the land, because, as the answer alleged, Lucinda Robinson and her husband Cyrus V. Robinson had sold and conveyed her interest in the property; and that her title thereto, by several intermediate conveyances, had become vested in the respondent James C. Currin.

The record sets forth the chain of title claimed by James C. Currin, except the first link, to wit, the conveyance by Cyrus V. Robinson and wife. This conveyance, it is alleged, has been lost and is therefore not produced. It is fully proved, that Robinson contracted to sell his wife's interest in the property; and that the price contracted for was paid. That a paper writing purporting to be a deed from Robinson and wife to their vendee, was transmitted from the state of Missouri, where the vendors lived; that this paper writing was presented to the clerk of the County court of Montgomery county for recordation: that
147 the clerk *refused to receive it for that purpose, because as he alleged, the authentication of the deed was defective in this, that there was no certificate by the clerk in Missouri, that the persons, certifying themselves to be justices, and certifying the execution of the deed, were such justices.

Rhoda Currin having died, the suit was revived against her personal representatives, heirs and devisees. A hearing was had at May term 1849, on the bill, answer of James C. Currin, replication thereto, depositions and exhibits. As to the other defendants, the bill was taken for confessed. The court deciding the question of title between complainants and the defendant James C. Currin, in favor of complainants, appointed commissioners to make the partition prayed for, and directed an account of rents and profits before a master commissioner of the court: The commissioner and the master were respectively directed to report to the court.

At the October term 1849, the cause was again heard upon the papers formerly read, the order of May term 1849, and the report of the master touching the rents and profits; and a decree rendered in favor of complainants for the rents and profits. No report of the partition appears in the record, nor does it appear that anything further was done in regard to that subject.

On the case before the court below wherein so much reason was shown to doubt complainant's title, the court should have retained the cause until that question might be passed upon by a court of competent jurisdiction: The court exceeded its jurisdiction, (as then existing,) by deciding the question of legal title. Wiseley v. Findlay, 3 Rand. 361; Stuart's heirs v. Coalter, 4 Rand. 74; and Straughan v. Wright, 4 Rand. 493.

The defence of the appellant James C. Currin, at the time this decree was pronounced, only required that he should show cause to doubt the right of complain-
148 ants *to have the partition prayed

although a state statute permits courts of equity to take cognizance of questions of title in partition suits." Syllabus to American Ass'n v. Eastern Ky. Land Co., 68 Fed. Rep. 721, in which case the principal case is cited.

†Code, ch. 124, § 1, p. 526. "Tenants in common, joint tenants and coparceners, shall be compellable to make partition; and the courts of equity of the county or corporation wherein the estate or any part thereof may be, shall have jurisdiction in cases of partition; and in the exercise of such jurisdiction, may take cognizance of all questions of law affecting the legal title, that may arise in any proceeding."

‡Code, ch. 216, § 1, p. 800, provides that the laws in the Code shall go into operation on the 1st of July 1850; and repeals all acts of a general nature then in force, with certain limitations and exceptions. The 2d section provides that such repeal shall not affect any right established, accrued or accruing before that time, or any suit or proceeding pending on that day, except that the proceedings thereafter had shall conform so far as practicable, to the provisions of the Code.

for. It was not necessary at that time, that he should disprove their right; when a trial should be had directly upon the question of right, his proofs would be called for. It cannot be held that the jurisdiction given by the Code of 1849, ch. 124, § 1, p. 526, taking effect July 1, 1850, will supply the want of jurisdiction prior to that time. If a party shows a defence valid at the time it is passed on by the court, a subsequent change in the law cannot deprive him thereof.

I am therefore of opinion to reverse the decree of the court below. And inasmuch as the statute above referred to now gives the court jurisdiction; and as the statute, ch. 216, § 2, p. 800, requires that the further proceedings had in this cause shall conform to the statute, I am further of opinion to remand the cause, with directions to the Circuit court to allow the parties a reasonable time in which to prepare for trial, and then to decide the question of title between them; and that the general rules of practice observed in courts of equity shall be observed in this case, for the purpose of ascertaining facts by a jury or otherwise, as may be proper. If the title shall be adjudged to belong to complainants, that then they shall have the partition and account of rents and profits prayed for; if adjudged to the defendant, that then the bill shall be dismissed.

ALLEN and LEE, Js., concurred in reversing the decree and remanding the cause.

DANIEL and MONCURE, Js., concurred in the opinion of Judge Samuels.

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149 ***Peay v. Morrison's Ex'ors.**

July Term, 1858, Lewisburg.

(Absent MONCURE, J.)

1. **Bonds—Assignment of—Case at Bar.**—In March 1836 C executed his bond to P for twelve thousand dollars payable on the 24th February 1841, with interest from the 1st of April 1836 payable semi-annually; and executed a deed of trust to secure it, which might be enforced upon the failure of C to pay the principal when due, or to pay the semi-annual interest. In June 1836 P purchased real estate from M, and paid in part cash, and for the balance assigned to M the bond of C, and executed a mortgage on the property, with condition that if M failed to collect from C the bond and interest, or any part of it, and P paid it, then the deed to be void. The interest was regularly paid on C's bond until October 1839, and in September 1840 the interest was again paid. In February 1841 C was insolvent. The trust property was sold in February 1844; and soon after M proceeded to foreclose the mortgage, and the property was sold in July 1845, leaving a large balance still due M. HELD:

1. **Same—Same—Liability of Assignor ***—In absence of proof of an express agreement to the contrary, the assignment of P to M imports a guarantee that M shall receive the full amount of the bond of C; and the right of M to resort to P for any part thereof which he should fail to collect from C with the exercise of due diligence.
2. **Same—Same—Same.**—The sale of the trust and mortgaged property did not impair the right of M to hold P responsible for the balance of the debt.
3. **Same—Same—Same**—The delay in the sale of the trust property not appearing to have been occasioned by the active agency of M, or that he can be regarded as assenting to it in any other sense than might equally be imputed to P, and it not appearing that the value of the security was diminished by the delay, that delay cannot discharge P from his liability upon his assignment.
4. **Same—Same—Same.**—C having become insolvent before the bond was due, a suit against him would have been unavailing, and was therefore unnecessary to establish the right of M to recover of P. And it does, not appear from any circumstances in the case, that a sale of the trust property for the failure to *pay the semiannual interest would have been judicious or expedient; still less that it was necessary to entitle M to hold P liable on his assignment.

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2. **Fraudulent Conveyances—Foreign Debtor—Bill to Set Aside by Creditor at Large.†**—A creditor at large may maintain a suit in equity to set aside as fraudulent a deed conveying real estate, made by his debtor, both the debtor and his grantee living and being out of the commonwealth.

This was a suit instituted in the Circuit court of Ohio county, by the executors of Joseph Morrison deceased, claiming to be the creditor of Austin Peay, a free negro, to set aside a deed executed by said Peay to his son William A. Peay, on the ground of fraud. Both Austin and William A. Peay were residents in Upper Canada; and the suit was an attachment in equity to subject certain real and personal estate to the payment of the plaintiff's debt, for which no judgment had been recovered against Austin Peay.

On the 10th of March 1836 John M. Clarke and James A. Clarke as his surety executed

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*Bonds—Assignment of—Liability of the Assignor.—In Welsh v. Ebersole, 75 Va. 657, it was said: "Assignments relate only to nonnegotiable securities. The assignor in effect agrees that the assignee shall recover the full amount of the bond from the debtor, and if, after the exercise of due diligence, he is unable to do so, he, the assignor, will make good the amount received by him upon the assignment. *Peay v. Morrison's Ex'ors, 10 Gratt. 155.* The assignee's right of recourse upon the assignor rests upon the ground that there was a valuable consideration for the assignment. In all cases, however, the actual consideration may be shown, and this constitutes the measure of recovery by the assignee against the assignor, whereas in a case of guaranty the guarantor is liable, whether he has or has not received any consideration."

See also, monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409. See an article on the contract relation, "The Contract Relation between Assignor and Assignee of Nonnegotiable Choses in Action, and the Rights Arising Therefrom."

†See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

to Austin Peay their bond in the penalty of twenty thousand dollars, with condition to be void if John M. Clarke, his heirs, &c., should pay to Peay, his heirs, &c., the sum of twelve thousand dollars on or before the 24th of February 1841, and interest thereon semiannually on the 1st days of April and October in each year; such interest to commence from the 1st of April 1836. To secure the payment of this bond, John M. Clarke and wife conveyed in trust to Alexander Wilson certain real estate in the city of Wheeling. This deed provided that upon the failure of Clarke to pay the principal when due, or to pay the semiannual interest as it fell due, the trustee might sell the trust subject upon terms specified in the deed.

In 1836 Austin Peay purchased from Joseph Morrison real estate in the city of Wheeling, for the sum of twelve thousand eight hundred dollars, for which he assigned to Morrison the bond of the
151 Clarkes for *twelve thousand dollars, and executed to him his note for eight hundred dollars, which he afterwards paid. At the same time Peay executed a deed bearing date the 9th of June 1836, by which he conveyed to Morrison the real estate purchased of him upon the condition that if Peay paid the note of eight hundred dollars, with interest from the 11th of April preceding, when it fell due; and further, if Morrison should fail to collect from the Clarkes the bond for twelve thousand dollars, or any part thereof, with its interest, then if Peay, his executors, &c., should pay the same, or any balance that should be due thereon, according to the terms thereof, to Morrison or his assigns, then the deed to be void. But it was expressly agreed between the parties, that if the said bond for twelve thousand dollars could not or should not be paid from the proceeds of any sale which might take place under the deed of trust by which it was secured, Morrison was not to be required to pursue the obligors in the bond personally; but might have immediate recourse to this mortgage for any balance either of principal or interest which might be due and unpaid on said bond.

The interest on the bond of the Clarkes seems to have been regularly paid up to the 1st of October 1839. A payment of seven hundred and forty-six dollars and sixty-five cents seems to have been made on the 30th of September 1840; and a further payment of thirty dollars was made by Clarke on the 24th of December 1840. It appears that John M. Clarke was insolvent in 1839; certainly both of the Clarkes were insolvent in February 1841.

In 1839 Austin Peay removed with his family to Toronto in Upper Canada. Payments upon the bond were made out of the rents of the subject mortgaged by Peay to Morrison, from February 1841 to January 1844, amounting, in the aggregate, to eleven hundred and ninety-five dollars and
152 five cents. In February 1844 *Wilson sold the property conveyed by John M. Clarke in trust to secure this bond, and the net proceeds of the sale amounted to four thousand one hundred and ninety-three dollars and fifty cents. Soon after this sale, Morrison's executors instituted a suit against Austin Peay to foreclose the mortgage given by Peay further to secure Clarke's bond; and under a decree made in that cause, the mortgage subject was sold, and produced the net sum of three thousand and thirty-seven dollars and twenty-six cents, which was credited on the bond; leaving due thereon on the 1st of July 1845, six thousand six hundred and ninety-one dollars and seventy-one cents.

By deed bearing date the 27th of January 1843, Austin Peay, for the consideration as expressed in the deed, of five thousand one hundred dollars, in hand paid, conveyed to his son William A. Peay, several lots of land in the city of Wheeling, and also his interest in several other lots which he held jointly with William W. Ross, his brother in law. There had been several conveyances of these lots by Austin Peay and Ross to Henry Moore, and a reconveyance of the lots to them by Moore, so that Austin Peay held in this joint property an interest of thirty-seven forty-ninths, and Ross held an interest of twelve forty-ninths. One of the lots conveyed by Austin Peay to William A. Peay, had been sold by Moore to Lukus and McClaskey; and three of these lots had been sold under a decree in a suit by the Northwestern Bank of Virginia against Peay and Ross, to satisfy a debt due by them to the bank.

In December 1845 this suit was instituted. The bill, after setting out substantially the foregoing facts, and stating the various conveyances from Peay and Ross to Moore, and the reconveyance to them, charged that the conveyance from Austin Peay to Wil-
liam A. Peay was fraudulent, and
153 intended to hinder and delay *the creditors of Austin Peay. That the price pretended to be given for the property was wholly inadequate, and that in fact no consideration was paid for it. The prayer of the bill was that the conveyance might be declared null and void as to the plaintiffs; that Austin Peay's interest in the property might be ascertained, and that it might be sold for the payment of the balance due to the plaintiffs as executors of Joseph Morrison deceased.

Austin and William A. Peay filed their answers to the bill. They admit the facts as to the execution of the bond by the Clarkes, and its assignment by Austin Peay to Morrison; and William A. Peay admits that the Clarkes were insolvent in 1840, and so continued, though Austin Peay denies they were insolvent before 1844, when they obtained their discharge as bankrupts. They both deny that the deed from Austin to William A. Peay was intended to defraud the creditors of Austin Peay; and state that the whole consideration money was paid by William A. Peay. Austin Peay denies that he is indebted to Morrison; and insists that the only contract between them

was contained in the mortgage deed; and it was not intended that he should be personally liable as assignor of Clarke's bond. That Morrison was bound to proceed upon the deed of trust of Clarke, but that he neglected to do so until February 1844, although the semiannual interest from October 1839 was unpaid; and the defendant, upon being informed thereof, wrote to the trustee Wilson to take such steps as he should deem advisable; and he urged Morrison to have the said trust property sold. That it was by the delay from 1839 to 1844 that a large portion of the interest upon Clarke's bond had been lost by Morrison, which he was endeavoring to charge upon respondent.

It appeared that about the time of the conveyance from Austin to William A. 154 Peay, the latter paid to the *former a large sum of money, probably about five thousand dollars; and there was some evidence that William A. Peay's mother derived from her father, who was a white man, a considerable estate; but there was no evidence that William A. Peay received any part of it; and there was evidence that when at school in New England his supplies of money were derived from his father; and he was quite a young man scarcely of age, when the conveyance was made to him by his father.

This cause came on to be heard in June 1850, together with another suit by French's ex'ors against the same parties, claiming to subject the same property, when the court held that the plaintiffs were creditors of Austin Peay, and that the deed of the 27th of January 1843 from Austin to William A. Peay, was fraudulent and void as to the plaintiffs; and a commissioner of the court was directed to ascertain and report the amount due to the plaintiffs; and other commissioners were directed to divide the property mentioned in said deed between Austin Peay and William W. Ross, according to their interest therein; and to value that part allotted to Austin Peay. These commissioners made their report estimating the property allotted to Austin Peay at ten thousand seven hundred and ninety-one dollars and sixty-six cents. The commissioner directed to ascertain the amount due to the plaintiffs, reported that there was due to French's executors the sum of eleven hundred and fourteen dollars and fourteen cents, with interest on seven hundred and sixty-nine dollars and eighty-two cents, a part thereof, from the 6th day of August 1850 until paid; and that there was due to Morrison's executors eight thousand and fifty-one dollars and seventy-one cents, with interest on six thousand two hundred and four dollars and four cents from the same date.

The causes, with two others, came 155 on to be heard *together in November 1850, when the court confirmed the reports, and made a decree, that unless the sums decreed to the respective plaintiffs were fully paid within sixty days from the date of the decree, that a commissioner appointed by the court should proceed to sell the real estate set apart to Austin Peay, or so much thereof as should be sufficient for the purpose of paying said debts, interest and costs, in the manner and upon the terms therein stated, and should apply the proceeds of sale to the payment of said debts in the order directed in the decree. From the decree in favor of Morrison's executors, William A. Peay applied to this court for an appeal, which was allowed.

Patton, for the appellant.
Russell, for the appellees.

LEE, J., delivered the opinion of the court.

The court is of opinion, that notwithstanding Joseph Morrison, at the time of taking the assignment of the bond of John M. Clarke and James A. Clarke from Austin Peay, took from the said Peay a mortgage upon other real estate, by way of further and additional security to that afforded by the deed of trust executed by the said John M. Clarke upon the property for the purchase money of which said bond was given, yet the said assignment by the said Peay being for value received by him of the said Morrison, in the absence of proof of an express agreement to the contrary, must be regarded as importing a guarantee that the said Morrison should receive the full amount due upon the bond; and the right on the part of Morrison to resort to the said Peay for any part thereof which he might be unable to collect from the said Clarkes, if no want of due and proper diligence in pursuing his remedies against them could justly be imputed to him.

156 *And the court is further of opinion, that the subsequent sale by the trustee of the property conveyed in trust to secure the payment of the said debt by the said John M. Clarke, and the sale of the property mortgaged by the said Peay for the same purpose, and the application of the proceeds of both in discharge of so much of the debt, did not impair or affect the right of the said Morrison to hold the said Peay responsible for any balance of the same that might still remain unsatisfied.

And the court is further of opinion, that if the delay on the part of the trustee in the deed of trust executed by Clarke, to make sale of the property thereby conveyed, might under different circumstances, occasion a forfeiture of the right of Morrison to hold the said Peay personally responsible on his assignment, yet it not appearing that said delay was occasioned by the active agency of the said Morrison, nor that he can be regarded as assenting to it in any other sense than might be justly imputed to Peay, to whom the right to hasten the action of the trustee by a proper proceeding for that purpose, if danger were apprehended from delay, was equally open and available; and it further not appearing that the value of the security was in any degree affected or dismissed by the delay, it cannot serve to discharge the said Peay from liability upon his assignment.

And the court is further of opinion, that whether due diligence on the part of the said Morrison in the prosecution of his remedies against the said Clarkes was or was not consistent with the delay that was suffered to take place before the sale was made under the trust executed by the said John M. Clarke, is a question not very material to be decided in this cause; because the court is of opinion, that from the answer of the appellant and the evidence in the case, it sufficiently appears that on the 24th of February 1841, when the principal of the bond of the said Clarkes
157 became due and payable *according to its terms, both the said Clarkes had become insolvent, and that a suit against them would have been unavailing, and was therefore unnecessary to establish the right of the said Morrison to maintain his action against the said Peay upon his assignment of the said bond. And as it respects the interest accruing semiannually upon the principal secured by the said bond, anterior to the period when said principal itself became due, the court is of opinion that although by the terms of the deed of trust executed by Clarke, a sale of the property was authorized to be made by the trustee in default of payment of such interest as the same accrued and fell due, yet from the circumstances disclosed in the cause, it does not feel authorized to say that such a sale of the property for interest in arrear would have been a judicious and expedient measure; still less that it was a necessary one to preserve the right of the said Morrison to hold the said Peay personally responsible upon his assignment for the principal of the said debt or any part thereof, or the interest thereon accruing after the said principal became due and payable according to the terms of the said bond.

And the court is further of opinion, that the deed from the said Austin Peay to the appellant of the 27th of January 1843, was made as disclosed by the evidence in the cause, under such circumstances of fraud and covin, and with such intent to hinder, delay and defraud the creditors of the said Austin Peay, that the same was, and was properly held to be, utterly void and of no effect as to the said appellees and other creditors of the said Austin Peay; and should not have been suffered to stand in their way in the prosecution of their remedies for the recovery of their respective debts.

And the court is further of opinion, that the said Austin Peay being at the
158 time of the institution of this *suit no inhabitant of this commonwealth, but a citizen of a foreign state, sufficient ground was shown for the jurisdiction of the court in this cause, and to authorize the appellees to assail the said deed from the said Austin Peay to the said William A. Peay as fraudulent, notwithstanding they had prosecuted no previous suit, nor recovered a judgment against the said Austin Peay for the amount claimed by them to be due upon his assignment of the bond of the said Clarkes.

The court is therefore of opinion, that there is no error in the said decree, and that the same be affirmed with costs to the appellees.

Decree affirmed.

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159 *Cleland v. Watson.*

July Term, 1858, Lewisburg.

Deed of Personalty—Construction of—Case at Bar.—M, the father of D the wife of C, executes a deed by which in consideration of natural love and affection for D, and for the further consideration of one dollar paid to him by D and C, he grants to D for the use of herself and C, and their joint heirs, certain slaves. To have and to hold the said slaves to D and C, their heirs, &c. And he warrants the title to D and C. This deed is duly recorded. The slaves go into the possession of C and his wife, and are held by them until C and D convey some of them to W; but there is no privy examination of D. C dies leaving D surviving him, who sues W for the slaves. HELD:

1. **Same—Same—Same.**†—The deed conveyed to D and C a joint estate in the slaves.
2. **Personalty—Joint Estate in Husband and Wife—Right of Husband to Dispose of.**—The joint estate so conveyed to D and C, carried with it the right in the husband C to dispose of it absolutely, after the same had been reduced into possession; and the deed to W was an exercise of the marital right of the husband C to dispose of said slaves; and the title passed by the deed to W.

This was an action of detinue in the Circuit court of Marion county, brought by Dorothy Cleland against James D. Watson, to recover a number of slaves. On the trial the parties agreed the facts, and submitted the case to the court.

By deed bearing date the 5th of May 1827, Morgan Morgan the father of the plaintiff, in consideration of natural love and affection for Dorothy Cleland the wife of John Cleland, as well as for the further consideration of one dollar to him in hand paid by the said Dorothy and John Cleland, granted to Dorothy Cleland, for the use of herself and her husband John Cleland, and their joint heirs forever, the following property, viz: Mentioning a number of slaves and other personal property. To have and to hold the said slaves and other property, unto his daughter Dorothy Cleland aforesaid, and her husband John Cleland, their heirs,
160 executors, administrators and *assigns. And the said Morgan Morgan, for himself, his executors and administrators, the said slaves and other property did warrant and defend unto the said Dorothy and John, their heirs, &c. against the claims of him the said Morgan, his executors and administrators, and against the

*For monographic note on Husband and Wife, see end of case.

†The principal case was cited in Graham v. Graham, 10 W. Va. 382; Coatney v. Hopkins, 14 W. Va. 361.

claim of all and every person or persons whatsoever. This deed was acknowledged by Morgan before two justices on the day of its date, and was admitted to record in the clerk's office of the County court of Monongalia, in which county the parties then lived.

The slaves conveyed by the foregoing deed went into the possession of Cleland and wife, and remained in their possession until the 17th of February 1831, when by a deed of that date Cleland and wife conveyed them to James D. Watson. Though this deed was executed by Mrs. Cleland she does not appear to have been privily examined. The slaves sued for are either slaves mentioned in this deed or their descendants. Cleland died in January 1849; and after his death this action was instituted by Mrs. Cleland. There were other facts agreed; but they are not important upon the question decided by this court.

The Circuit court rendered a judgment in favor of the defendant; and thereupon the plaintiff applied to this court for a supersedeas, which was allowed.

Price, for the appellant, made the following points:

1st. That the deed from Morgan having been recorded, was notice of its contents to Watson; and his requiring Mrs. Cleland to join in the deed to him shows that he had actual notice. That Watson therefore stood in the same condition as Cleland or his representatives would have stood. He referred to Sugden on Vend. 723, notes C and 2.

2d. That the purpose and object of the deed was to give to Mrs. Cleland a separate interest in the slaves, free from the marital rights of the husband. And if 161 *the husband had any title, it was as a mere trustee; and such title was not to be set up against the cestuis que trust. Robinson v. Brock, 1 Hen. & Munf. 212; Smith v. Smith, 6 Munf. 581; Goodtitle ex dem. Hart v. Knot, 1 Cowp. R. 43; Scott v. Gibbons, 5 Munf. 86.

3d. That where there is the intention of the donor to give a separate estate to the wife, the marital rights of the husband will not be allowed to defeat it. Smith v. Smith, 6 Munf. 585; Lewis v. Adams, 6 Leigh 320.

4th. That the bill of sale from Cleland and wife to Watson was void as to her; a feme covert having the powers of a feme sole only so far as the power is given her by deed or will. Blanton v. Taylor, Gilm. 209; 2 Tuck. Bl. 444, note 21; Elwin v. Williams, 13 Simon's R. 309; Ashby v. Ashby, 28 Eng. Ch. R. 549; Methodist Church v. Jaques, 3 John. Ch. R. 77.

5th. That the right of action survived to the wife. Brown on Actions, 176, 20 Law Libr.; Crossman v. Reade, Croke Eliz. 114; Comyn's Dig. title Baron & Feme, 218; May v. Boisseau, 12 Leigh 512; Phillish v. Pluckwell, 2 Maul. & Sel. 393; 2 Tuck. Com. 213.

Fry, for the appellee, insisted:

1st. That the legal effect of the deed from Morgan to Cleland and wife was to vest the property in them jointly. That in the premises of the deed the consideration was stated to move from the husband as well as the wife; and so the use was to him as well as to her. That there was no difference between the grant of the use of a thing and a grant of the thing itself. Coke Litt. 4 b; Parker v. Plummer, Croke Eliz. 190; Tothill v. Pitt, 1 Madd. 264, 273. That this is especially so as to chattels; and that the grant of the use to the husband and wife and their joint heirs, is an absolute estate. Haskins v. Coalter, 2 Porter's R. 471; Deane v. Hansford, 9 Leigh 253; Goodwin v. Taylor, 4 Call 305; 2 Black. Com. 113; 162 Coke Litt. 20; Tothill *v. Pitt, 1 Madd. R. 264, 275; Fearne Cont. Rem. 463, 465; Earl of Chatham v. Tothill, 7 Bro. Par. Cas. 453. So in the habendum of the deed, it is to the wife and her husband and their heirs, &c.: and the habendum may vary the premises, 2 Black. Com. 298; Coke Litt. 7 a, 21 a, notes 1 and 2; 183 a, 183 b; Wheadon v. Sugg, Croke Jac. 372; Brooks v. Brooks, Id. 434; Samme's Case, 13 Coke R. 54, 466: and the warranty is to the husband and wife.

2d. The grant carried the estate to the husband and wife, and vested the jus disponendi in the husband. This is clearly so if given to the wife alone, and when he takes it into possession it is his; and it cannot be otherwise when given to both. In a grant of chattels to husband and wife, they pass to husband's executor, and do not survive to the wife. 3 Bac. Abr. 674; 43 Edward 3, 10; Rolle's Abr. 349. Husband jointly possessed of a leasehold interest or other personal thing may dispose of it in his life time without the consent of his wife. Rolle's Abr. 343; 5 Bouvier's Bac. Abr. 244; 3 Wilson's Bac. Abr. 674. And on similar questions, see Grute v. Locroft, Croke Eliz. 287; Sym's Case, Id. 33; Siter, Price & Co. v. McClanachan, 2 Gratt. 280.

3d. If a separate estate was conveyed to the wife, she had the power of a feme sole over it; and by joining in the deed to Watson she parted with her interest in the property. West v. West, 3 Rand. 373; Vizonneau v. Pegram, 2 Leigh 183; Fittiplace v. Gorges, 1 Ves. jr. R. 46; S. C. 3 Bro. Ch. Cas. 8; Wagstaff v. Smith, 9 Ves. R. 520; Sturges v. Corp, 13 Id. 190; Major v. Lansley, 13 Cond. Eng. Ch. R. 73; Jaques v. Methodist Episcopal Church, 17 John. R. 548; Long v. White, 5 J. J. Marsh. R. 226.

ALLEN, J., delivered the opinion of the court.

The court is of opinion, that according to the legal effect and true construction of the deed of Morgan 163 *Morgan, dated the 5th May 1827, a joint estate was conveyed to John Cleland and Dorothy his wife. There is nothing on the face of the deed to show that the husband was not the object of the grantor's bounty, as well as the wife. The property is granted to his use as well as to hers; and by the habendum the said Dorothy and her hus-

band were to hold the property to them, their heirs, executors, administrators and assigns forever; and the warranty of title was to the said Dorothy and her husband, their heirs, executors and assigns; thus showing an intention by the premises, the habendum and warranty, to vest in both a joint benefit, to be held by a joint title, secured by a warranty to both jointly.

The court is further of opinion, that the joint estate so conveyed to the wife and her husband, carried with it the right in the husband to dispose of it absolutely after the same had been reduced into his possession; and it appearing from the facts agreed that the slaves named in the deed from Morgan Morgan to said Cleland and wife, passed into the possession of said Cleland and wife, according to said deed of the 5th May 1827, where they remained until the execution of the deed from Cleland and wife to the defendant in error, when those named in the deed to the defendant in error of the 17th February 1831, passed into his possession according to the deed to him.

The court is of opinion, that the conveyance of the 17th February 1831 was an exercise of the marital right of the said John Cleland to dispose of said slaves; and the title thereto for the interest conveyed by said last mentioned deed, passed to and vested in the defendant in error.

The court is therefore of opinion, that there is no error in said judgment, and the same is affirmed, with thirty dollars damages and costs.

Judgment affirmed.

HUSBAND AND WIFE.

I. Disabilities Arising from Coverture.
- A. To Contract Generally.
  - 1. At Common Law.
  - 2. By Statute.
    - a. In West Virginia.
    - b. In Virginia.
- B. To Convey Realty.
  - 1. At Common Law.
  - 2. By Statute.
  - 3. Effect of Warranty.
  - 4. Easement in Separate Estate.
  - 5. Effect of Wife's Joining in Conveyance of Husband's Lands.
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    - a. Generally.
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- B. Property Rights.
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I. DISABILITIES ARISING FROM COVERTURE.

A. TO CONTRACT GENERALLY.

1. AT COMMON LAW.—At common law the contract of a married woman is regarded, in a court of law, as invalid and null against her, whether made while living separate and apart from her husband, or while she was living with him. Peck v. Marling, 22 W. Va. 708.

Void Not Voidable.—Unlike an infant's contract which is voidable only, the contract of a married woman is void *ab initio*. Crockett v. Doriot, 85 Va. 240, 3 S. E. Rep. 128; Ogle v. Adams, 12 W. Va. 213.

May Be Beneficiary with Consent of Her Husband.—But with the consent of her husband she may become the grantee in a deed, the obligee in a bond or the payee of a note, by contract with a third person, and upon the survivorship of the wife they will vest in her. Dictum in Roseberry v. Roseberry, 27 W. Va. 759.

Presumption as to Existence of Disability When Contract Was Made.—Where a married woman constitutes a company, in the absence of any proof that she did business under that name at any time when she was not married, the necessary conclusion is that the contract was made during coverture. White v. Manufacturing Co., 29 W. Va. 385, 1 S. E. Rep. 572.

Power to Engage in Trade.—A married woman may engage in trade on her separate account, and enter into partnership for that purpose, by the consent of her husband; and she will be entitled to the profits of the trade against her husband, even though his agreement be merely voluntary; and against his creditors, at least to some extent, if the agreement be founded on valuable consideration paid by, or for, the wife. Penn v. Whitehead, 17 Gratt. 503.

Where a wife, being without any adequate means of support for herself and family, and her husband being insolvent, with his consent and for the purpose of obtaining a support, engages in a mercantile business for her separate use, by the aid of her friends in loaning her money or selling her goods on the credit of the business, her stock in trade will be liable for the payment of her debts thus contracted, and so liable, preferably to the proper debts of her husband; even though the necessary labor and skill employed in conducting the business was furnished by him and his minor sons. Penn v. Whitehead, 17 Gratt. 503.

Where she furnishes all or a portion of the labor, or a portion of the capital or credit, used in carrying on the business, the wife will be entitled, even as against his creditors, to such portion of the profits as will compensate her for what she may have contributed to the business either in the shape of capital or credit; at least provided there can be an apportionment of the profits according to the respective contributions of the parties. It may be impossible in some cases to make a complete apportionment. But to the extent to which a just apportionment can be made, it will be made by a court of equity. Penn v. Whitehead, 17 Gratt. 503.

The expenses of the support of the husband and his wife and family are a part of the necessary expenses of the business, without which there could be no profits. Penn v. Whitehead, 17 Gratt. 503.

The husband's voluntary agreement that his wife may carry on a trade for her separate use, though good against him, is fraudulent and void as to his creditors, at least to the extent of subjecting the profits of the trade to liability for their claims; and that, too, though the trade be carried on by the skill and labor of the wife, as, for instance, the trade and business of a milliner. Penn v. Whitehead, 17 Gratt. 527.

Exception, Where Husband Has Abjured the Commonwealth.—At common law, a married woman, whose husband has deserted her and resides without the state with no intention of returning, is allowed to manage and dispose of her property as if she were a feme sole, and the statutory provisions in no wise affect this right. Buford v. Adair, 43 W. Va. 211, 27 S. E. Rep. 260.

Mere Separation Not Sufficient.—Although a wife is living apart from her husband by consent, she remains subject to the disability of coverture, and can contract no debt for which she can be personally liable, either at law or in equity. There can be no personal judgment or decree against her on such debt. Harshberger v. Alger, 31 Gratt. 53.

Requisites of Such a Replication.—Where a defendant pleads coverture at the time of the execution of a bond to an action on the bond, a replication that

the defendant's husband "had abjured the commonwealth and was not then, or now, a citizen thereof," on general demurrer, is bad; GREEN, J., saying: "If it was intended to rely upon the common-law abjuration of the realm; that never existed here, or, if it did, it could only be proved by a record taken by a coroner, and by him certified to the proper court; and the plea should have been verified by the record, instead of concluding to the country. If it was intended to rely upon the expatriation of the husband under our statute, it should have been shown how he expatriated himself, by a recorded declaration by deed, or in open court, and that he had departed from the commonwealth: and even that would not have been sufficient, without the further allegation, that he resided abroad at the time of the execution of the bond by his wife." Branch v. Bowman, 2 Leigh 170.

2. BY STATUTE.

a. *In West Virginia.*

The General Disability Not Removed by Code of 1868.—In West Virginia, the general disability of a married woman living with her husband to incur, by contract, a personal obligation on which she could be sued *at law*, was not removed by ch. 66, Code W. Va. 1868, and therefore, she might rely on her plea of coverture as a bar to any action on a contract made by her while married; and if there were any exception to her disability to incur such personal responsibility, the plaintiff, by replication, should bring it to the attention of the court. Stockton v. Farley, 10 W. Va. 171; Pickens v. Kniseley, 36 W. Va. 794, 15 S. E. Rep. 997; Carey v. Burruss, 20 W. Va. 571.

A married woman living with her husband is in all cases utterly incapable of making any contract which a court of law would regard as binding upon her. Peck v. Marling, 22 W. Va. 708.

Contract of Partnership Void.—A married woman, while living with her husband, cannot form a valid partnership with a third person, which a court of law would recognize, and though she went through the form of entering into such a partnership she could not be sued for a debt of the partnership in a court of law, for in the view of such a court she would not be a member of the partnership and never was such a member; the court saying: "The legislature does not appear to have intended that she should have the power to engage in trade except so far as may be necessary to manage the property she may own." Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790.

A partnership between a married woman, living with her husband, and another person is void. She cannot be sued at law on such a contract of partnership; but the other member of the firm may be made liable therefor, and judgment given against him alone. Ringold v. Suiter, 35 W. Va. 186, 13 S. E. Rep. 46.

If the person with whom she formed the called partnership, was sued for such debt, and he pleaded in abatement, that she was a partner and should have been sued with him, the plaintiff might reply that she was a married woman, which would be a good replication to such a plea, or if he chose he might traverse the plea, and if, on the trial of the issue on the plea in abatement, it be proved that she was, when the partnership was formed, a married woman living with her husband, the jury ought to find their verdict for the plaintiff. Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790.

Except Where She Is Living "Separate and Apart" from Her Husband.—But sec. 13, ch. 66, Code W. Va. 1868, authorizing a married woman living apart from her husband to carry on any trade or business and securing the profits to herself, impliedly removes from them, under such circumstances, the common-law disability of making binding contracts, and this provision should be construed liberally, and should be held to remove from them the common-law incapacity generally, and should not be confined to a removal of such disability only when they are actually engaged in trade or business, and should not be confined to contracts in carrying on such business. Peck v. Marling, 22 W. Va. 708.

This was held in accordance with a suggestion in Carey v. Burruss, 20 W. Va. 571, and Stockton v. Farley, 10 W. Va. 171, that this was the proper construction of the above section. Hence, to a plea of coverture, a replication that the defendant, at the time of making said promises, was living separate and apart from her husband, is good. But a replication that merely states that "all the time the plaintiff was performing the services for her, she was living separate and apart from her husband, was at first, held insufficient, as she may have been living *with* her husband when she *made* the promise sued on; but on a rehearing it was held that such an allegation was sufficient, as the promise sued on is an implied promise and an implied promise is considered to arise at the time the services are rendered, hence an allegation that the services were rendered while she was living separate and apart from her husband is equivalent to an allegation that the promise was made while she was living separate and apart from her husband. Peck v. Marling, 22 W. Va. 708.

Since, where a divorce is obtained for cruelty or reasonable apprehension of bodily hurt, the husband is primarily liable for attorneys' fees, the wife is not liable unless she gives a *written* guarantee. But where the divorce is obtained for any other cause, the wife living separate and apart from her husband, is liable, on her express contract if she made one, otherwise on the implied contract. Peck v. Marling, 22 W. Va. 708.

By statute, sec. 13, ch. 66, Code of W. Va. 1868, a married woman living separate and apart from her husband may contract and be sued, and a valid judgment may be rendered against her upon her contract in a court of law. Peck v. Marling, 22 W. Va. 708; White v. Manufacturing Co., 29 W. Va. 385, 1 S. E. Rep. 572; Pickens v. Kniseley, 36 W. Va. 794, 15 S. E. Rep. 997.

Burden of Proof Is on Plaintiff.—When it is pleaded or shown that the defendant is a married woman, the burden is cast upon the plaintiff to establish the fact that she is living separate from her husband. The presumption is that all married women live with their husbands, and the fact that some do not, is an exception; therefore he who claims the benefit of the exception must show it. White v. Foote Lumber & Manfg. Co., 29 W. Va. 385, 1 S. E. Rep. 572.

Wives Owning Separate Estate.—Section 13, ch. 66, Code 1887, sec. 14 of the Code 1899, providing that any married woman living separate and apart from her husband, may carry on any trade or business, relates not to wives, living with their husbands, employing their separate estate in business, but only to those living separate and apart from their husbands. That section does not prohibit wives living with their husbands and *owning separate estate* from engaging with it in business. Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. Rep. 570.

She May Engage in Trade as to Her Separate Estate.

—Under sec. 3, ch. 66, Code W. Va. 1868, a married woman may engage in business for the purpose of preserving and increasing her separate property, although living with husband and by trade or sale change the character of her personal property without impairing her title to the after-acquired property. Miller v. Peck, 18 W. Va. 75; Robinson v. Neill, 34 W. Va. 128, 11 S. E. Rep. 999.

Mechanic's Lien May Be Created on the Rents and Profits of Her Separate Realty.—By a contract with a mechanic to build a house on her separate real estate, or by a contract with any one to furnish material for such a building, a married woman may create a lien under the West Virginia law, which will render the rents and profits of the building so erected, so long as the marriage continues, liable to the payment of said lien in preference to any lien, which she and her husband can subsequently create by uniting in a deed. But such lien can only be enforced, as other debts of a married woman are enforced, by renting out the property from year to year during the continuance of the marriage. C. L. & M. Co. v. Brockmyer, 18 W. Va. 586.

Effect of Act 1893, ch. 3.—BRANNON, J., in Williamson v. Cline, 40 W. Va. 194, 20 S. E. Rep. 917, was of opinion, though he said it was unnecessary to the decision of the case, that sec. 15, ch. 66, Code W. Va. 1899, was not intended to enlarge the capacity of a married woman to contract, but to extend the *remedy* against her upon the contracts which she was already competent to make.

b. In Virginia.

Act of April 4, 1877.

May Only Contract in Relation to Her Separate Estate, When Husband Must Join.—Even under the "Married Woman's Act," April 4, 1877, Acts 1876-7, p. 333, a married woman, as to the separate estate created by that act, is only empowered to contract *in relation thereto*, or *for the disposal thereof*, and to sue and be sued as a feme sole, *provided* her husband join in the contract, except as to property acquired as a sole trader. If a married woman contract without joining her husband with reference to property not acquired as a sole trader, her contract is void. Crockett v. Doriot, 85 Va. 240, 3 S. E. Rep. 128.

Still Not Personally Bound.—No power is given her to contract *generally*; she is still unable to bind herself *personally*. It is only in consequence of the existence of the separate estate, that the statute authorizes her to contract. The enforcement of the contract is in the nature of a proceeding *in rem*. Her *personal* contract is a nullity. Crockett v. Doriot, 85 Va. 240, 3 S. E. Rep. 128.

Under Code 1887.—Section 2288 of the Code of Virginia, does not confer upon a married woman the power to contract generally; it limits such power to those who have separate estates. And the declaration must show this, else it will be demurrable. Hirth v. Hirth, 98 Va. 121, 34 S. E. Rep. 964.

B. TO CONVEY REALTY.

1. AT COMMON LAW.—At common law a married woman could not convey. Hairston v. Randolphs, 12 Leigh 445.

2. BY STATUTE.

a. Generally.

Statute Must Be Substantially Complied with.—The statute points out a mode by which she may make a valid conveyance. It is an innovation on the common law and its terms must be substantially complied with. Hairston v. Randolphs, 12 Leigh 445.

Privy Examination of Wife Necessary.—A feme covert cannot pass her legal title without a deed accompanied by a privy examination, to evince that she does not do it under her husband's influence. Countz v. Geiger, 1 Call 190.

A court of equity will require some equivalent testimony of her freedom of mind in parting with her equitable title; an affidavit made in her husband's presence is not sufficient. Countz v. Geiger, 1 Call 190.

b. Relief in Equity.

Defective Execution Not Curable.—No defective execution can be set up, cured or affected by a court of equity. Wynn v. Louthan, 86 Va. 946, 11 S. E. Rep. 878.

See monographic *note* on "Acknowledgments" appended to Taliaferro v. Pryor, 12 Gratt. 277.

It May Constitute an Equitable Lien in Connection with a Former Deed.—But where a tract of land is conveyed to two married women, and, to secure the residue of the purchase money to the vendor, the married women at the same time, together with their husbands make a deed of trust to a trustee, the acknowledgment of which is wholly insufficient, although such trust deed conveys no title from the married women to the trustee, yet the two deeds must be taken together, and an equitable lien is thereby created in favor of the vendor, which can only be enforced in a court of equity. Schmertz v. Hammond (W. Va.), 35 S. E. Rep. 945.

c. Defective Execution or Acknowledgment.

Rights of Grantee.—The deed from a husband and wife, defectively acknowledged as to the wife, is absolutely *void* as to her and incapable of passing even the shadow of a title, legal or equitable to the grantee; hence, a subsequent conveyance by her, will carry a good title and such purchaser will not be a trustee for the purchaser under the defective deed, though he took with notice of the prior conveyance. Nor can he charge the purchase price on the land in the hands of the second purchaser; his claim is merely a personal one against the husband. Central Land Co. v. Laidley, 32 W. Va. 134, 9 S. E. Rep. 61; Harvey v. Pecks, 1 Munf. 518.

No Estoppel Arises from Receipt of Purchase Money.—Even where the married woman receives and enjoys the consideration, she will not be estopped to deny the validity of the conveyance, hence neither will a subsequent purchaser from her of the same property, though with notice of the prior conveyance. Central Land Co. v. Laidley, 32 W. Va. 134, 9 S. E. Rep. 61.

Specific Performance Could Not Be Compelled.—Where a deed by husband and wife of the wife's land is defective in execution and acknowledgment, a purchaser could not maintain a bill against her heirs for specific performance. Wynn v. Louthan, 86 Va. 946, 11 S. E. Rep. 878.

Aliter Since Code of 1887.—A deed by the husband and wife of the wife's separate realty, though void on account of being defectively acknowledged, the purchase money having been paid and possession given, will be specifically enforced against her as an executory contract to convey. Va. Coal & Iron Co. v. Roberson, 88 Va. 116, 13 S. E. Rep. 350.

Especially where the married woman is only seeking to carry out her part of the contract and to enforce deeds of trust executed on the faith of such conveyance. Clinch River Veneer Co. v. Kurth, 90 Va. 737, 19 S. E. Rep. 878. See title "Specific Performance," *infra*.

Return of Purchase Money.—In Garber v. Armen-

trout, 32 Gratt. 255, where a deed by husband and wife of the wife's *contingent* interest in her father's estate, was set aside by the wife on the ground of her disability, it was held that an action of assumpsit would lie by the purchaser against the administrator of the husband, where the money had been paid to the husband.

In such a case, where the purchaser was in possession under the deed, the cause of action does not arise until the decree setting aside the deed, hence the statute of limitations only runs from that time, and will not bar an action for the purchase money brought immediately thereafter. Garber v. Armentrout, 32 Gratt. 235.

And in Watson v. Michael, 21 W. Va. 568, it was held that if the purchaser elected to rescind a deed as to the husband, which was void as to the wife, for defective acknowledgment, the consideration must be returned to him, and would be a charge on the land of the wife until paid.

But in Wynn v. Louthan, 86 Va. 946, 11 S. E. Rep. 878, where the deed was made by husband and wife of the wife's land, and the purchase price was paid to *the wife*, it was held that the purchaser could not recover back the purchase money from her heirs, when the deed was set aside for defective execution and acknowledgment, on the ground that the purchase price having been paid to the wife, there could arise no implied promise on her part to repay it, when the consideration failed.

Where a purchaser takes a deed from husband and wife of the wife's land knowing such deed to be void as to the wife, a purchaser from him of his interest in the land, must be presumed to have known that the deed was void, and, having received all that he bargained for, has no claim against the wife for purchase money received by her from the first purchaser. Ogle v. Adams, 12 W. Va. 213.

Where 200 acres of land are purchased of a husband and wife, $200 cash, and a bond for $800 is executed to the husband and a bond for $400 to the wife who owns 60 acres of the tract, if an action is brought by the husband on his bond for the use of his assignees, an injunction will not be granted, because the wife refuses to convey her 60 acres, when the wife's part is of average value with the rest of the tract, and there is no averment or proof that it was the inducement to the contract or that the residue cannot be advantageously enjoyed. The $400 bond in the hands of the wife is ample indemnity to the purchaser and if she attempts to enforce it, collection thereof will be restrained. Scott v. Perkins, 4 W. Va. 591.

Subsequent Ratification Ineffectual.—Such a deed being void and not voidable no subsequent ratification or recognition will have any effect on the deed. Central Land Co. v. Laidley, 32 W. Va. 134, 9 S. E. Rep. 61; Leftwich v. Neal, 7 W. Va. 569.

Such Conveyance Carries Husband's Interest.—The purchaser under such deed, invalid as to the wife, becomes vested, however, with the freehold life estate of the husband, and he and his vendees have a right to the possession during the joint lives of husband and wife. Central Land Co. v. Laidley, 32 W. Va. 134, 9 S. E. Rep. 61; Merritt v. Hughes, 36 W. Va. 356, 15 S. E. Rep. 56; Dejarnatte v. Allen, 5 Gratt. 499; Ogle v. Adams, 12 W. Va 213; Arnold v. Bunnell, 42 W. Va. 473, 26 S. E. Rep. 359.

Or if they have issue, and the husband survive the wife, then the grantee will have an estate for the life of the husband. Merritt v. Hughes, 36 W. Va. 356, 15 S. E. Rep. 56; Arnold v. Bunnell, 42 W. Va. 473, 26 S. E. Rep. 359.

A conveyance by a husband will only pass his life interest in his wife's lands; he cannot pass a greater interest than he has himself; so where the wife has only an estate for *her life*, her husband's conveyance will pass her entire interest, if he survives her, but if she survives him, it only passes an estate for *his* life. Evans v. Kingsberry, 2 Rand. 120.

If the purchaser elects to take the interest of the husband, he must take it in full satisfaction of the contract and is entitled to no abatement of the purchase money. Watson v. Michael, 21 W. Va. 568. See title, "Specific Performance," *infra*.

Statute of Limitations Runs Only from Death of Husband.—Hence, neither the wife nor a subsequent purchaser from her, could sue for the land until the termination of the husband's life estate, from which time only the statute of limitations will begin to run. Central Land Co. v. Laidley, 32 W. Va. 134, 9 S. E. Rep. 61; Merritt v. Hughes, 36 W. Va. 356, 15 S. E. Rep. 56; Arnold v. Bunnell, 42 W. Va. 473, 26 S. E. Rep. 359.

Nor can a married woman in such case maintain a suit for the *partition* of the land during the lifetime of the husband. Merritt v. Hughes, 36 W. Va. 356, 15 S. E. Rep. 56.

So also, in voluntary partition of the wife's land by the husband and wife and other tenant in common, parcener, or joint tenant, the husband, who is *sui juris* will be bound even where the wife is not, and he will be so bound during coverture, or, if he be tenant by the curtesy, during his life; and a bill filed for partition by him and wife during such coverture or life as the case may be, should be dismissed. Heavener v. Godfrey, 3 W. Va. 426.

In such case the right of action only accrues at the death of the husband or termination of the coverture as the case may be, hence it is not barred by the expiration of twenty years from the time possession is taken under the conveyance, which is the utmost limit allowed to married women, under disability when their right accrues. Merritt v. Hughes, 36 W. Va. 356, 15 S. E. Rep. 56.

d. Recordation.

Void Even between the Parties till Recorded.—A married woman's deed stands on an entirely different footing from that of persons *sui juris*. It is not good even between the parties till actually admitted to record in the mode prescribed by the statute and an unauthorized recordation is void. Rorer v. Roanoke Nat. Bank, 83 Va. 589, 4 S. E. Rep. 820.

Where a deed is made by husband and wife of the wife's maiden land, which is void for lack of recordation, and afterwards the grantee executes a quit-claim deed to the husband acknowledging the invalidity of the prior conveyance as to the wife, if, fourteen years after its date the void deed is recorded, it will not revive it, so as to vest the title, by the quit-claim deed, in the husband. Rorer v. Roanoke Nat. Bank, 83 Va. 589, 4 S. E. Rep. 820.

Contra in West Virginia.—A deed by a husband and wife of her separate real estate, duly executed, acknowledged, and delivered, is good between the parties, though not recorded. Morgan v. Snodgrass (W. Va.), 33 S. E. Rep. 695.

Deed May Be Recorded as to Husband and Wife at Different Times.—Where a deed by husband and wife is first recorded as to the husband, then a commission for the privy examination of the wife is issued and executed, and then the commission

and privy examination of the wife is recorded, the deed is hereby perfected as to the wife, though it does not appear that she had signed and sealed it at the time when it was recorded as to the husband. Langhorne v. Hobson, 4 Leigh 224.

e. Joinder of Husband.

Husband Must Join—The deed of a feme covert, to be valid, must be executed by the husband also. Sexton v. Pickering, 3 Rand. 468.

Where a deed states that it is made by a married woman, and A B, her husband, of the first part and certain other parties of the second part and that they convey unto the parties of the second part a certain tract of land, etc., such a deed duly acknowledged, conveys all the right, title and interest of the husband in the described property whether the legal title was in him or in his wife. The mere fact that he is mentioned as husband does not show that his marital rights only are conveyed and the word "convey" is equivalent to the word "grant," suggested in sec. 1, ch. 73 of the W. Va. Code. Chapman v. Charter, 46 W. Va. 769, 34 S. E. Rep. 768.

Husband Need Not Be Named as Grantor, if Deed Is Acknowledged by Him.—A deed from a married woman of her separate real estate, signed and acknowledged by the husband, is good, though he is not named as a grantor or otherwise in the body of the deed; but it is not good unless acknowledged by both. Morgan v. Snodgrass (W. Va.), 38 S. E. Rep. 695.

Deed Must Be Signed by Husband before Acknowledgment by Wife.—A deed by husband and wife must have been signed by him when acknowledged by her. She cannot acknowledge a paper not signed by him. It must be one deed, not separate nor duplicates, one executed by the husband, the other by the wife, though both are to the same effect. Cecil v. Clark, 44 W. Va. 659, 30 S. E. Rep. 216.

f. Deed by Wife Alone Void.—A married woman, not living separate and apart, but with her husband, undertook, by deed dated April 20, 1878, to sell and convey a certain tract of land, part of her real estate, to two of her sons, and without her husband joining in such deed. *Held*, said pretended deed was wholly ineffectual to divest the grantor, of her ownership of such land, and did not pass any interest therein, legal or equitable, to the said grantees. Austin v. Brown, 37 W. Va. 634, 17 S. E. Rep. 207.

Good as Evidence of Adverse Possession.—But the deed of a married woman, in which her husband does not join, while void as a conveyance, is still competent evidence to prove that the grantee held the land thenceforward under the deed and adversely where he had previously been holding as coparcener. Cooey v. Porter, 22 W. Va. 120.

Statute of Limitation Begins to Run Immediately against Her.—A deed by the wife *alone* is void as to her and of course cannot pass any right of the husband. In this case there is nothing to prevent husband and wife from suing at once, hence her right of action is held to accrue as soon as the grantee takes possession, and the twenty-year limit placed on the exception in favor of married women applies. Merritt v. Hughes, 36 W. Va. 356, 15 S. E. Rep. 56; Cooey v. Porter, 22 W. Va. 120.

Sufficient Evidence of Execution by Husband.—But if it appears by sufficient evidence, that the deed was executed by a feme covert, it would be completely valid as to her if it appears, by the testimony of even a single witness, that it was executed by the husband also. But prior to the act of 1819 the *certificate* of a foreign magistrate was not sufficient proof. Sexton v. Pickering, 3 Rand. 468.

Under Statute in West Virginia, Wife Living with Her Husband.—A married woman living with her husband can, under the West Virginia statute, convey her separate real estate by joining with her husband and after privy examination of her, in precisely the same manner, as is required to relinquish her interest in real estate not her separate property; and she can convey her separate real estate in no other manner. Watson v. Michael, 21 W. Va. 568; McMullen v. Eagan, 21 W. Va. 233.

When Living Apart from Her Husband.—A deed for land by a married woman alone, as one living separate and apart from her husband, must recite that fact, as also the fact that the land is her sole and separate estate; otherwise, the deed is void. Bennett v. Pierce, 45 W. Va. 654, 31 S. E. Rep. 972.

A certificate of acknowledgment of a deed for real estate made by a married woman alone, as one living separate and apart from her husband, must state that it has been proven to the satisfaction of the officer that the real estate is the sole and separate property of the woman and that she was, at the date of the deed, and still is, at the date of the certificate, living separate and apart from her husband; otherwise, the deed is void. Bennett v. Pierce, 45 W. Va. 654, 31 S. E. Rep. 972.

g. Presumption Where Wife Unites with Her Husband in Conveyance of Her Land.

A Gift, Where Conveyance Is Absolute.—It is well settled in Virginia, that where a wife unites with her husband in conveying her maiden lands *absolutely*, the presumption is that she *gives* to her husband all her interest therein. Filler v. Tyler, 91 Va. 458, 22 S. E. Rep. 235.

As Surety Where the Conveyance Is a Mere Charge on the Land.—But both upon principle and precedent, a married woman who unites with her husband by mortgage, or deed of trust, in *charging* her inherited land with the individual debts of her husband, should be considered as the *surety* of her husband and entitled to all the rights of a surety in the absence of any agreement to the contrary. Filler v. Tyler, 91 Va. 458, 22 S. E. Rep. 235; Christian v. Keen, 80 Va. 377.

Where a deed of trust to secure a husband's individual indebtedness binds the property of both wife and husband, a court of equity will protect the interest of the wife as surety for her husband, and will compel a sale and application of the husband's interest or property first, if the same can be done without substantially prejudicing the rights of the trust creditor. Hall v. Hyer (W. Va.), 37 S. E. Rep. 594.

Where a tract of land is owned by a husband and wife, the same being part of a larger tract, she owning as her separate estate four-ninths, and he two-ninths, and she joins with him in the execution of a deed of trust on the entire six-ninths to secure the payment of a debt owed by the husband, and dies before the debt falls due, leaving children, when the trustee proceeds to sell the entire six-ninths conveyed to him, if collusion is shown between him and the trustee, and it appears the sale is made only for the purpose of conferring title on him, equity will consider and treat him as a trustee for the children who inherited said four-ninths, subject to the trust as to said four-ninths. Where the debt secured by such trust was the debt of the husband, and the wife's property was only included in the trust deed as an additional security, equity would require

that the husband's portion of the property should be exhausted before selling the wife's property. Jones v. Thorn, 45 W. Va. 186, 32 S. E. Rep. 173.

But Not as against Husband's Creditors.—But where the wife thus joins with her husband in a conveyance of her land in trust to satisfy a debt, the wife is not to be regarded as the surety of her husband *as against the creditor*, or as a mere guarantor and can claim none of their rights against him. Thurmond v. Woods, 27 Gratt. 727.

Right of Subrogation.—*Subsequent* lien creditors cannot compel the sale of the wife's property to pay the husband's debt, for which she is surety, so as to give them the benefit of the husband's property. If her property is taken to pay a prior lien against her husband for which she is surety, she is entitled to be subrogated thereto as against *subsequent* lien creditors. Hall v. Hyer (W. Va.), 37 S. E. Rep. 594.

Conditions Imposed by Wife, Create a Valid Trust.—Where a wife joins her husband in a conveyance of her land on condition that the proceeds be applied to extinguish a debt binding her children's lands, a valid trust is thereby created, which a court of equity will enforce, though the bonds for the proceeds are taken payable to the husband, if they remain in the hands of the husband, and have not passed into the hands of *bona fide* purchasers. Barnes v. Trafton, 80 Va. 524.

Where a married woman joins with her husband in a conveyance of her land upon the agreement that the proceeds are to be applied to the discharge of a certain debt, a trust is thereby created, which equity will enforce against the husband though the bonds were taken payable to him, provided they have not passed into the hands of *bona fide* purchasers. Barnes v. Trafton, 80 Va. 526.

A parol agreement, between husband and wife, that, in consideration of her joining him in a conveyance of a parcel of her lands, he would purchase certain other lands, build thereon, and convey the same to her, being clearly proved, and partly executed, by her joining in the deed, and his making the purchase and erecting the buildings, ought to be enforced in equity against his heirs; notwithstanding a great disparity in value between the lands so bought and sold; it appearing that, at the time of the marriage, the husband was very poor, and that all the real property in his possession (except the land purchased as aforesaid), was held in right of the wife. Gosden v. Tucker, 6 Munf. 1.

3. EFFECT OF WARRANTY.

Not Bound by a General Warranty.—And when all that is required by the statute is done and completed, the operation of a married woman's deed is so restricted as to convey only her *interest*, and not to operate any further upon her or *her representatives* by reason of any *covenant* or warranty therein contained. She and her heirs are bound by no covenant nor subject to any estoppel by reason of such deed. Rorer v. Roanoke Nat. Bank, 83 Va. 589, 4 S. E. Rep. 820.

A decree that a married woman shall convey land with general warranty, though erroneous, is no cause for reversing the decree, as under the statute the warranty would not bind her. Code 1849, ch. 121, sec. 7, p. 514; Clarke v. Reins, 12 Gratt. 98.

Applies to Separate Estate Also.—The rule, that the general warranty of a married woman will not bind her further than to pass her estate in the land, applies as well where the land is the separate estate of the married woman as where it is not. Bennett v. Pierce, 45 W. Va. 654, 31 S. E. Rep. 972.

Such Warranty Cannot Charge the Land.—A covenant of warranty in a deed by husband and wife of her land will not bind the wife as, by sec. 6, ch. 73, Code of W. Va. 1887, such covenant binds the wife no further than to pass her land. It could not charge the land, for that would measurably defeat the object of the law. Central Land Co. v. Laidley, 32 W. Va. 134, 9 S. E. Rep. 61.

Husband Alone Bound.—Where a husband unites with his wife in a deed, conveying with covenant of general warranty, land of the wife in which the husband has a freehold estate, the warranty in the deed will not bind the wife, but will be obligatory on the husband alone. Sine v. Fox, 33 W. Va. 521, 11 S. E. Rep. 218. Hence, the wife is not a proper party to a suit for compensation for deficiency in the amount of the land, since no relief can be decreed against her.

Likewise, since the husband acts in his own right and not merely as agent for his wife, his declarations, though not a part of the *res gestæ*, are admissible evidence. Sine v. Fox, 33 W. Va. 521, 11 S. E. Rep. 218.

4. EASEMENT IN SEPARATE ESTATE.

May Grant an Easement, Enjoyable in Her Separate Estate.—A married woman, being entitled to the rent, issues and profits of her separate estate, by sec. 1, ch. 66, Code W. Va. 1887, may grant an easement to be enjoyed in her separate estate, such as the right to construct and operate a tramway across said land. Tufts v. Copen, 37 W. Va. 623, 16 S. E. Rep. 793.

Husband Need Not Join.—The grant of such an easement is not a sale or conveyance of her lands so as to require her husband to join with her in making the contract. Tufts v. Copen, 37 W. Va. 623, 16 S. E. Rep. 793.

Grant May Be Verbal.—A married woman may grant such an easement verbally. Tufts v. Copen, 37 W. Va. 623, 16 S. E. Rep. 793.

5. EFFECT OF WIFE'S JOINING IN CONVEYANCE OF HUSBAND'S LANDS.—The effect of a wife uniting with her husband in a deed, is not to vest in the grantee any estate, separate and distinct, from that of the husband, but simply to relinquish a contingent right, in the nature of an incumbrance, upon the land conveyed, which, if not so relinquished, would attach, and be consummate on the death of the husband. Corr v. Porter, 33 Gratt. 278. See monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

6. EXECUTORY CONTRACT TO CONVEY.

a. Generally.—The statutes, authorizing a married woman to convey, do not qualify them to enter into a valid executory agreement, to sell. If they did such an agreement would have to conform to the statute. Ogle v. Adams, 12 W. Va. 213.

b. Specific Performance of Contract to Convey Will Not Be Decreed, Contract by Married Woman Herself.—Prior to the "Married Woman's Act" a married woman not being able to make a valid contract of sale of her land, a court of equity cannot decree specific performance of such a contract made by her or her husband as her agent. Nalle v. Farish, 98 Va. 130, 34 S. E. Rep. 985; Moore v. Ligon, 22 W. Va. 292, 30 W. Va. 146, 3 S. E. Rep. 572; Litterall v. Jackson, 80 Va. 604.

An oral contract by a married woman for the sale of her land cannot be specifically enforced under the doctrine of part performance. Rosenour v. Rosenour (W. Va.), 35 S. E. Rep. 918; Sturm v. McGuffin (W. Va.), 37 S. E. Rep. 561.

A written contract by a married woman for the sale of her land, unless living separate and apart from her husband, cannot be specifically enforced unless acknowledged by her before an officer authorized to take such acknowledgment. Her husband must join in the contract. Rosenour v. Rosenour (W. Va.), 35 S. E. Rep. 918.

Contract by Husband or by Husband and Wife.—Independently of any statute on the subject, an executory contract of the husband, or of the husband and wife, for the sale of the wife's lands, is not one of which specific performance will be decreed, because, as to the wife, the contract is void, and as to the husband, it cannot be enforced, because, to coerce him, would operate morally as a constraint upon the wife, and since the contract is not enforceable against them, so neither can it be enforced by them. Shen. Valley R. R. Co. v. Dunlop, 86 Va. 346, 10 S. E. Rep. 239; Clarke v. Reins, 12 Gratt. 98; Cheatham v. Cheatham, 81 Va. 395; Litterall v. Jackson, 80 Va. 606.

Conveyance of Husband's Life Estate.—The court will not decree a conveyance of the husband's life estate reserving to the purchaser the right to resort to his action at law on a title bond executed by the husband. McCann v. Janes, 1 Rob. 256.

Or with compensation for the failure of the wife to convey her interest in the land. Clarke v. Reins, 12 Gratt. 98; Watson v. Michael, 21 W. Va. 568.

But where the purchaser is willing to take such life estate in full discharge of the contract, without remuneration or abatement, a conveyance of the husband's life estate will be decreed. Cady v. Gale, 5 W. Va. 547; Watson v. Michael, 21 W. Va. 568.

Where a husband receives the purchase money for his wife's interest in her father's realty, puts the purchaser in possession and promises to make him a deed, and the purchaser continues to hold possession and improves the property for many years with the knowledge and acquiescence of the vendor, this is such a part performance as will take the case out of the statute of parol agreements, and the vendee will be entitled to such estate as the husband has in the land in right of his wife, *i. e.*, an estate during coverture and by the curtesy if the requisites exist. Hedrick v. Hern, 4 W. Va. 620.

Vendee Protected Where Possible.—But where the vendee pays part of the purchase money, which remained unpaid by the married woman, if the married woman refuses to convey, the payments will be considered as unauthorized payments by a stranger made under a mistake of law, the contract under which they were made being void, and the court will consider the debt, to satisfy which they were paid, as unsatisfied, and will enforce this debt against the married woman, for the benefit of the party who made the payments. Moore v. Ligon, 22 W. Va. 292, 30 W. Va. 146, 3 S. E. Rep. 572.

Conversely, Specific Performance Will Not Be Decreed at Suit of Husband and Wife.—Upon a bill in chancery by the husband and wife against the purchaser to compel specific execution of an agreement on the part of the husband to sell the wife's land, specific execution will not be decreed, because specific execution could not be decreed at the suit of the purchaser upon a bill against the husband and wife to compel her to convey her land, and so the remedies are not mutual. Chilhowie Iron Co. v. Gardiner, 79 Va. 305; Shen., etc., R. Co. v. Dunlop, 86 Va. 346, 10 S. E. Rep. 239.

In any case, upon a bill for specific execution of such a contract, preferred by husband and wife against the purchaser, a decree for specific execution against the purchaser, before the wife shall have executed a deed conveying the land, though the decree be suspended till she shall execute such a deed, is erroneous. Watts v. Kinney, 3 Leigh 272, 23 Am. Dec. 266.

Or of His Widow and Children.—Where the husband contracts to sell the wife's land as his own, but dies before the contract is executed, his widow and children cannot enforce the contract against the purchaser, for lack of privity between him and them, but the court will decree the rescission of the contract at the option of the purchaser. Hoover v. Calhoun, 16 Gratt. 109.

Where a purchaser has made permanent improvements on the property, but has offered to surrender possession, if an account is taken, the rents and profits up to the time of the decree for the surrender of the property, are to be set off against such improvements; but the purchaser is not entitled to a decree for any balance on account thereof. Hoover v. Calhoun, 16 Gratt. 109.

Specific Performance of Covenant for Further Assurance Decreed.—Under the act of assembly providing that the conveyance of husband and wife, provided she be privily examined, shall be valid; if the feme covert be privily examined, her covenant for further assurance in a deed is obligatory and a specific execution will be decreed. Nelson v. Harwood, 3 Call 394.

Or of Stipulation in Deed.—But where the husband and wife have granted right of way over their lands, by *deed* they are entitled to specific performance of the stipulation of the deed. Shen., etc., R. Co. v. Dunlop, 86 Va. 346, 10 S. E. Rep. 239.

Specific Performance Now Decreed as to Separate Estate.—Since, by virtue of sec. 2286, 2288, and 2289, a married woman may dispose of her separate estate, and may contract in respect thereto, and may sue and be sued in respect to such contract and a personal judgment or decree rendered for or *against* her and the same may be enforced against her and her separate estate in the same manner as if she were unmarried, specific performance may be decreed against her of her contracts to convey her separate estate. Gentry v. Gentry, 87 Va. 478, 12 S. E. Rep. 966; Va. Coal & Iron Co. v. Roberson, 88 Va. 116, 13 S. E. Rep. 350.

C. TO CONVEY PERSONALTY.—Prior to the Code of 1849, there was no way in which a married woman could convey her interest in personalty (except her separate estate), so that though she united with her husband in signing a deed, it was his deed only and not hers. A method was provided by Code 1849, ch. 121, sec. 4. Henry v. Graves, 16 Gratt. 244.

Code of 1819 Not Applicable to Conveyances of Personalty.—The act. 1 Rev. Code 1819, ch. 99, sec. 15, in relation to conveyances by femes covert, does not apply to personal estate. And a deed executed by husband and wife, with the formalities required by that act and admitted to record, is not sufficient to pass the interest of the wife in personal estate, which was incapable of being reduced into possession by the husband. Nelson v. Jennings, 2 P. & H. 369.

May Convey Now Just Like a Feme Sole.—A deed of trust of the separate *personal* estate, need not be executed with the formalities required by sec. 4, ch. 73, Code W. Va., which only apply to conveyances of real estate. She may convey such separate *personal* property in the same manner as if she were a feme sole. Osborn v. Glasscock, 39 W. Va. 749, 20 S. E. Rep. 702.

D. TO EXECUTE A POWER OF ATTORNEY.—A power of attorney given by a married woman is void, not falling within the letter or the spirit of sec. 15, ch. 99, 1 Rev. Code, validating "deeds" executed by husband and wife, with privy examination, etc. Shanks v. Lancaster, 5 Gratt. 110.

Deed Executed under Such Power.—A deed of husband and wife, executed under a power of attorney, is the deed of the husband, though void as to the wife, the power being void as to her. Shanks v. Lancaster, 5 Gratt. 110.

E. TO MAKE A WILL.—A married woman could not dispose of her property by will, except such as was her equitable separate estate. Stroud v. Connelly, 33 Gratt. 217.

By Statute in Virginia.

See Code Va. 1887, sec. 2286, 2313.—A husband who by his will gives property, real and personal, to his wife, absolutely, if she survives him, may by his will authorize her to make a will in his lifetime disposing of said property. And the wife having made a will in the lifetime of her husband, disposing of the property, and afterwards surviving her husband, and dying without re-executing or revoking her will, the same is valid to pass the property to her devisees and legatees. Thorndike v. Reynolds, 22 Gratt. 21. See "Equitable Separate Estate," *infra*.

F. TO BE ESTOPPED.

Where Estoppel is Connected with Contract.—In Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411, BRANNON, J., was of opinion that a married woman even by positive, intentional fraud could not lose her *land* when her sole deed would not devest her of it, saying: "As the law scrupulously limits her power of alienation to one only mode, she could not do so; she could not do indirectly what she could not do directly by a solemn deed, because it is the policy and positive provision of statute that she shall be disabled by any act of hers to part with her land except in one way." And this is true whether the land is her separate estate or not, since under our statute her sole deed is void in both cases, and she could only pass either class of land by a deed with privy examination (when this transaction occurred), and now, by acknowledgment, her husband joining.

If she cannot thus lose her land by an affirmative act of fraudulent representation, still less can she lose it by silence. Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411.

This is true of land not personalty, for she may thus lose her personalty as she is competent to sell that.

Where the Estoppel is Unconnected with Contract.—Where a married woman is entitled to an undivided moiety of certain real estate, and a division line is run by agreement, although she has never fully given her consent, yet if she stands by, and seemingly acquiesces in a sale of the other moiety to a third party, she will be estopped afterwards to claim that the division was unequal. Heavener v. Godfrey, 3 W. Va. 426.

A married woman is not estopped to set up a resulting trust in land paid for by her father but which her husband obtains to be conveyed to him through collusion with the grantor, by the failure of her father in his lifetime and of herself afterwards, to assert their rights, when she did not know how the legal title stood, or what her father's intentions were till after his death, yet asserted her title long before it was assailed. Steagall v. Steagall, 90 Va. 73, 17 S. E. Rep. 756.

Modern Doctrine.—The old rule, that in order for fraud by a married woman to constitute an estoppel against her, it must be unconnected with contract, because, as her contract would be void, her mere conduct connected with it would not operate to enforce it, now no longer applies. But since our statute now enables her to contract, any fraudulent act, which would estop her when not connected with a contract will do so though connected with a contract. Since this limitation proceeds from her disability, that having been removed, the limitation is also removed. Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411; Tufts v. Copen, 37 W. Va. 623, 16 S. E. Rep. 793.

Where a married woman has accepted the consideration for and acquiesced in the use of an easement in her separate estate, which she has the power to grant, for some time, and the other party has made large expenditures relying on the easement, she will be estopped to deny the grant of the easement and will be enjoined from obstructing the enjoyment of such easement. Tufts v. Copen, 37 W. Va. 623, 16 S E. Rep. 793.

Where the disability of a married woman to contract has been removed by the fact that her husband has abandoned her, her deed will operate as an estoppel in favor of a purchaser in good faith, whether such deed be sufficient as a conveyance or not, on account of the interest conveyed being a remote contingent right. Buford v. Adair, 43 W. Va. 211, 27 S. E. Rep. 260.

G. TO ELECT.—A feme covert cannot of her own will make an election; the only way in which she can do it is under a commission from a court of chancery. Pratt v. Taliaferro, 3 Leigh 419; Siter v. McClanachan, 2 Gratt. 280; Shanks v. Edmondson, 28 Gratt. 804.

Election by Husband.—A husband cannot elect for his wife, so as to make her property real or personal, he is too much interested in the result. Pratt v. Taliaferro, 3 Leigh 419.

Where the wife's realty is converted into personalty, if the husband elects to reconvert it into realty, the election is that of the husband, he having complete control over the subject, and would enure to his sole benefit, unless shown to have been made for himself and wife jointly; in that case, the result would be, not a remitter of the wife to her former estate in the land, but a transmutation of their joint interest in the personalty to a joint estate in the realty; but they would be tenants by the entirety with a right of survivorship, not joint tenants. Siter v. McClanachan, 2 Gratt. 280; Shanks v. Edmondson, 28 Gratt. 804; Pratt v. Taliaferro, 3 Leigh 419.

Where land is directed to be sold and the proceeds paid to a feme sole, but the election is given her when she comes of age or "when married" to take it *as land* if she fails to elect before marriage and her husband does not elect in behalf of himself and her jointly, the land is converted absolutely into personalty, and vests absolutely in the husband if reduced into possession and he may elect to take it as land or personalty. Pratt v. Taliaferro, 3 Leigh 419; Shanks v. Edmondson, 28 Gratt. 804.

II. RIGHTS, DUTIES AND LIABILITIES INTER SE.

A. PERSONAL RIGHTS.

1. OF HUSBAND.

To the Person of the Wife.—A wife, being a lunatic, and put under the care of a committee by the county court, will be restored to her husband, by a decree

of this court, upon his giving bond and security according to law. Coleman's Case, 4 H. & M. 506; Hanley v. Nat. Loan & Inv. Co., 44 W. Va. 450, 29 S. E. Rep. 1002.

2. OF WIFE.

Wife's Right to Support by Husband.—A wife leaves her husband's house without his consent, during his absence from home, and goes to reside with her brother, carrying away with her a sum of money belonging to her husband, which she applies to her own use; the husband dies, and his administrator exhibits a bill in chancery against her, praying a discovery of the amount so taken away by her, and a decree for the same. *Held*, the husband during his life would not be, and his administrator is not, entitled to such relief. McCormick v. McCormick, 7 Leigh 66.

B. PROPERTY RIGHTS.

1. OF HUSBAND.

a. In Wife's Real Estate.—A husband was entitled to a life estate in the freehold real estate of his wife, to take the rents and profits during their joint lives, and as tenant by the curtesy, if he survived her. James v. Gibbs, 1 P. & H. 277; Poindexter v. Jeffries, 15 Gratt. 363; Wallace v. Taliaferro, 2 Call 447; Laidley v. Central Land Co., 30 W. Va. 505, 4 S. E. Rep. 705; Dejarnatte v. Allen, 5 Gratt. 499; Stroud v. Connelly, 33 Gratt. 217; Breeding v. Davis, 77 Va. 689; Pickens v. Kniseley, 36 W. Va. 794, 15 S. E. Rep. 997; Merritt v. Hughes, 36 W. Va. 356, 15 S. E. Rep. 56; Sine v. Fox, 33 W. Va. 521, 11 S. E. Rep. 218; Central Land Co. v. Laidley, 32 W. Va. 134, 9 S. E. Rep. 61; Gale v. Oil Run Petroleum Co., 6 W. Va. 200.

Before the birth of issue the husband is seized of freehold, not as his own, but as his wife's; the after issue born, he has a freehold in his own right. Wyatt v. Smith, 25 W. Va. 813.

The rents and profits of real estate held in actual possession by a coparcener with the wife, belong absolutely to the husband. Dold v. Geiger, 2 Gratt. 98.

At common law on the death of a wife her real estate descended to her heirs immediately, except where she had had a child by her surviving husband, born alive and capable of inheriting her estate, in which case he had a life estate in such lands as tenant by curtesy. Beard v. Beard, 23 W. Va. 130; Wallace v. Taliaferro, 2 Call 447. See monographic *note* on "Curtesy."

Land Sold for Reinvestment.—Where land is directed by will to be sold and the proceeds invested in other lands for the benefit of a married woman, but she elects with the approval of the court, to take the proceeds as money, her husband is entitled to no greater rights in the money than he would be entitled to in the land. Ashby v. Smith, 1 Rob. 55.

Land Sold for Partition.—So where land is sold for partition the proceeds remain land, where the married woman has done nothing before or after marriage to signify an intention to take the proceeds as personalty. The husband is not entitled to them as his wife's administrator. Turner v. Dawson, 80 Va. 841.

Wife's Consent Not Sufficient without Privy Examination.—Even if the married woman consent that the proceeds be paid to the husband absolutely, it is not sufficient unless such consent be ascertained by privy examination, as required in case of a *conveyance* of her realty. Ashby v. Smith, 1 Rob. 59, Turner v. Dawson, 80 Va. 841.

Land Exchanged for Other Land.—Where, prior to the "Married Woman's Act," a wife's land, at her request, is sold by the husband and the same day another tract of land, for which both husband and wife wished to exchange the former tract, is purchased by the husband, such exchange being the sole object of the sale, such sale will not amount to a conversion into personalty so that the marital rights of the husband will attach, but it will be held an *exchange*, and if the proceeds are diverted to the payment of the husband's individual debts, his estate will be made to refund to the wife the amount so diverted. Aston v. Kendrick, 90 Va. 825, 20 S. E. Rep. 827.

Inherited Realty Entitled to Exoneration Out of Personalty.—Where the wife is entitled as heir of her father to real estate encumbered by a mortgage and to personalty as his distributee, she is entitled to have the mortgage paid off out of the personalty. Her husband cannot elect to take the personalty free from the obligation to pay off the mortgage, with or without the consent of the personal representative. Dandridge v. Minge, 4 Rand. 397.

Husband's Possession Not Adverse.—A husband occupying his wife's land does not hold *adversely* to her, but under her, as tenant by the curtesy. The fact that there is an agreement for a separation does not affect the case, when it says nothing about the tract so occupied. Dooley v. Baynes, 86 Va. 644, 10 S. E. Rep. 974.

As Heir to Wife.—The marital rights of the husband, can never be included under the word "heirs." He is never "heir" to his wife except where she has no blood relation in existence. Robinson v. Brock, 1 H. & M. 212; Code Va. 1887, sec. 2548, sec. 10.

b. In Wife's Chattels Real.

Generally.—A husband has a qualified title to his wife's chattels real. He has a right to the possession and enjoyment of them during coverture and a right to dispose of them during that period. If he does dispose of them by a complete act in his lifetime, her right by survivorship is gone and this whether his disposition was with or without consideration and whether the legal estate in the term was in the wife or was held in trust for her benefit. If the husband do not alien the terms and survive his wife, he takes them by virtue of his marital rights. Harcum v. Hudnall, 14 Gratt. 369; Yerby v. Lynch, 3 Gratt. 460; Dold v. Geiger, 2 Gratt. 98.

May Release or Assign Them.—The husband's power to assign, surrender, or extinguish his wife's chattels real in possession actual or constructive, is unlimited and that either for, or without consideration. Yerby v. Lynch, 3 Gratt. 460, 475.

But Cannot Bequeath Them.—But the husband cannot dispose of his wife's chattels real by will. Such a disposition will not prevail against her right by survivorship, for, as this takes effect immediately upon his death, it takes precedence of the bequest in the will, which cannot take effect until after his death. Harcum v. Hudnall, 14 Gratt. 384; Henry v. Graves, 16 Gratt. 244.

Husband's Right by Survivorship.—If the husband survives, he will be entitled to his wife's chattels real by survivorship, not as administrator of his wife. Dold v. Geiger, 2 Gratt. 98; Henry v. Graves, 16 Gratt. 244.

Wife's Right by Survivorship.—But notwithstanding the husband's possession and enjoyment of the terms during the coverture, if the wife be the survivor and the terms remain *in statu quo* and unchanged, she, and not the husband's next of kin will

be entitled to them. Harcum v. Hudnall, 14 Gratt. 384; Dold v. Geiger, 2 Gratt. 98.

c. In Wife's Personalty.

(1) **In Possession.**—It is an undisputed principle of the common law that marriage is an absolute gift to the husband of all the personal estate of which the wife is actually and beneficially possessed in her own right at the time of marriage, and such other personal estate as comes to her during the marriage. Campbell v. Bowles, 30 Gratt. 662; Dold v. Geiger, 2 Gratt. 98; Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615; Hannon v. Hounihan, 85 Va. 429, 12 S. E. Rep. 157; Yerby v. Lynch, 3 Gratt. 460; Wallace v. Taliaferro, 2 Call 447; Hutchinson v. Parkersburg, 25 W. Va. 226; Taylor v. Yarbrough, 18 Gratt. 183; Lanham v. Lanham, 30 W. Va. 222, 4 S. E. Rep. 273; Crabtree v. Dunn, 86 Va. 953, 11 S. E. Rep. 1058; Branch v. Booker, 3 Munf. 43; Williams v. Sloan, 75 Va. 137; Coatney v. Hopkins, 14 W. Va. 338; Grant v. Sutton, 90 Va. 771, 19 S. E. Rep. 784; Yates v. Law, 86 Va. 117, 9 S. E. Rep. 508; Miller v. Blose, 30 Gratt. 744; Tabb v. Archer, 7 Gratt. 408; Clarke v. King, 34 W. Va. 631, 12 S. E. Rep. 775.

Hence a conveyance by the husband alone will pass such interest. Linn v. Patton, 10 W. Va. 187.

Personalty belonging to the wife and not conveyed to her as her equitable separate estate and having been reduced into possession by the husband, thereby becomes his absolute property and liable for his debts. Hill v. Wynn, 4 W. Va. 453.

This right applies as well to personalty coming into her possession during coverture as to that in her possession at the time of marriage. Wallace v. Taliaferro, 2 Call 447.

Where the interest on a sum of money was given by will to a married woman during the lifetime of her husband and on his death the principal to be paid to her, it was held that the wife took an absolute estate, to which, if she died first, her husband was entitled. Stark v. Lipscomb, 29 Gratt. 332.

Slaves.—Slaves being personal property before emancipation, were governed by the same rule. Graham v. Graham, 10 W. Va. 355.

Where a will directs that a division of the estate be made when each child "separates" from the family, marriage of a daughter is such a separation, though she continue to live with the widow, as to entitle the husband to demand her share of the estate, and he is entitled to the profits from the time of the marriage or a reasonable time thereafter and is chargeable with her proportion of any expense in maintaining unproductive slaves. Branch v. Booker, 3 Munf. 43.

Effect of Emancipation.—Under the statute of Virginia an instrument of emancipation is ineffectual to confer freedom, till full probate thereof be made according to law, and takes effect only from the date of the complete probate; and, as the rights of the husband, in this case, attached to the property long before full probate was made, the subsequent full probate did not divest or affect those rights, or give any right to freedom. Thrift v. Hannah, 2 Leigh 300.

Dower by Former Marriage.—When a widow marries again, the slaves which she held for the term of her life, as dower belong to her second husband, and his representatives, until her death. McCargo v. Callicott, 2 Munf. 501.

Emblements Severed during Coverture.—Wheat severed from the land of the wife before her death belongs to the husband *jure mariti*, and where the guardian of the wife continues to manage her land as *agent* after the marriage, he acts as agent for the husband, and the purchaser of the wheat is liable to the husband and not to the guardian, for the purchase price and if he pays it to the guardian after notice from the husband not to do so, he pays in his own wrong and must pay again to the husband. Guerrant v. Hocker, 7 Leigh 366.

Wife's Equitable Interests.—The husband's interest in his wife's equitable interests is only an equity, hence, cannot be taken in execution under a *fi. fa.* Lewis v. Adams, 6 Leigh 320. See monographic *note* on "Executions" appended to Paine v. Tutwiler, 27 Gratt. 440.

Immaterial Whence Personalty Was Derived.—Where the husband is in possession of his wife's money in West Virginia, where they reside and where he purchases personalty, it is immaterial whether the money so paid was in fact a part of the proceeds of the real estate formally owned by the wife or whether it was derived by him from other sources. For even if, as claimed, it was the former, yet having been reduced into possession by the husband, and brought into that state during coverture, by the laws thereof it became thenceforth absolutely his own money by virtue of the marital rights and it was not competent for him to defeat his creditors by investing it in personal property in the name of his wife. Hill v. Wynn, 4 W. Va. 453.

Wife's Interest as Survivor.—Nor will the wife have any interest in the personalty on the death of the husband, except as a distributee of her husband. Graham v. Graham, 10 W. Va. 355.

(2) **In Action.**

Must Reduce Them into Possession during Coverture.—The husband is not absolutely entitled to his wife's choses in action unless he reduces them into possession during her lifetime. Dold v. Geiger, 2 Gratt. 98; Wallace v. Taliaferro, 2 Call 447; Ware v. Ware, 28 Gratt. 670; Williams v. Sloan, 75 Va. 137; White v. Gouldin, 27 Gratt. 491.

If the husband reduces the choses in action of his wife into possession during coverture, they belong to him absolutely and on his death his administrator is entitled to them as against the wife. Harcum v. Hudnall, 14 Gratt. 369; Yerby v. Lynch, 3 Gratt. 460; Haxall v. Shippen, 10 Leigh 536.

A husband had such an interest in his wife's choses in action, as to render him an incompetent witness in a suit to recover them. Murphy v. Carter, 23 Gratt. 477.

Insurance Money.—Insurance money recovered by the husband and wife during coverture from an insurance company, although arising from the destruction of realty, belongs to the husband, *jure mariti*. Haxall v. Shippen, 10 Leigh 536.

Slaves.—Under sec. 4, Act 1727, slaves are governed by the same rules as other classes of personalty with respect to the necessity for reduction into possession by the husband, when they are merely in action. Wallace v. Taliaferro, 2 Call 447.

Distributory Share.—A claim against her mother as administratrix for the proportion of the money which a married woman was entitled to receive as one of the distributees of her father's estate is a chose in action which, upon reduction into possession, belongs to her husband. Shanks v. Edmondson, 28 Gratt. 804.

Bonds.—Where a husband advances the money arising from the sale of his wife's real estate, and takes a bond therefor, payable to his wife, such bond is a chose in action subject to be reduced into possession, by the husband, but in default thereof

survives to the wife on the death of the husband. Perkins v. Clements, 1 P. & H. 141.

Character of Possession Necessary, Possession as Executor Not Sufficient.—"Possession as executor is not sufficient. Possession in his character as husband, and in right of his wife is indispensable. Such possession, if he were a different person from the executor, could not legally be without the executor's assent; but the law is the same where both characters are united in the same person. In that case, an assent or election to take as devisee, must be expressed or clearly implied. Otherwise, his possession will be considered, as in his character of executor." Wallace v. Taliaferro, 2 Call 447; Keagy v. Trout, 85 Va. 390, 7 S. E. Rep. 329; Blakey v. Newby, 6 Munf. 64; Williams v. Sloan, 75 Va. 137.

Possession as Cestui Que Trust.—To amount to a reduction into possession by the husband, he must be possessed of his wife's personalty *as husband*, a possession as *cestui que trust* is not sufficient. Robinson v. Brock, 1 H. & M. 213.

Reduction into Possession.

Generally.—The acts, to effect a reduction into possession of the wife's chose in action, must be such as to change the property in it, or something to divest the wife's right and to make that of the husband absolute; such as a judgment in an action commenced by him in his own name, or a receipt of the money or a decree that it be paid to him or applied to his use. Harcum v. Hudnall, 14 Gratt. 379; Yerby v. Lynch, 3 Gratt. 476.

Choses in Action Accruing during Coverture.—As to the choses in action, which accrue to the wife during the coverture, the unity which then exists between them, and the merger in a great degree of her separate legal existence in his, prevents her from having any continuing interest without his consent, which is however presumed during his acquiescence: and hence the necessity of his disagreement by some decisive act of separate ownership. It is in his election to prosecute an action or suit for the recovery of the chose to a judgment or decree in his own name alone, or in the joint names of himself and wife. In the former case, the wife's right by survivorship is defeated; in the latter it is not, without the further act on his part of suing out execution. Yerby v. Lynch, 3 Gratt. 474; Perkins v. Clements, 1 P. & H. 141.

Choses in Action Accruing before Coverture.—In Haxall v. Shippen, 10 Leigh 536, it was held that the recovery of judgment by husband and wife on a bond, accruing to the wife before coverture, was a sufficient reduction into possession.

Voluntary Payment to Husband.—If he does not sue, but receives payment of the bond, he also defeats her title by survivorship; and if the wife, being in possession of the bond, institutes suit on it after the death of the husband, the plea of payment to the husband by the obligor, will be a valid defence to the action. Perkins v. Clements, 1 P. & H. 141.

Execution of Bond to Husband by His Wife's Guardian.—Where a guardian, who had executed official bonds, makes a settlement with the husband of her ward, and executes her bond to him for the amount found due, it was held by a divided court, two to two, that this was a sufficient reduction into possession by the husband to vest the claim in him and defeat the wife's right of survivorship. Yerby v. Lynch, 3 Gratt. 460. STANARD, J., was of same opinion, but died before completing his opinion.

Where the guardian of the infant husband takes bonds from the administrator in satisfaction of the wife's distributive share, surrenders these to the respective obligors and takes bonds payable to himself as guardian, institutes suits, recovers judgments, and sues out executions on these, levies the executions, and only fails to make sales on account of the stay laws, this was held a sufficient reduction into possession. Ware v. Ware, 28 Gratt. 670.

Possession under Interlocutory Decree of Partition.—Where slaves were in the possession of a husband and his wife under an interlocutory decree for partition, it was held by a divided court that this was not such a reduction into possession as would give the husband title to the property. Gregory v. Marks, 1 Rand. 355.

Possession under Unconfirmed Commissioner's Report.—A widow entitled to an interest in the slaves of her deceased husband marries a second time and a suit is brought by her second husband and herself for a division of the slaves, which is made by commissioners appointed by the court, but their report was never returned nor, therefore, confirmed; the slaves remain on the plantation in possession of husband and wife and in this state of things the husband dies. *Held* (though by a divided court), that the husband acquired no right to the slaves. Gregory v. Marks, 1 Rand. 355; Taylor v. Yarbrough, 13 Gratt. 183.

Renting Out Property.—Where the husband conjointly with the guardian of another beneficiary rents out land which has been equitably converted into personalty this does not amount to a reduction into possession of the principal of such property. Harcum v. Hudnall, 14 Gratt. 369.

Receipt of Rents.—The receipt of rents from the wife's choses in action is a sufficient reduction into possession of the *rents*, and vests them absolutely in the husband. Harcum v. Hudnall, 14 Gratt. 369.

But the receipt of interest or rents by a husband upon a chose in action of the wife is not such a reduction into possession as would vest the *chose* in him and defeat the wife's right of survivorship. Harcum v. Hudnall, 14 Gratt. 369.

Deed of Adjustment Conveying Property to Husband.—A deed of adjustment, by which the interest of his wife and another distributee in realty is conveyed to the husband is a sufficient reduction into possession. Shanks v. Edmundson, 28 Gratt. 804. See title, "Wife's Equity," *infra*.

Assignment of Wife's Choses in Action.

Generally.—But the potential ownership of the husband over his wife's choses in action, may be exercised in other modes, besides the reduction of them into actual possession. Yerby v. Lynch, 3 Gratt. 474.

Thus a husband has power to sell the wife's choses in action. Taliaferro v. Taliaferro, 4 Call 93; Ware v. Ware, 28 Gratt. 670.

The interest of the wife in her father's estate after his death is such a present interest susceptible of being reduced into immediate possession as to pass by the assignment of the husband, so as to deprive the wife of her right of survivorship. Browning v. Headley, 2 Rob. 340.

Must Be for Valuable Consideration.—The assignment, to deprive the wife of her right by survivorship, must be for a *valuable consideration*. When the assignment is without consideration, if the husband dies before the chose is reduced into possession, the legal right of the wife by survivorship attaches and defeats the right of the assignee. Ware v. Ware, 28 Gratt. 670; Browning v. Headley, 2 Rob. 340.

A husband's assignment for value of his wife's legal chose in action is good against the wife

because it is equivalent to a reduction into possession. Having a right to reduce it into possession, he, in effect, does so, when he receives value for it. By selling it, he agrees to reduce it into possession for the benefit of the vendee; and a court of equity, in such a case considers that as done which is agreed to be done. Henry v. Graves, 16 Gratt. 244.

Except When Assignable at Common Law.—So far as choses in action are assignable at common law, a husband's assignment of them either for or without consideration is valid against the wife's right of survivorship, but assignments of choses in action not assignable at common law, to be valid, must be for a valuable consideration. Yerby v. Lynch, 3 Gratt. 460, 476.

Assignment Must Be Special.—The assignment, to deprive the wife of her right by survivorship, must also be special. A general assignment of the husband's estate for the benefit of creditors, an assignment in bankruptcy, or an assignment under the insolvent laws, would not defeat the wife's right to take by survivorship a present interest, capable of being reduced into possession, but not actually so reduced during the coverture. Browning v. Headley, 2 Rob. 340; Ware v. Ware, 28 Gratt. 670.

Release of Wife's Choses in Action.—A husband may release his wife's choses in action either for, or without, consideration and such release is good to bar the surviving wife. Yerby v. Lynch, 3 Gratt. 460, 475.

Disposition by Will.—A disposition by will on the part of the husband of the wife's chose in action will not avail to defeat the wife's right of survivorship. Wallace v. Taliaferro, 2 Call 447.

By Whom Reduction May Be Made, Guardian of Infant Husband.—The guardian of an infant husband has the right to reduce into possession for the husband, the choses in action of the wife. Ware v. Ware, 28 Gratt. 670.

Creditors of the Husband.—The husband's rights in the choses in action of the wife are liable to attachment at the suit of the husband's creditors. Vance v. McLaughlin, 8 Gratt. 289.

The creditors have the right to seize the earnings of the wife by proper process against the husband, before they are reduced to possession by the husband; but are liable to be defeated in such proceeding by the death of the husband before they are reduced to possession, as in such case they would survive to the wife. Bailey v. Gardner, 31 W. Va. 94, 5 S. E. Rep. 636.

The commencement of attachment proceedings by the creditors of the husband is not, in legal contemplation, equivalent to a reduction into possession by the latter of the subject sought to be charged, but creates only a lien in favor of the creditor, which is liable to be defeated by the husband's dying pending the proceeding, leaving his wife surviving him. Vance v. McLaughlin, 8 Gratt. 289.

Wife's Right of Survivorship.—On the death of the husband (the wife surviving) before the reduction to possession, the chose in action survives to the wife. Dold v. Geiger, 2 Gratt. 98; Ware v. Ware, 28 Gratt. 670; Vance v. McLaughlin, 8 Gratt. 289; Harcum v. Hudnall, 14 Gratt. 369; Beard v. Beard, 22 W. Va. 130; Perkins v. Clements, 1 P. & H. 141; May v. Boisseau, 12 Leigh 512.

A fortiori, the wife's right of survivorship will attach to the increase of slaves belonging to the wife, but born *after* the husband's death. Taylor v. Yarbrough, 13 Gratt. 183.

A slave having been lent to a husband and wife on their marriage, by the wife's father, he by his will gives the slave and her increase to his daughter for life, with remainder to her children. The husband having died a few months after the father, leaving his wife surviving him, in the absence of all proof, the court will not presume the assent of the father's executors to the legacy, so as to vest the life estate of the wife in the husband; but it will be held to survive to the wife. Livesay v. Helms, 14 Gratt. 441.

Divorce a Civil Death.—A divorce is in effect a civil death, and the right of the wife to her choses in action not reduced into possession during coverture, is placed on the same ground as if the husband had died. Browning v. Headley, 2 Rob. 340.

Husband's Rights as Administrator of His Wife.—On the death of the wife (the husband surviving), the beneficial interest therein survives to the husband as entitled to administration to the wife, and absolved from the obligation to distribute. Dold v. Geiger, 2 Gratt. 98; Harcum v. Hudnall, 14 Gratt. 369; Beard v. Beard, 22 W. Va. 130.

Where a testator bequeaths to a daughter the interest on £4,000, during her life, and at her death the interest on said sum to go to his four granddaughters equally, and at their decease, the principal and interest to be disposed of by them to their heirs; and his daughter releases to the husband of one of the granddaughters all her right to the interest on one-fourth of the said amount and the said granddaughter dies in the lifetime of the daughter, her husband, as her administrator is entitled to recover the said one-fourth interest of his wife. Goodwin v. Taylor, 2 Wash. 74.

A plaintiff suing for slaves as administrator of his wife, is not barred by a decision against him, in her lifetime, in a suit to which she was not a party; the ground of that decision having been that, under the act of limitations, the opposite party had obtained a legal title to the slaves by five years' possession commencing during the coverture; during which also the right of the wife accrued; and the husband having never had possession in his character as husband. Blakey v. Newby, 6 Munf. 64.

Administration Not Necessary.—A husband surviving his wife (or in case of his death afterwards, his executor or administrator) may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate. Chichester v. Vass, 1 Munf. 98.

Effect of Assignment after Wife's Death.—An assignment by a husband of a note belonging to his deceased wife is a violation of the rights of her personal representative and amounts to no more than an order in favor of his assignee upon her administrator, when appointed, for whatever interest he may have as sole distributee after the payment of debts and costs of administration. Commercial Bank v. Cabell, 96 Va. 552, 32 S. E. Rep. 53.

d. In Earnings of Wife.

At Law.—The principle, governing the husband's right in the wife's personalty in possession, embraces her earnings, or the products of her skill and labor, as fully and completely as any other personal estate which comes to her during coverture. The common law makes them as absolutely the property of the husband as his own earnings. Campbell v. Bowles, 30 Gratt. 662; Jones v. Reid, 12 W. Va. 350; Bailey v. Gardner, 31 W. Va. 94, 5 S. E. Rep. 636; Lanham v. Lanham, 30 W. Va. 222, 4 S. E. Rep. 273; Grant v. Sut-

ton, 90 Va. 771, 19 S. E. Rep. 784; Yates v. Law, 86 Va. 117, 9 S. E. Rep. 508.

In Equity.—Where by the husband's consent the wife earns money, with the agreement or understanding between them, that it is to be hers, and the rights of creditors do not intervene, it will, in a court of equity, be given to her, as against the devisees or distributees of the husband. Jones v. Reid, 12 W. Va. 350, 365, 29 Am. Rep. 455.

In such a suit it is only necessary to make the personal representative of the husband a party, the children are not necessary parties. Such a bill is not multifarious because it asks for an issue of *devisavit vel non*, since the latter is not within the jurisdiction of a court of equity as such; the court will proceed with the matter over which it has jurisdiction as if it were the only object of the bill. Jones v. Reid, 12 W. Va. 350.

If she desires to secure them to herself against her husband and his creditors she may do so before marriage, and in contemplation thereof, by settlement to her separate use, and she will be protected in her rights in a court of equity, and she may be thus secured, even after the marriage, but such postnuptial settlement will be no protection against the *creditors* of the husband, existing at the time of the settlement, unless it is based on a valuable consideration. Campbell v. Bowles, 30 Gratt. 662; Bailey v. Gardner, 31 W. Va. 94, 5 S. E. Rep. 636.

This rule of the common-law and chancery practice was not changed by chapter 66, Code W. Va. 1868, as to the rights of married women. Bailey v. Gardner, 31 W. Va. 94, 5 S. E. Rep. 636.

Where Wife's Labor is Applied to Her Separate Estate.—But the right of the husband to the earnings of the wife does not apply where her skill and labor are applied to her separate estate. The husband will not be entitled to the profits merely because they arise from this source. Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. Rep. 570.

e. In Wife's Expectant Interests.

In Personalty, Alienation, Assignment.—The husband has no power to give effect to any assignment of his wife's choses in action, unless circumstances so turn out as to put him in a situation which would have enabled him to reduce the *chose in action* into possession. If at the time of the assignment he is in a condition to reduce the *chose* into possession, the assignment operates immediately; if he is afterwards in a condition to reduce it into possession, the assignment will then have full effect; but if he dies before the event happens on which it may be reduced into possession, the assignment becomes altogether inoperative. Browning v. Headley, 2 Rob. 340; Dold v. Geiger, 2 Gratt. 98; Henry v. Graves, 16 Gratt. 244; Moore v. Thornton, 7 Gratt. 99.

Effect of Such an Assignment.—A deed by the husband and wife prior to the Code 1849, purporting to convey their interest in the wife's vested remainder in personalty expectant on the death of a tenant for life, made in the lifetime of both wife and life tenant, is to be regarded as a conveyance by the husband of his contingent interest in his wife's vested remainder which will become absolute in the assignee when and as it would have become absolute in the husband if he had made no assignment. As such an assignment it is valid, even though voluntary. Henry v. Graves, 16 Gratt. 244.

Disposal of Will.—A husband dying in the lifetime of his wife has not a right to devise away slaves, to which she is entitled in remainder or reversion, the particular estate not having expired. Upshaw v. Upshaw, 2 H. & M. 381; Taylor v. Yarbrough, 13 Gratt. 183.

In such case, however, if the husband does devise such slaves away from the wife, and devises other property to herself for life with remainder over to other persons in fee simple: and she takes possession of the estate devised to her by him, holds it for many years, and then disposes of part of it to those entitled in remainder, in consideration of their enlarging her interest in the residue to a fee simple: she thereby makes her election to accept the provision made for her in the will, and precludes herself from holding the slaves also; these circumstances together with her taking possession of these slaves, being sufficient evidence of her having such knowledge of the two funds as is requisite to make such election obligatory. Upshaw v. Upshaw, 2 H. & M. 381.

Wife's Right of Survivorship.—Where a wife has a vested remainder in personal estate expectant on the death of a tenant for life, and both the wife and tenant for life outlive the husband, the wife is entitled, by right of survivorship, to the interest in remainder, not only against the representatives and general assignees of the husband, but even against the particular assignee for valuable consideration, and this is as true of slaves as of other personalty. Henry v. Graves, 16 Gratt. 244; Moorman v. Smoot, 28 Gratt. 80; Moore v. Thornton, 7 Gratt. 99; Taylor v. Yarbrough, 13 Gratt. 183; Street v. Tinsley, 2 P. & H. 612.

In Upshaw v. Upshaw, 2 H. & M. 381, it was said obiter that a husband could sell his, and his wife's interest in her remainder or reversion in personalty for a *valuable* consideration, during the continuance of the particular estate. But this was overruled in Henry v. Graves, 16 Gratt. 244, as far as it held such an assignment good against the wife's right of survivorship.

When Husband Outlives Life Tenant.—Where the husband and the life tenant join in a *voluntary* assignment of a chose in action which belongs to the wife in remainder, though the life tenant die first, yet if the husband dies before the chose is reduced into possession by the alienee, it will survive to the wife. Hayes v. Ewell, 4 Gratt. 11. See title, "Choses in Action," *supra*.

Husband's Right of Survivorship.—A feme sole, being entitled to slaves in remainder or reversion and afterwards marrying and dying before the determination of the particular estate, the right vests in the husband absolutely without any administration. Dade v. Alexander, 1 Wash. 30; Drummond v. Sneed, 2 Call 491; Brent v. Washington, 18 Gratt. 526. The same is true, where the wife's interest in remainder accrues during coverture. Wade v. Boxley, 5 Leigh 442.

A husband who has survived his wife and has qualified as her administrator, may unite with the other joint owners of the reversion of a slave for an injury done to him; and the description of him in the commencement of the declaration as administrator of his deceased wife, will be considered as mere *descriptio personæ*; the declaration stating the interest in the property as his, and the injury as done to his property. Harvey v. Skipwith, 16 Gratt. 393.

Life Tenant Has No Power to Convert into Realty.—A life tenant has no right to convert personalty belonging to a married woman in remainder into realty so as to exclude the marital rights of the husband. Haxall v. Shippen, 10 Leigh 536.

Rights of Alienee.—But where a charge is imposed on the interest of a wife under a will, the alienee of the wife's interest, if he is deprived of the wife's *reversionary* interest by her right of survivorship, is entitled to be relieved of a proportionate part of the charge on the whole interest alienee to him. Moore v. Thornton, 7 Gratt. 99.

In Realty.—A husband has no interest in his wife's expectant interest in realty as long as the particular tenant is living. Stroud v. Connelly, 33 Gratt. 217.

f. Effect of Divorce.—The act of February 17th, 1827, Sup. Rev. Code, p. 222, entitled "An act to prescribe the method of proceeding in suits, and on petition for divorces," which empowers the chancery court "to restore to the injured party, as far as practicable, the rights of property conferred by the marriage on the other," does not authorize the court to interfere with, or defeat the vested rights of creditors, or *bona fide* alienees, or incumbrancers, which attached to the property prior to the institution of such proceedings for divorce, and when the property was the absolute property of the husband. Jennings v. Montague, 2 Gratt. 350.

An attachment against the effects of the husband as an absconding debtor, levied before the institution of a suit by the wife for a divorce, entitled the attaching creditor to be satisfied out of the effects, in preference to the claim of the wife. Jennings v. Montague, 2 Gratt. 350.

A marriage within the prohibited degrees having been declared null by a sentence of the court, the husband has no interest in the property which was the wife's at the time of the marriage; and his creditors cannot subject it to the payment of his debts. Kelly v. Scott, 5 Gratt. 479.

2. OF WIFE.

a. In Husband's Realty.—See monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

As Heirs to the Husband.—The wife is the only heir to the husband in the absence of blood relations. Code Va. 1887, sec. 2548, sec. 10; Hannon v. Hounihan, 85 Va. 429, 12 S. E. Rep. 157.

Such Possession Not Adverse.—Where a wife remains in possession of her husband's property, claiming as heir to her husband in default of blood relations of the husband, such possession will not be deemed adverse to the claims of such blood relations of the husband, if it turn out that any such exist. Hannon v. Hounihan, 85 Va. 429, 12 S. E. Rep. 157.

b. In Husband's Personalty.

As Distributee.—See Code Va., sec. 2557, sec. 4.

Court Should Protect Widow's Interests.—In decreeing a sale at the suit of the heirs of a decedent's estate real and personal, except the widow's share of the slaves, the court should protect and secure to her, her interest in the proceeds of the sale of the other personal property. White v. White, 16 Gratt. 264.

Widow Not a Purchaser for Value.—A widow having received her distributable share of the personal estate of her husband, is not a purchaser for value, so as to be entitled to set up the defence of purchaser for value without notice. Snoddy v. Haskins, 12 Gratt. 363.

Widow's Election.—Testator by his will, gives real and personal estate to his wife, and leaves part of his personal estate undisposed of; the wife does not renounce, but accepts, the provision made for her by the will. *Held*, she is excluded, by the statute, 1 Rev. Code, ch. 104, sec. 26, from any share of her husband's personal estate undisposed of by his will. Dupree v. Cary, 6 Leigh 36; Thornton v. Winston, 4 Leigh 152.

The husband by his will gave to his wife certain personal estate absolutely, and a tract of land for life; but she after his death renounced the will in the mode prescribed by the statute. *Held*, she is not entitled to take under the will what is thereby given to her; but the property bequeathed to her is to be applied to compensate the legatees who are disappointed by her taking her distributable share of the personal estate. Findley v. Findley, 11 Gratt. 434.

By an agreement in contemplation of marriage, the intended husband bound his estate to pay to the intended wife certain sums of money, if she survived him; which were to be in bar of and in full compensation for her dower. *Held*, this agreement barred her of her dower in her husband's real estate; but does not deprive her of her distributable share of his personal estate. Findley v. Findley, 11 Gratt. 434.

Barred by Irrevocable Alienation by Husband in His Lifetime.—A wife has not such an interest in that portion of the personal estate of her husband, to which she may be entitled in the event of his dying intestate, or leaving a will which she may renounce, as that an absolute and irrevocable, though merely voluntary, deed thereof, executed by him to his children by a former marriage, can be considered a fraud on her rights, or be set aside at her instance. Lightfoot v. Colgin, 5 Munf. 42.

The conveyance by a husband by which he parts absolutely with an interest in personal property, though it is not to take effect until his death, and although he retains the power to sell and reinvest or account, and also the power to reappoint among specified objects, is valid to bar the wife of her distributable share therein, BALDWIN, J., saying: "Two circumstances must concur to render the gift testamentary in its nature. The one is that it is not to be substantially effective until his death; and the other is, that the husband does not divest himself of the capacity to recall it, and so resume to himself, or his estate, the ownership granted." Gentry v. Bailey, 6 Gratt. 594.

Advancements Not Brought into Hotchpot for Widow.—Advancements to children are not brought into hotchpot for the benefit of the widow; she is only entitled to share in the estate of the intestate of which he died possessed. Knight v. Oliver, 13 Gratt. 33.

Widow's Right to Administration.—For wife's right to administration on her husband's estate, see monographic *note* on "Executors and Administrators."

c. Wife's Equity.

Generally.—The rights of the wife lying in suit, for the recovery of the possession of which, the remedy is of equitable or ecclesiastical jurisdiction, come under a different category. When such rights are sought to be enforced by the husband, on a claim in equity on behalf of the wife, that court raises up and enforces an equity in her favor, which sustains a title in her to a reasonable provision out of the property in action, and that court will withdraw from the marital power of the husband a reasonable portion of the property in action, and dedicate it to the wife and her children. This right to a settlement is the creation of the court of equity, and is called the wife's equity. Dold v. Geiger, 2 Gratt. 98; Browning v. Headley, 2 Rob. 340; James v. Gibbs, 1 P. & H. 277; Poindexter v. Jeffries, 15 Gratt. 363;

White v. Gouldin, 27 Gratt. 491; Dabney v. Kennedy, 7 Gratt. 317.

The wife's equity is so substantial an interest that it will constitute a valuable consideration for a post-nuptial settlement by the husband upon her (made while the equity exists), which will be sustained against his creditors, to the extent of the equity, by a court of chancery. Poindexter v. Jeffries, 15 Gratt. 363; Smith v. Bradford, 76 Va. 758; Walden v. Walden, 33 Gratt. 88.

Jurisdiction of Equity to Enforce the Right.—The equity of the wife will be administered to her, not only in a suit in which the husband or his assignee is plaintiff, seeking the aid of a court of equity to recover her property; but generally also, in a suit brought by her or her trustee for the purpose of asserting it. This was at one time doubted; it being supposed that the jurisdiction rested solely on the ground that he who asks equity should do equity; but it has long since been firmly established. There seems to be one exception to this general rule, and that is, where the property is in its nature legal, but the aid of a court of equity is invoked for its recovery on some collateral ground of jurisdiction, as, in the case of a mortgage debt recovered in a foreclosure suit. There, the wife's equity attaches solely on the ground that he who asks equity must do equity, and therefore cannot be asserted in a suit brought by her. Poindexter v. Jeffries, 15 Gratt. 363; White v. Gouldin, 27 Gratt. 491. Or where she files a petition in a pending suit. Sherrard v. Carlisle, 1 P. & H. 12.

Purely Legal Claims.—If the claim be recoverable at law and the aid of a court of equity be not actually invoked for its recovery, the wife's equity will not attach. Poindexter v. Jeffries, 15 Gratt. 363; Ware v. Ware, 28 Gratt. 670.

But in Dold v. Geiger, 2 Gratt. 98, the learned judge suggests that *under particular circumstances*, equity might interpose to prevent the husband from obtaining possession even by *legal* remedies, until he made some reasonable settlement.

Property Already Reduced into Possession by Husband.—Where the husband has already reduced the property of the wife whether legal or equitable, into possession, equity will not interfere. Dold v. Geiger, 2 Gratt. 98; Gregory v. Marks, 1 Rand. 355; James v. Gibbs, 1 P. & H. 277; Poindexter v. Jeffries, 15 Gratt. 363. A reduction by his assignee has the same effect. Williams v. Sloan, 75 Va. 137.

Where real estate descends on a married woman from her father who, at his death was possessed thereof and had the legal title thereto, the legal title devolves immediately on the wife and her husband, and, there being no occasion to go into equity to obtain possession, the wife's equity is cut off, and no necessity for a recourse to equity arising afterwards, for partition or any other purpose, will revive the wife's right to settlement. Poindexter v. Jeffries, 15 Gratt. 363.

What Amounts to Reduction into Possession.

General Deed of Assignment.—A general assignment by the husband for the benefit of creditors is not such a reduction into possession of the wife's equitable choses in action as to defeat the wife's equity to a settlement. The court declined to express an opinion as to the effect of the assignment of a legal claim. Williams v. Sloan, 75 Va. 137.

The execution of such a deed by the husband only releases the parties from further *personal* liability, and does not release the chose in action itself, so does not amount to a reduction of the chose into possession. Williams v. Sloan, 75 Va. 137.

Where the trustees in such a deed are the trustees of the husband as well as of the debtor in the chose in action, it will not amount to a reduction into possession by the husband, unless there is some unequivocal act on the part of the trustees showing an intention to hold the fund as trustees for the husband instead of as trustees for the debtor in the chose. Williams v. Sloan, 75 Va. 137.

Unexecuted Award.—An award though entered as an *ex parte* decree of court, which has not been executed and which leaves matters *in statu quo*, is not a reduction into possession and will not cut off the wife's equity, especially where the wife never consented to the submission or ever had notice of it. White v. Gouldin, 27 Gratt. 491. See title, "Choses in Action," *supra*.

Subsequent Recourse to Equity.—In James v. Gibbs, 1 P. & H. 277, it was held that if it became necessary to invoke the aid of a court of equity for a sale in order to a partition of real estate, the equity of a feme covert to a settlement out of the proceeds of the sale of her interest in such estate is superior to the claims of a grantee, or of a judgment creditor, of the husband, and she is entitled to the entire proceeds, if they do not exceed an adequate settlement for her. But this case is overruled by that of Poindexter v. Jeffries, 15 Gratt. 363, which holds that, where the husband's title is once complete, no subsequent necessity for recourse to equity for partition or any other purpose, will revive the wife's equity to a settlement.

Settlement Voluntarily Made by Husband.—It is settled law in Virginia that an insolvent husband may make a valid settlement upon his wife of his uncollected share of an estate of which he, in right of his wife, is a distributee. Smith v. Bradford, 76 Va. 758; Poindexter v. Jeffries, 15 Gratt. 363.

A settlement by the husband on the wife as her equitable separate estate will be sustained when it does not exceed in value the amount for which she is liable as surety for her husband. Filler v. Tyler, 91 Va. 458, 22 S. E. Rep. 235.

If a reasonable provision has already been made for the wife, her right to a settlement will be barred. Gregory v. Marks, 1 Rand. 355; Browning v. Headley, 2 Rob. 340; Poindexter v. Jeffries, 15 Gratt. 363.

In Penn v. Spencer, 17 Gratt. 85, a full settlement was made upon the wife of an insolvent husband, out of her brother's estate though a partial provision had been previously made for her by her father's will, where that objection was held to have been waived by the other side.

When Wife May Assert Her Claim.—It is sufficient if the wife assert her claim to a settlement out of her distributive share of her father's estate before it is actually recovered by her husband, though her husband recover it before the decree sustaining her settlement. Poindexter v. Jeffries, 15 Gratt. 363.

Although, in a suit for partition, no provision was in fact made for a feme covert in an interlocutory decree for a sale, but the fund was retained within the control of the court, in a subsequent suit in another court by the judgment creditors of the husband, to subject the husband's interest in the feme's estate to the payment of their claims, the court will consider what would have been a proper settlement for the feme, and regarding such settlement made, as ought to have been made, it will decree the balance only of the funds to the grantee and the judg-

ment creditors of the husband. James v. Gibbs, 1 P. & H. 277.

Amount of Settlement.—The true rule as to the amount of the settlement seems to be that the settlement should be reasonable and adequate and may be a part or the whole of the property, according to the sound discretion of the court upon all the circumstances of the case. The usual practice is to refer to a commissioner to enquire and report what would be a reasonable and adequate settlement. But the court may decide the matter for itself, if there be sufficient material in the record for the purpose; and if it plainly appear that the whole property subject to the settlement is not more than adequate, a reference is of course unnecessary. Poindexter v. Jeffries, 15 Gratt. 363; White v. Gouldin, 27 Gratt. 491.

In James v. Gibbs, 1 P. & H. 277, where the wife's realty was only worth $2,400 the *whole* annual interest, $145 was settled on her. See also, Browning v. Headley, 2 Rob. 340; Williams v. Sloan, 75 Va. 137; Sherrard v Carlisle, 1 P. & H. 12.

Wife's Real Estate.—The husband's interest in his wife's real estate is as much subject to his wife's equity to a settlement as his interest in her personal estate. James v. Gibbs, 1 P. & H. 277. See also, Poindexter v. Jeffries, 15 Gratt. 363.

When Settlement Should Take Effect.—As to *when* the provision for the wife should take effect; this, also, is a matter of discretion for the court upon all the circumstances. If her husband lives with and supports her, it may be made to take effect when he ceases to do so or at his death, but if he has deserted or ill-treated her or is insolvent or is unable or fails to support her, it will be directed to commence immediately. Poindexter v. Jeffries, 15 Gratt. 363.

The interest and profits arising from property and *choses in action*, to which a wife who lives with her husband and is supported by him, becomes entitled during coverture, belong to the husband, free from the equity of the wife to a settlement, if the same are recovered during coverture. Dold v. Geiger, 2 Gratt. 98.

Assignee of Husband Occupies Same Position as Husband.—Even though the assignment be special and for valuable consideration, if the assignee has not reduced the chose in action into possession, he occupies the same position as the husband, and the wife is entitled to her equitable settlement out of the chose. Williams v. Sloan, 75 Va. 137; Browning v. Headley, 2 Rob. 340; Gregory v. Marks, 1 Rand. 355.

Rights of Children.—Such settlement is as much for the benefit of the children as the wife, and when she has obtained a decree, her children, after her death, are entitled to the benefit of the decree and may enforce it by supplemental bill. Sherrard v. Carlisle, 1 P. & H. 12.

Rights of Husband's Creditors.—The interest accruing, pending the suit of the husband's creditors to subject his interest in the feme's estate, on the fund final decreed to her for a settlement, is not liable to the claims of his creditors, for they were not entitled to the fund itself, and cannot, therefore, be entitled to its legal or natural increase. The court distinguished this case from that of Dold v. Geiger, 2 Gratt. 98, on the ground that the profits which were subjected in that case consisted of rents and profits, interest, etc., which accrued during coverture and to which the marital rights of the husband had already attached and were an excess over and above a reasonable settlement on the wife. James v. Gibbs, 1 P. & H. 277.

The husband's creditors, however, are entitled to any surplus of the annual profits accruing from the wife's realty, remaining after a reasonable settlement has been made on the wife. James v. Gibbs, 1 P. & H. 277.

C. FRAUD ON MARITAL RIGHTS.

Generally.—Deeds executed by a woman just before her marriage, giving away her property without the knowledge of her intended husband, are fraudulent and void as to the husband. Waller v. Armistead, 2 Leigh 11.

Fraudulent Intent Essential.—But a *bona fide* sale by a woman of her property before marriage, will be upheld against her husband where there is no fraud intended on the husband's rights even though the husband did not know of the conveyance. Crump v. Dudley, 3 Call 507.

There is no question that before the marriage the husband can have no right to any portion of his wife's property. She is at liberty to dispose of her fortune in such manner as she pleases, provided it is done with proper motives, and without an intention to deceive her intended husband. The equity which arises in cases of this nature depends upon the peculiar circumstances of each case, as bearing upon the question whether the facts proved do or do not amount to sufficient evidence of fraud practiced on the husband. Gregory v. Winston, 23 Gratt. 102.

Parol declarations of a grantor previous to the execution of a deed, and at the very moment of executing it, are admissible to explain the intention with which it was made. Land v. Jeffries, 5 Rand. 211.

Knowledge of Husband.—In Fletcher v. Ashley, 6 Gratt. 332, a deed executed by a woman a few days before her marriage, to secure a debt due her daughter by a former marriage, was held valid, since it did not appear that it was executed with intent to defraud the husband of his marital rights. BROOK, J., said, however, that if it had not appeared that he knew of the transaction, it would be voidable by the husband.

But in Gregory v. Winston, 23 Gratt. 102, it was held that an obligation founded on a valuable consideration, executed pending a treaty for marriage, could not be set aside merely because it was concealed from the husband.

Voluntary Settlements.—Although the settlement is voluntary and not disclosed to the intended husband, it is not, therefore, necessarily fraudulent. The courts will consider the nature of the provision, the situation of the husband in point of pecuniary means, and any other facts which tend to show that no fraud was intended. Gregory v. Winston, 23 Gratt. 102.

Treaty of Marriage Must Be Pending.—It is well settled, that the equity in favor of the husband does not arise, unless it can be clearly made out that at the time of the conveyance of her property by the wife there was an engagement of marriage between them.

So where the disposition of her property by the wife is made in pursuance of an agreement entered into before any marriage was definitely contemplated, all presumption of fraud is negatived. Gregory v. Winston, 23 Gratt. 112.

Not Void as to Creditors of Husband.—Such a conveyance is not void as to creditors of the husband either by the registration act if not recorded, or by the statutes of fraudulent conveyances, since these only apply to creditors of the grantor.

Therefore, where a woman about to be married makes a conveyance of her personal property to a third person, with the privity and approbation of her intended husband, the marriage takes place a few minutes after the conveyance, and the husband takes possession of the property after the marriage; the property thus conveyed will not be subject to the husband's creditors, as his possession after marriage was not that of his wife (she not being *sui juris*), and her short possession between the time of the conveyance and that of the marriage, not being sufficient, or of a nature to render the deed fraudulent. *Dissentiente*, GREEN, J. Land v. Jeffries, 5 Rand. 211.

D. JOINT OWNERSHIP OF PROPERTY.

1. REALTY.

Tenancies by Entireties.—An estate given to husband and wife is not a joint tenancy, and therefore not affected by the Virginia Act of Assembly, concerning joint rights and obligations. In such an estate, each party takes the entirety, and the survivor takes the whole, not by survivorship, but by virtue of the original conveyance. It has the same effect as if the land had been given to them during the lives of both and after the death of either, to the survivor alone, nor can this interest be severed by any act of the husband or wife or both of them. Norman v. Cunningham, 5 Gratt. 63; Thornton v. Thornton, 3 Rand. 179.

This was the law until the Code of 1849 took effect on July 1st, 1850. Dooley v. Baynes, 86 Va. 644, 10 S. E. Rep. 974; Farmers' Bank v. Corder, 32 W. Va. 233, 9 S. E. Rep. 220.

In Farmers' Bank v. Corder, *supra*, the court held that the husband was entitled to a life estate in such property, but it is error to decree a sale of the husband's interest, as an undivided half in fee simple at the suit of a creditor of the husband, though the court seemed to incline to the opinion that the interest of the husband, such as it was, might be subjected.

If the husband alien it for value and without notice, the heirs will be entitled to compensation from his personal representatives for its value at the time of husband's death exclusive of improvements made by purchasers. Affirmed by a divided court in Norman v. Cunningham, 5 Gratt. 63.

But where the wife was originally entitled to a moiety, and the husband having acquired the right to the other moiety, takes a patent to himself and wife jointly, on his wife's death, equity will hold him a *trustee* for his wife's heirs as to her moiety. Norman v. Cunningham, 5 Gratt. 63. See also, Countz v. Geiger, 1 Call 190.

2. IN PERSONALTY.—Where a father in consideration of love and affection for his daughter, and of one dollar, to him in hand paid by her and her husband, executes a deed of personalty to his daughter for the use of herself and husband, the conveyance carries a joint estate to husband and wife, and the husband has the right to dispose of it absolutely, after the same has been reduced into his possession, so that a conveyance by the husband and wife, though void as to the wife for lack of privy examination, will still pass the property as the sole deed of the husband. Cleland v. Watson, 10 Gratt. 159.

Where husband and wife join in a deed conveying the wife's realty to a trustee upon trust to sell the land and hold the proceeds for the use and benefit of the husband and wife, by the doctrine of conversion the land is considered to be converted into personalty, and in its new character the equitable right to it is conferred upon husband and wife jointly, the husband may alien or encumber it without the concurrence of the wife and, if he survives her, the whole interest becomes his absolute property, and the wife's heirs at law are excluded. Siter v. McClanachan, 2 Gratt. 280; Pratt v. Taliaferro, 3 Leigh 419.

E. TRANSACTIONS BETWEEN HUSBAND AND WIFE.

1. CONTRACTS AND CONVEYANCES AT COMMON LAW.—At common law, a married woman could not contract with her husband on account of the legal unity of husband and wife. Alexander v. Alexander, 85 Va. 358, 7 S. E. Rep. 335; McKenzie v. Railroad, 27 W. Va. 306.

Good in Equity—Although contracts made directly between husband and wife are void at common law, because the common law regards them as one person, yet in equity they may contract with, and convey to each other, though not so freely as third persons, and such gifts, sales, and conveyances are good, between husband and wife, and against all persons claiming under them. Robinson v. Woodford, 37 W. Va. 377, 16 S. E. Rep. 602; McKenzie v. Railroad Co., 27 W. Va. 306; Cosner v. McCrum, 40 W. Va. 339, 21 S. E. Rep. 739; Farmers' Bank v. Corder, 32 W. Va. 233, 9 S. E. Rep. 220; Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780; Roseberry v. Roseberry, 27 W. Va. 759.

Against Whom.—If the conveyance was founded upon a valuable consideration equity would enforce it in favor of the wife even against the creditors of the husband, otherwise it would only do so against the husband. McKenzie v. Railroad Co., 27 W. Va. 306.

Not Altered by Code 1868 in West Virginia.—Chapter 66, Code W. Va. 1868, was intended as an enabling act and not to impose further disabilities on married women. It was designed to empower them to take property from persons other than their husbands and hold it as their separate estate, a power they had not before; but it leaves conveyances directly from the husband as they were before, *i. e.*, invalid at law, but good in equity. Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. Rep. 410; Robinson v. Woodford, 37 W. Va. 377, 16 S. E. Rep. 602; McKenzie v. Railroad Co., 27 W. Va. 306.

May Contract or Convey Indirectly.—But they may contract with and convey to each other indirectly by having a third person intervene. These indirect conveyances are still valid under enabling statutes of West Virginia. Code W. Va., ch. 66; McKenzie v. Railroad Co., 27 W. Va. 306.

A conveyance by a husband and wife of the wife's real estate, to a third person, for the purpose of having the same conveyed to the husband, and thus transferring the estate to him, will be sustained, where no fraud has been practiced upon the wife. Shepperson v. Shepperson, 2 Gratt. 501.

A deed made by husband and wife, of the wife's land, to a trustee, which gives an estate for life to the husband will pass the estate, although no consideration be expressed therein, particularly, if the verdict find that it was for the purpose of settling it in the wife's family. Ware v. Cary, 2 Call 263.

Statute Authorizing Conveyances by a Married Women Not Applicable.—The statute prescribing the mode by which the interests of femes covert in real estate may be divested, applies to conveyances executed by the husband and wife to third persons, and not to deeds executed by the wife to the husband, or for his benefit. It is the union of the

husband and wife as grantors that makes the instrument operative. Such a deed can derive no validity from the privy examination of the wife. Switzer v. Switzer, 26 Gratt. 574.

Disability Removed in Virginia by Married Woman's Act.—But this idea of legal unity was severed by the Married Woman's Act of April 4, 1877, so that she may now contract with him or any one else. Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335.

Recompense for the Husband's Labor on Wife's Separate Estate.—The husband can recover for the use of his teams in cultivating his wife's farm, the crops on which are her separate estate, even in the absence of an express contract, if it sufficiently appears that he expected to be remunerated in some way. Browning v. Browning (Va.), 36 S. E. Rep. 108.

Not Changed by Code 1868 in West Virginia.—The common-law rule as to the disability of a married woman to contract with her husband has not been altered by ch. 66, Code W. Va. 1868, so that a single bill executed by a husband to his wife is void at law, whatever her rights in equity. Roseberry v. Roseberry, 27 W. Va. 759.

Confession of Judgment between Husband and Wife.—A judgment confessed by a husband in favor of his wife, free from fraud, for a just debt due from him to her on account of her separate estate, will not be held void in a court of equity at the instance of his creditors, but will be a lien on his land. Bennett v. Bennett, 37 W. Va. 396, 16 S. E. Rep. 638.

Subsequent Marriage Will Not Affect an Existing Debt between Contracting Parties.—Where the prospective husband is indebted to his prospective wife, their subsequent marriage, if it took place since April 1, 1869, will not affect the status of the debt. It will still be a good and valid debt. Cale v. Shaw, 33 W. Va. 299, 10 S. E. Rep. 637.

Effect of an Agreement for Separation.—An agreement for a separation does not relieve the wife from any of the ordinary disabilities of coverture, nor has it any other legal force and effect than the obligation contracted by the husband with trustees to provide for the maintenance of the wife. Dooley v. Baynes, 86 Va. 644, 10 S. E. Rep. 974; Switzer v. Switzer, 26 Gratt. 574.

Leaving out of consideration the question whether a deed of separation between husband and wife is valid, such a deed by which the wife releases the husband from all obligation for her support, and vests in him all her property, for a totally inadequate consideration, is void. Switzer v. Switzer, 26 Gratt. 574.

When a Contract Will Be Sustained.—A contract between a husband and wife in an agreement for a separation, cannot be sustained in any case in which it does not clearly appear, that in the negotiation which preceded the agreement, as well as at the time of executing the same, the wife was in a position in which she could act and did act, not only with perfect freedom, but with a full knowledge and appreciation of all the circumstances of her situation, and of her individual and marital rights; and the contract in itself must be fair and just, wholly free from exception, and such as a court of equity might have imposed upon the parties in a case in which their persons and their property had properly fallen under its jurisdiction and control. Switzer v. Switzer, 26 Gratt. 575.

By deed of settlement before marriage, the wife's estate is conveyed to the use of the husband during the joint lives of husband and wife, and thereafter to be at her sole disposal; and the husband's estate, from and after his death, is conveyed to the use of the wife for her life; after the marriage, the husband and wife agree upon a separation, and that each shall relinquish all claim upon the estate of the other; they separate accordingly, and the husband conveys to the wife's trustee all his interest in her estate under the deed of settlement; the wife retains possession of the estate and takes the profits until the husband's death, a period of 14 years, the annual value being greater than that of the husband's own estate; after the husband's death, the wife files a bill in chancery against the devisee of his estate, for an account of the rents and profits, which she claims as tenant for life under the marriage settlement. *Held*, the claim cannot be allowed in equity. Fadeley v. Weatherby, 8 Leigh 29.

Invalidity Extends to the Children—A deed invalid as to the wife, is invalid as to the children. The disability, the constraint operating on the wife, and the inadequacy of the consideration, necessarily extend to them. Switzer v. Switzer, 26 Gratt. 575.

2. GIFTS.

Valid in Equity.—A gift of bonds by the husband to the wife, while void at law, will be valid in equity, when perfected by delivery and not unreasonable in its provisions, nor in conflict with the claims of creditors, being founded on a meritorious consideration. Fox v. Jones, 1 W. Va. 205.

Also by Code 1891 in West Virginia.—Under section 2, ch. 66, of the Code 1891, a married woman could acquire property by gift from her husband, in the same manner and to the same extent as if she were a feme sole, if there were no existing creditors; but by sec. 1, ch. 71, the gift must be by deed since possession at the place of residence of donor and donee, when they reside together, is insufficient. Good v. Good, 39 W. Va. 357, 19 S. E. Rep. 382.

Altered by Acts 1893.—This section has been amended by sec. 3, ch. 3, Acts 1893, so as to restore the wife's former incapacity to take by gift from her husband. Good v. Good, 39 W. Va. 357, 19 S. E. Rep. 382.

3. HUSBAND AS AGENT OF WIFE.—Where the husband transacts business for his wife as her agent and executes a note for her as her agent, her separate estate will be liable. Camden v. Hiteshew, 23 W. Va. 236.

Where the husband acts as the agent of his wife in purchasing land at a tax sale, and procuring the deed, etc., he will be considered the agent of the wife to receive the redemption money from the owner of the land, so that a refusal to receive it will authorize the owner to pay the money to the clerk of the county court, Danser v. Johnsons, 25 W. Va. 380.

Where property is conveyed to a trustee to hold the property and its issues to the sole and separate use of a married woman, as though she were a feme sole and to the use and benefit of her issue, although the husband is the agent of his wife and children in general, as to such property he is not so, and he cannot rent or otherwise dispose of the property, nor will his lessee acquire any right of possession from such a lease. Pannill v. Coles, 81 Va. 380.

As to Separate Estate.—If there is not established a want of *bona fides*, her business may be done through her husband as her agent; and all accretions, accumulations, or appreciation in the value of her separate estate resulting from handling or exchanging the same, enure to the benefit of the wife, without regard to the question of coverture. He was her

agent, and "*qui facit per alium facit per se.*" The law of agency is not changed by reason of the marital relation, and it follows that the agent cannot in the execution of his duties as such, obtain any tangible interest in the property in his charge. Miller v. Peck, 18 W. Va. 75; Camden v. Hiteshew, 23 W. Va. 236; Robinson v. Neill, 34 W. Va. 128, 11 S. E. Rep. 999; Atwood v. Dolan, 34 W. Va. 563, 12 S. E. Rep. 688.

III. MARRIAGE SETTLEMENTS.

A. ANTENUPTIAL.

1. AS BAR TO MARITAL RIGHTS.—The rights of a husband to the property of his intended wife, may be intercepted by his agreement to that effect. And where by express contract before, and in contemplation of marriage, for which the marriage is a sufficient consideration, he agrees to surrender his right to the enjoyment of the property during the coverture, and his right to take as survivor, there remains nothing to which his marital rights can attach, during the coverture, or after the death of the wife. In such case the wife is to all intents to be regarded as a feme sole in respect to such property; and there is no necessity that the marriage contract or settlement should limit the property to her next of kin upon her failure to appoint; but it will pass as if the wife died *sole* and intestate. Charles v. Charles, 8 Gratt. 486, 56 Am. Dec. 155; Robinson v. Brock, 1 H. & M. 218.

If the husband has relinquished his marital rights to his wife's property, he is not entitled to administration upon her estate. Charles v. Charles, 8 Gratt. 486, 56 Am. Dec. 155.

By a deed of marriage settlement, personal property of the wife is conveyed to the husband for the exclusive benefit of the wife and her children during her life, and at her death, of her issue, if any of them be living; and it is provided that in the event of the wife's dying without issue, the property shall be distributed in the same manner as if the deed had not been made. Upon the death of the husband without children (the wife still living), a creditor of the husband, at whose suit the latter took the oath of insolvency, claims that the husband has an interest in the property, which may be charged in the event of the wife's dying without issue. *Held*, the conveyance to the husband was merely in the character of trustee, and its effect was to intercept the marital rights of the husband, and preclude him from all beneficial interest during the existence of the trust; that the provision for the event of the wife's dying without issue looked not to the state of things existing at the time of the marriage, but to such as should exist at the death of the wife; that the purpose was in such event to divest the legal title conveyed to the husband as trustee, and let the personal estate stand upon the same footing as any other personal chattels of a wife not reduced into possession by the husband during the coverture; that if the husband had survived the wife, he would have had a right to administer upon her personal estate, and hold the same free from distribution; but in the event that actually occurred, of the survivorship of the wife, the husband at no time acquired any individual ownership of the subject. Matthews v. Woodson, 2 Rob. 601.

Mother's Dower Not Barred, Though She Is One of the Trustees.—The real and personal property of an intestate being undivided between his widow (who was also administratrix), and his only child, a daughter, and the marriage of the latter being about to be solemnized, a deed of settlement by the daughter and her intended husband was executed, conveying to the trustees (of whom the mother was one), certain tracts of land by metes and bounds, and slaves by name, describing them as the property of the daughter; the same being, in fact, all the lands and slaves of which the intestate died seised and possessed. It was determined that the mother's right to dower of the lands, and thirds of the personal estate, of the intestate, was not relinquished by her being a party to this deed. Wilcox v. Hubard, 4 Munf. 346.

Not Barred to a Greater Extent than Intention Plainly Requires.—But the husband will never be deprived of his marital rights to a greater extent than the terms of the deed clearly require. Mitchell v. Moore, 16 Gratt. 275; Pickett v. Chilton, 5 Munf. 467; Coatney v. Hopkins, 14 W. Va. 338.

The husband, on the marriage, being a purchaser for a valuable consideration, cannot be deprived of any of his legal rights, accruing by the marriage; except such as (according to a just and liberal construction of the articles) he must be understood and intended to have given up; if, then, there be any chasm in the articles, whereby the legal rights of the husband may, in certain events, interpose between the uses declared by them, a court of equity, in directing the settlement, ought to have regard to those legal rights, so as to preserve to the husband the enjoyment thereof, on the happening of such events. And the same construction ought to be made, in relation to the wife's legal rights, either accruing on the marriage, or existing antecedent thereto, and independent of it. Tabb v. Archer, 3 H. & M. 399.

A marriage settlement which provides that the wife shall have a separate estate in all her property and may dispose of it in any manner she pleases, will not deprive the husband of his interest in her separate personal estate as administrator and sole distributee, in the event of her dying childless and without disposing of her separate estate, Code of W. Va. 1899, ch. 78, sec. 9, since there is nothing which shows clearly that he intended, and agreed, expressly or by necessary implication, that he would surrender such interest. Beard v. Beard, 22 W. Va. 130.

A deed of marriage settlement that provides that the husband shall take the profits of the trust subject during coverture, and if the wife survive, she shall have them, and if she dies first, giving her a power of appointment, but making no provision for her failure to appoint, it was held that in default of her appointment, the marital rights of her husband attached. Mitchell v. Moore, 16 Gratt. 275; Pickett v. Chilton, 5 Munf. 467.

2. MARRIAGE ARTICLES.—Marriage articles are considered as the heads or minutes, only, of an agreement entered into between the parties, upon a valuable consideration (the marriage), and being in their nature executory, ought to be construed and moulded, in equity, according to the intention of the parties at the time of concluding them. And equity will totally disregard the *form*, if the substance of the agreement and the intention of the parties in making it can be gotten at. Tabb v. Archer, 3 H. & M. 399.

Where there is no covenant or grant or any words capable of passing an interest or of declaring that she will stand seised to the uses in the instrument or of creating a use or trust on the part of the wife, such an instrument will be held to constitute marriage articles, not a marriage settlement, being

executory, not *executed*. Tabb v. Archer, 3 H. & M. 399.

Specific Execution.—The children born of the marriage, are purchasers, under both father and mother, by virtue of marriage articles, though, upon the death of father and mother, they take (where the limitation is to the issue generally) as coparceners *per stirpes*, and not *per capita*. Marriage articles are not to be rescinded, after the marriage, even by consent of the husband and wife, their chief object being an effectual provision for the issue or by any conveyance which they, or either of them can make; but may be enforced in equity, at the suit of the issue (whether *in esse*, or *en ventre sa mere*), or of any other persons for whose benefit such articles were intended. The court will either compel performance (by appointing trustees where none were inserted in the articles, and decreeing a settlement), or set aside any conveyance made with intent to defeat the rights of the issue, or of those in remainder, expectant on the estate for life of the husband and wife. Tabb v. Archer, 3 H. & M. 399.

The children of a marriage, when provided for by a settlement, whether it be ante or postnuptial, are always regarded as being embraced within the consideration of the settlement; and the rights thereby secured to them cannot be released by the wife by any instrument however formal. McChesney v. Brown, 25 Gratt. 393.

A marriage settlement made after marriage, in pursuance of articles entered into before marriage, is to be controlled by the articles. Stubbs v. Whiting, 1 Rand. 322.

An indorsement made on articles by the husband and wife subsequent to the marriage, can neither be regarded as a part of the original contract, nor as explanatory thereof. Tabb v. Archer, 3 H. & M. 399; Eidson v. Fontaine, 9 Gratt. 286.

In a suit by husband and wife against the executor of her father, to obtain possession of her property, there is a decree directing the executor to deliver it to the husband and wife, to be held by them subject to the uses and stipulations of a marriage agreement entered into by them before marriage, but unrecorded. *Held:*

1. The decree did in effect set up and execute the marriage agreement; the marital rights of the husband were thereby intercepted; and the property, taken and received in virtue of the said decree, was thereafter held by the husband and wife as trustees under said decree for the purposes of the agreement; and not by the husband in his character of husband alone.

2. That the validity of the decree is not impaired by the failure to record it in the county where the property was situated or the parties resided; and the rights acquired in virtue of the decree are good and valid against the subsequent creditors of the husband.

3. After the death of the husband, the wife and children file a bill against his administrator to recover the property covered by the decree which remained, and for satisfaction for that which had been wasted by the husband; and there is a decree in their favor. *Held*, such recovery of the property undisposed of, and for the value of such as was wasted, is conclusive against the administrator and creditors of the husband. Dabney v. Kennedy, 7 Gratt. 317.

Intention Governs.—It is the proper province of a court of equity to decree the specific execution of marriage articles, where the apparent intention of the parties will direct the decree, without a strict scanning of the articles according to nice grammatical rules, or the technical meaning of the words. Roane v. Hern, 1 Wash. 47.

The intention of the parties to marriage articles is to be collected from the nature of the agreement; the language and context thereof: the usage in similar cases; and the legal rights of the parties, as they existed before, and would have existed after the marriage, if no such articles had been made; but parol or other evidence, dehors the articles, to explain, or vary their meaning, ought not to be resorted to, unless there be some latent ambiguity which is otherwise impossible to be solved or explained, or unless something agreed on by the parties at the time, has been omitted, through fraud or accident. Such instruments are to be construed *as a whole*. Tabb v. Archer, 3 H. & M. 399; Coatney v. Hopkins, 14 W. Va. 338.

Parol Evidence Admissible.—Parol evidence is admitted to explain the meaning of the parties, in marriage articles, when a conveyance is called for. Flemings v. Willis, 2 Call 5, see *supra*.

3. PAROL MARRIAGE SETTLEMENTS.

Prior to 1789.—Parol marriage agreements were valid in Virginia prior to the act of 1789. Thornton v. Corbin, 3 Call 384.

Since 1789.—An antenuptial contract, even if satisfactorily proved, must be in writing in accordance with the section of the statute of frauds providing that "any agreement made upon consideration of marriage" must be in writing in order to be valid. There can be no departure from the statutory rule where there has been no fraud and no agreement to reduce the settlement to writing. Hannon v. Hounihan, 85 Va. 429, 12 S. E. Rep. 157.

Marriage Not a Part Performance.—In such case the subsequent marriage is not deemed a part preformance, so as to take the case out of the statute. Hannon v. Hounihan, 85 Va. 429, 12 S. E. Rep. 157.

4. PARTIES.—It is sufficient if the prospective husband and wife are parties to the settlement. Roane v. Hern, 1 Wash. 47.

Marriage Settlements by Infants.—Infants may contract by marriage articles or settlements, and such contracts will bind them when of full age. Tabb v. Archer, 3 H. & M. 399.

The law has entrusted the father or guardian with the marriage of infant children, or wards; and, consequently, settlements made by infants through their father or guardian are binding. Tabb v. Archer, 3 H. & M. 399.

A deed of marriage settlement is made before marriage, between an infant female, her guardian, the intended husband, and trustees; whereby *her* real estate is settled on her and her children, etc., and her husband covenants, that he will, when afterwards required, execute any and every further conveyance proper for more effectually settling and assuring the subject to the uses declared by the deed; husband and wife exhibit a bill in chancery, praying that this settlement be set aside, on the ground of the infancy of the wife at the time it was executed; and the wife, on a privy examination directed by the chancellor, declares that she has freely and voluntarily joined in the bill. *Held*, whether the infant feme were bound by the deed or not, the husband was bound by his covenant, and equity will not aid him to avoid it; and bill was dismissed. Lee v. Stuart, 2 Leigh 76.

5. CONSIDERATION.

Marriage a Sufficient Consideration.—The intended marriage is a sufficient consideration for the settle-

ment made in contemplation thereof. Roane v. Hern, 1 Wash. 47.

Although the deed does not mention that it was made in consideration of a marriage contract, the party may aver and prove it. Eppes v. Randolph, 2 Call 125.

Sufficient Proof of Execution before Marriage.—Upon a bill of injunction, exhibited by husband and wife and their trustee, to prevent the husband's creditors from selling property covered by a deed of marriage settlement; the deed appearing on its face, and by the oaths of all the complainants, including the trustee (who appeared to have no interest except as a party to the suit), to have been executed before the marriage; and it not being charged in the answers, or any of them, that the said deed was *in fact antedated*; though not attested by any subscribing witness, but admitted to record upon the acknowledgment of the parties only; and though the defendants, in their answers, averred that the said acknowledgments took place after the marriage; the court could not with propriety dissolve the injunction on the ground that the said deed was antedated. Scott v. Loraine, 6 Munf. 117.

6. INSTRUMENT.

Deed of Bargain and Sale.—"In Virginia a woman might, and in this state she may, in contemplation of marriage, by deed of bargain and sale in which the intended husband joins, convey land to a person in fee, in trust for the bargainor till the marriage, and thereafter to permit the husband to occupy and enjoy the land during the joint lives of husband and wife, and if, during the coverture she shall by deed or will appoint it to another and die, then the estate to determine in the trustee and vest in the appointee; or if, without appointment made by her by deed, the husband shall die and she shall survive him, then the estate in the trustee to determine; or if, without appointment by deed or will, she shall die in the lifetime of the husband, then, at her death the estate in the trustee to determine. And if she properly appoint the estate, it will accordingly vest; but if not, then on the husband's death in her lifetime, the estate will revert to her; or at her death in his lifetime it will revert to her heirs." Ocheltree v. McClung, 7 W. Va. 232.

7. RECORDATION.—A deed of marriage settlement made before the marriage, conveying the property of the wife, and in which the intended husband joined, is fraudulent and void as to subsequent purchasers from the husband, without notice, unless duly recorded. Thomas v. Gaines, 1 Gratt. 347.

Under the act of 1785, a deed of marriage settlement must be recorded within eight months, else it will be void as to creditors of the husband, and a court of equity will not relieve against a neglect to comply with the statute. It will only relieve where recordation has been prevented by the fraud of the creditors themselves or their privies. Anderson v. Anderson, 2 Call 198.

Reacknowledgment.—But a deed reacknowledged within eight months from its date, and recorded within four months from the reacknowledgment, is good from the date of the reacknowledgment, although more than eight months have elapsed between the time when the deed was first executed, and the day of recording it. Eppes v. Randolph, 2 Call 125.

A deed of marriage settlement executed before, and recorded after the marriage, but within the time required by law, is conclusive against the creditors of the husband, for debts contracted by him before the marriage. And this, although such deed was recorded upon the acknowledgment of the parties, without any privy examination of the wife. Scott v. Gibbon, 5 Munf. 86.

Removal of Personal Property.—Deed of marriage settlement of slaves then in Hanover, where deed was made and duly recorded: husband, entitled to, and holding possession under settlement, removes with the slaves to Richmond, and there mortgages them for debt of his own, contrary to terms of the settlement, within 12 months after his removal of them: the trustee of the subject under the settlement, fails to have it recorded in Richmond, within 12 months after removal of the slaves; but within the 12 months, he files a bill in chancery against the husband and mortgagee, asserting his legal title to the slaves and the trusts of the settlement. *Held*, the mortgagee is a purchaser with notice of settlement within 12 months after removal of slaves to Richmond, and as to him, the failure of the trustee in the deed of marriage settlement, to have it recorded in Richmond, does not make the settlement void, under statute 1 Rev. Code, ch. 99, sec. 11, p. 364. Hughes v. Pledge, 1 Leigh 443.

Good between the Parties.—An agreement made in contemplation of marriage, though void against creditors because not recorded, is valid between the parties; and the wife and children for whose benefit it is made, may call for a specific execution of the agreement, if there is no existing creditor or purchaser whose rights will be affected by it, though the marital rights of the husband have attached by an actual reduction of the property into his actual possession. Dabney v. Kennedy, 7 Gratt. 317.

Recordation Necessary Only against Purchasers for Value.—In Thornton v. Corbin, 3 Call 384, it was held that the statute requiring the recordation of marriage agreements against "purchasers," applies only to purchasers for value, hence, such agreements do not have to be recorded against mere volunteers.

8. CONSTRUCTION.—The prevailing intent in each deed, properly manifest, controls its construction and effect, as to whether the estate, vested in the immediate bargainee for his own benefit or upon the trusts declared, is a fee determinable, and, on the happening of the contingency or execution of the appointment, the legal estate determines in him and shifts to another, or reverts to the bargainor; or, on the other hand, the legal estate, vested in the trustee, is a fee absolute, and remains in him, while a mere equitable interest declared in favor of an ulterior contingent beneficiary or an appointee, vests in the latter. Ocheltree v. McClung, 7 W. Va. 232.

A deed of marriage settlement, conveying "all the lands, slaves, goods, chattels and property" of the wife, includes her choses in action; so that a sum of money due to the wife before the marriage will not, when recovered, belong to the husband, but to the trustees, for the uses specified in the deed. In such case, therefore, a submission to arbitration of a controversy concerning a debt to the wife, being made by the debtor with the husband, is void, as relating to a subject not in their power to control. Wilcox v. Hubard, 4 Munf. 346.

By marriage settlement, the wife, at the death of her husband, was to have one-third of all the negroes whereof the husband died possessed, in lieu of dower; and if she survived and had no child by him, she was to have all the negroes which came by

her, in her absolute right. She did survive and had no child by him. *Held*, that she was entitled to the dower slaves in addition to her own before the marriage, and she is not precluded by a different division and assignment in the county court, to which she was no party. Hearne v. Roane, Wythe 90; Roane v. Hern, 1 Wash. 47.

Under a settlement by a husband on himself and wife, and to the survivor for life, she has a power of appointing to whom the land shall go in the event that she shall die without leaving issue at her death; so that such disposition is signified under her hand and seal in writing, or by last will and testament. The wife afterwards unites with her husband in a deed by which she relinquished her right in the land for a valuable consideration, and dies without leaving issue. *Held*, that although she was not privily examined as to her execution of the deed, yet the same being under her hand and seal in writing, as prescribed in the deed vesting in her the power, she thereby destroyed her power of appointment. Hume v. Hord, 5 Gratt. 374.

E being about to marry F, executes a deed, by which he authorizes her during their lives or at her death, to control and dispose of her property in as full and ample a manner as she could do if she were not his wife; and he relinquished to her all right and title to the said property which he might acquire by the marriage. On this deed there is an endorsement of the same date executed by E and F, which says: "It is further understood and agreed upon between us, that should she die first, I am to retain the property and have the use of it during my natural life; but at my death it is to go to the person or persons which it may be her will or desire should have it." The wife may give away or dispose of the property in her lifetime; and the husband is only entitled to a life interest in that which remains at her death. Eidson v. Fontaine, 9 Gratt. 286.

Husband and wife convey the lands of the wife in trust for themselves during their joint lives, with power to the wife to direct a sale and dispose of the proceeds either in her lifetime or by will, or to dispose of the land by will; and if the land is sold in her lifetime, and she dies without a will, that the husband shall receive out of the proceeds of sale $2,500, and the balance to go to certain other persons named. If the land is not sold during her life and the husband survives her, he shall hold and enjoy the land during his life. But if he, within three years from the wife's death, require a sale of the land, the trustee shall sell it within six months; and out of the proceeds of sale shall pay the husband $2,500. The husband survived the wife, and, within three years from her death, elected to have the land sold. The trustee was then dead, and by a friendly suit in chancery, a new trustee was appointed, who advertised the land for sale; but before the day of sale the husband died. *Held:*

1. That the husband having elected within the three years to have the land sold, and take the $2,500 in lieu of his life estate, the effect of such an election was an equitable conversion of the land into money.

2. That the election of the husband was not defeated by his death before the sale was made; and his executor is entitled to have the sale made, and to receive $2,500 out of the proceeds of said sale. Washington v. Abraham, 6 Gratt. 66.

If, by a deed of marriage settlement, duly recorded, slaves be conveyed to certain trustees and their heirs, to the use of the wife, for life; and after her death, to the use of the husband, for life; and after the death of the survivor, to the use of the children of the marriage, equally to be divided between them, and their heirs forever; upon the deaths of the husband and wife, the children of the marriage are entitled, not only to the equitable, but to the absolute legal estate. Baird v. Bland, 3 Munf. 570.

In an antenuptial marriage settlement conveying and settling the property of the feme, it was recited that "it had been agreed that the husband should, after the intended marriage had, receive and enjoy, during their joint lives, the interest and occupation of the said real and personal estate; and also that the same, and the interest and profits thereof, from and after the decease of such of them as should first happen to die, should be at the sole use and only disposal of the wife notwithstanding the coverture." The trusts declared in the deed were for the husband for their joint lives. If she survived, the whole property to be absolutely vested in her; but if he survived, to him for life; at his death, to the children of the marriage in equal portions; and if no child, or such child should die before age, then to the brothers and sisters of the wife, to be equally divided among them. *Held:* 1. The wife has no power to dispose of the property during the coverture. 2. The remainder vested in the children on their attaining full age. 3. A child dying within age without issue, the estate vested in the survivors. Whiting v. Rust, 1 Gratt. 488.

Husband and wife entered into a marriage contract, wherein it is recited, that with a view to secure to the wife her separate property, and to provide for the wife and the issue of the marriage, etc., the husband covenants with trustees named, that after his just debts are paid, there shall be raised out of his estate, the sum of ten thousand pounds current money, to be paid in preference to any voluntary disposition of his property, whether by will or otherwise, and placed in the hands of said trustees for the purpose aforesaid, to be held by them in trust for the issue of said marriage, as tenants in common, with benefit of survivorship; the wife to share the profits of said fund during her life, she taking a child's part. The husband died in 1841 and the wife in 1843, leaving seven children of the marriage. The husband by his will made in 1841, referred to and confirmed the marriage contract, and left the whole of his estate to be equally divided among his seven children. Five of the children died before the estate was ready for distribution. *Held*, that, looking to the deed and the will, the intention of the husband was an equal distribution among his children; and this intention is not defeated by the use of the words "with benefit of surviorship." On the death of the wife, the interest vested in the children, and the fund is to be divided among them and the children of those of them who have since died. Brown v. Brown, 31 Gratt. 502.

Liability of Subject for Beneficiaries' Debts.—Where a deed of marriage settlement declares that the husband and wife shall enjoy the interest and profits of the property settled, jointly, during their lives, that the trustee permit them, during their joint lives, to take and enjoy the said interest and profits for their own use and benefit, and that, if the husband survive, he shall pay over the property to the husband, the husband has no property in the subject

which can be subjected by his creditors. Scott v. Gibbon, 5 Munf. 86.

But the contingent interest of the husband in such a case may be charged by his creditors. Scott v. Gibbon, 5 Munf. 86.

Where the husband conveys his property to trustees for his maintenance and that of his wife and children, in order to guard against his improvidence, making provision for payment of past debts but expressly disabling himself from incurring future ones, a debt subsequently contracted by the husband cannot be charged on the prospective profits of the trust estate so as to deprive the beneficiaries of support. Markham v. Guerrant, 4 Leigh 279.

Nor can the trustee himself pledge the prospective profits of the trust estate necessary for the current support of the *cestuis que trustent*, to such a debt. Markham v. Guerrant, 4 Leigh 279.

This case was distinguished from that of Scott v. Loraine, 6 Munf. 117, where it was said that, property conveyed to trustees by a deed of marriage settlement, in trust to permit the husband and wife to have the income for their use and benefit, might be taken in execution to satisfy a debt incurred after marriage for their proper use and benefit; on the ground that the purpose in that case was merely to intercept the marital rights and shield the property from the husband's creditors. Markham v. Guerrant, 4 Leigh 279.

A deed of settlement made in contemplation of marriage between a single woman and her intended husband, who was at the time insolvent, and embracing her property alone, and providing that neither the property nor the profits arising therefrom should be liable for the debts of the intended husband, then due or thereafter to become due, will, in equity, be construed so as, consistently with the terms of the deed, to effectuate the leading intent of the parties. That being to secure the enjoyment of the property to the intended wife and her family, including the husband, free from the claims of his creditors, all idea of property in the husband during the coverture is excluded, and no right can be acquired by his creditors to seize or sell the subject of the trust. Perkins v. Dickinson, 3 Gratt. 335.

Marriage settlement of slaves to use of husband and wife during their joint lives; remainder to wife, if she survive; remainder to whomsoever the wife shall appoint, if she die before the husband; remainder, in default of such appointment, to husband for life, and afterwards, to offspring of the marriage; to the intent, that the property shall not be subject to disposal, debts, contracts or engagements of husband. *Held*, during wife's life, the property cannot be disposed of by husband, or applied to the satisfaction of his debts. Hughes v. Pledge, 1 Leigh 443.

By deed of marriage settlement, slaves of the feme are conveyed to a trustee, in trust to permit the husband to take the profits during the joint lives of himself and his wife; remainder, if the husband should first die, to the wife; and if she should first die, to such persons as she should appoint; with an express declaration, that the property should not be subject to the husband's debts. *Held*, the husband's interest in the profits during the joint lives of himself and his wife, is subject to his debts; and provision should be made for satisfaction of a creditor, by hiring the slaves out, or otherwise, as most convenient. Butler v. M'Cann, 4 Leigh 631.

Real estate vested in a trustee by deed of marriage settlement, in trust to pay the wife an annuity out of the profits, and, subject to the annuity, in trust for a son of the grantor; while the annuitant is yet living, a creditor of the son recovers a judgment against him, and exhibits his bill in chancery, to subject the son's equitable interest in the estate to the debt. *Held*, 1, that such an equitable interest cannot be taken in execution at law; 2, that it is bound by the judgment in equity, which will apply it to the satisfaction of the debt; but 3, as the annuitant is yet living, and is not compellable to take a gross sum in satisfaction of the annuity, and as the trustee is to hold the subject and pay the annuity out of the profits, the court of chancery ought not to direct the sale out and out of the debtor's equitable interest, subject to the annuity, but ought only to direct the application of the surplus of profits as they accrue, after paying the annuity, to the debt. Coutts v. Walker, 2 Leigh 268.

9. REFORMATION.—A woman being about to marry, it is agreed between her and her intended husband that out of her personal estate a sum of money shall be given to, and settled upon, her sister, and the intended husband undertakes to have an instrument drawn to carry this purpose into effect; the husband accordingly has an instrument prepared, which is produced by him immediately before the marriage, and executed; but it turns out that the instrument is so drawn, that at law it does not amount to a gift, nor intercept the marital rights. *Held*, notwithstanding, the agreement itself may be set up against the husband, and equity will correct the defect in the instrument, whether it proceeded from fraud or mistake. Brown v. Bonner, 8 Leigh 1.

B. POSTNUPTIAL SETTLEMENTS AND CONVEYANCES.—A postnuptial settlement in favor of a wife, made in pursuance of a fair contract for valuable consideration, will be good. William & Mary College v. Powell, 12 Gratt. 372.

A postnuptial settlement will be good against subsequent creditors, even where there is no consideration, provided the settler is not indebted when he makes it, and the transaction is free from circumstances of fraud. Blow v. Maynard, 2 Leigh 29. See monographic *note* on "Voluntary and Fraudulent Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

IV. EQUITABLE SEPARATE ESTATE.

A. CREATION.

1. WORDS NECESSARY.

No Particular Form of Words Necessary.—No particular form of words is necessary to create a trust for the separate estate of a married woman. Whenever it appears from the nature of the transaction or from the whole context of the instrument limiting the property to the wife, that she was intended to take the sole use, that intention will be carried into effect, but such intention must be clear and unequivocal, for the law will not lightly deprive the husband of his legal rights. Leake v. Benson, 29 Gratt. 153; Haymond v. Jones, 33 Gratt. 317; West v. West, 3 Rand. 373; Nixon v. Rose, 12 Gratt. 425; Miller v. Miller, 92 Va. 510, 23 S. E. Rep. 891; Harshberger v. Alger, 31 Gratt. 52; Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615; Fox v. Jones, 1 W. Va. 205; Coatney v. Hopkins, 14 W. Va. 338.

Expressions Which Have Been Held Sufficient.—Certain words or expressions, where a contrary intention is not disclosed by other parts of the instrument conferring the estate, have been held *per se* to manifest an intention to create an estate for the separate use of the wife. And among the words and phrases so construed are the following: "For her

sole use and benefit"; "for her own and sole use"; for her own use and benefit, independent of any other person"; "for her sole and only use," and "only for the use and benefit of the wife or her heirs." Miller v. Miller, 92 Va. 510, 23 S. E. Rep. 891; Nixon v. Rose, 12 Gratt. 425. "To her only use and behoof." Miller v. Miller, 92 Va. 510, 23 S. E. Rep. 891. "To her own special use." Smith v. Smith, 6 Munf. 581. "To be held in trust for the separate use of the wife, free from all debts heretofore contracted or which may hereafter be contracted, by her husband." Christian v. Keen, 80 Va. 369; Clay v. City of St. Albans, 43 W. Va. 589, 27 S. E. Rep. 368. "To the wife's express use, support and maintenance" and containing a covenant of indemnity to the husband against the wife's debts. Harshberger v. Alger, 31 Gratt. 52. "For her separate use free from the contracts of her husband and in no manner liable for her husband's debts." Smith v. Fox, 82 Va. 763, 1 S. E. Rep. 200.

Where a feme sole, in contemplation of marriage, "grants, bargains, sells and conveys, in consideration of five dollars, all her stock, bonds, etc., to be held by the trustee and his successors for the sole use and benefit of the said feme, with power to collect outstanding debts and interest and reinvest the property, and at the death of the feme, said property to pass to her children, if any, and if none to her heirs at law as if it were real estate; such an instrument is neither a will nor power of attorney, but it creates an equitable separate estate in the feme and is valid and irrevocable. Claiborne v. Radford, 91 Va. 527, 22 S. E. Rep. 348.

Grantor's Intention Paramount Consideration.—Whenever a gift is made to the wife during coverture, even by a stranger, if it appear by any circumstance that the intention of the donor was that she should have it to her separate use, equity will give effect to this intention. Lewis v. Adams, 6 Leigh 320.

In Lewis v. Adams, 6 Leigh 320, a gift by a father to his married daughter "in trust for her and all her children, their heirs, executors," etc., in consideration of his natural love and affection for them, was held to create a separate estate in the wife, free from the control of her husband.

Where a testator devised property to his executors for the benefit of his married daughter who lived apart from her husband and also directed his executors to sue the husband for a sum which had been advanced to him, it was held that, in view of all the circumstances, it was the testator's intention to confer a separate estate on his daughter and it was so held. West v. West, 8 Rand. 378.

In Coatney v. Hopkins, 14 W. Va. 338, where by marriage settlement, the property of the prospective wife was conveyed to a trustee, for the joint use of husband and wife, with the exception of $500.00, a slave and her beds and bedding which were conveyed to be held in trust for the said wife, the court held that these words, though insufficient of themselves to create a separate estate, yet, in view of the fact that it was a marriage settlement, and since otherwise the exception would be without effect, here, created an equitable separate estate in the wife.

But Intention to Create a Separate Estate Must Be Clear.—But courts of equity will not deprive the husband of his rights at law unless the words relied on to create a separate estate, of themselves leave no doubt of the intention to exclude him. Buck v. Wroten, 24 Gratt. 250; Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615; Coatney v. Hopkins, 14 W. Va. 338.

In Buck v. Wroten, 24 Gratt. 250, where the testator gave his estate to his daughter and her children, "for her and their sole and separate use and benefit, free from the debts of her husband" it was held that this did not confer an equitable separate estate on the *granddaughter*, so as, on *her* marriage, to exclude the marital rights of *her* husband.

To create a separate estate in the wife and to exclude the husband, the intention must be clearly and unequivocally expressed, hence a bequest, in trust for a married woman and her children, without more, carries a joint estate to the wife and children and does not give the wife a separate estate. Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615.

A conveyance in trust for the benefit of A for life, then to B, does not give B an equitable separate estate. White v. White, 16 Gratt. 264.

A simple grant to a married woman by another than her husband, without anything to indicate that the grant was to her sole and separate use, does not confer an equitable separate estate on her; hence, sec. 1, ch. 66, Code W. Va. 1868, providing that all property theretofore conveyed to a married woman by any person other than her husband, as her sole and separate property, shall be and remain her sole and separate property, does not apply, and the husband's marital rights attach. Laughlin v. Fream, 14 W. Va. 322; Laidley v. Central Land Co., 30 W. Va. 505, 4 S. E. Rep. 705; Pickens v. Kniseley, 36 W. Va. 794, 15 S. E. Rep. 997; Central Land Co. v. Laidley, 32 W. Va. 134, 9 S. E. Rep. 61; Wyatt v. Smith, 25 W. Va. 813.

Interposition of Trustees a Fact in Favor of Such Intention.—The fact that the property is given to trustees, is a circumstance in favor of the intention to create an equitable separate estate, though not of itself a sufficient evidence of such intention. Nixon v. Rose, 12 Gratt. 425.

Distinction between a Deed from a Stranger and a Deed from the Husband.—A distinction has however been taken between a deed by a stranger, and a deed by the husband to the wife. In the former case the deed must contain proper words or by implication equally plain show an intent to confer a separate estate, otherwise the marital rights will attach. Irvine v. Greever, 32 Gratt. 411.

Where the conveyance is by the husband to the wife, or to a third person for her benefit, as a general rule it will be construed as operating to her separate use, although no such words are used as would be necessary to create a separate estate on a conveyance by a stranger. Leake v. Benson, 29 Gratt. 153; Sayers v. Wall, 26 Gratt. 354; Garland v. Pamplin, 32 Gratt. 305; Irvine v. Greever, 32 Gratt. 411; Dugger v. Dugger, 84 Va. 130, 4 S. E. Rep. 171; Jones v. Jones, 96 Va. 749, 32 S. E. Rep. 463; Fox v. Jones, 1 W. Va. 205.

The right of a husband, either with or without the intervention of a trustee, to make a proper gift or settlement on his wife, is well established. Whether the estate is derived from him or from a stranger, the husband during his lifetime (if no other has been appointed), will be treated as a trustee for her benefit; and in the event of his death, *quoad* all separate personal estate derived from him during his lifetime, and which properly belongs to the wife in equity, his executors or administrators will be treated as trustees for the wife, and enjoined from making any legal disposition of the property in contravention of the trust. Fox v. Jones, 1 W. Va. 205.

At common law a conveyance directly from hus-

band to wife is invalid because of the legal unity between husband and wife. Sayers v. Wall, 26 Gratt. 354; Jones v. Obenchain, 10 Gratt. 259; McKenzie v. Railroad Co., 27 W. Va. 306; Farmers' Bank v. Corder, 32 W. Va. 233, 9 S. E. Rep. 220; Cosner v. McCrum, 40 W. Va. 339, 21 S. E. Rep. 739.

But equity, which looks more to the substance than the form, holds that a conveyance directly from husband to wife, if fair, and free from taint of fraud, is just as valid as if the conveyance had been made to a trustee for the benefit of the wife. Equity will interpose a trustee to hold the estate for the benefit of the wife, or will treat the husband as a trustee for the wife, and will give the same effect to the conveyance, as if it had been made to a third person, for the sole and separate use of the wife. Sayers v. Wall, 26 Gratt. 354; Jones v. Obenchain, 10 Gratt. 259.

So where a husband purchases property and causes the deed to be made to his wife, it is to be presumed that he designs it as a settlement upon her, and it will be considered as her separate estate. Irvine v. Greever, 32 Gratt. 411.

By Decree of Court.—Where in answer to a prayer for the construction of an instrument of marriage settlement, the court decrees "that all the property real, personal and mixed belonging to the woman at the date of the deed of settlement and all that she has since acquired or may hereafter acquire, shall be secured to her as completely as if she were a feme sole." This considered with the bill and answer as is proper, invests the wife with a separate estate in the property with all the incidents, such as the *jus disponendi*, etc. Burging v. McDowell, 30 Gratt. 236.

Land Purchased with Separate Funds.—Land was purchased with funds in which a married woman had a separate estate for life, with remainder to her children; and the land was to be subjected to the same uses and trusts. But without the knowledge of the wife the land was conveyed to her husband, and he conveyed it in trust to secure a debt to his creditors, who were informed of the fact that it was purchased with said funds, and was to be held on the same trusts. *Held*, the said creditors have no right in equity to charge the land with the payment of their debt. Smith v. Flint, 6 Gratt. 40.

May Be Created by Parol in Personalty.—A husband and wife may agree by parol that he will hold the personal property of the wife to her separate use as trustee. If the property is by law the separate estate of the wife, there is a valuable consideration, if not, there is meritorious consideration, and a court of equity will enforce it if the rights of creditors do not interfere. Section 2413 of the Code of Virginia 1887, has no application to *personalty*. Section 2414 has no application to choses in action, which was the subject in controversy in this suit, and section 2840 has no application, where, as here, it is not stated that the agreement was upon consideration of marriage. Riggan v. Riggan, 93 Va. 78, 24 S. E. Rep. 920.

2. OF WHAT IT MAY CONSIST.—"Property of every kind, real or personal, and any interest therein, may be conveyed, settled, or held to the wife's separate use. Her equitable separate estate may, therefore, include estates in fee in land, in possession, or reversion, life estates, estates for years, things in action, securities, specific chattels, or money." Price v. Planters' Nat. Bank, 92 Va. 473-74, 23 S. E. Rep. 887.

Husband's Interest in Wife's Lands.—Where a married woman is entitled to real estate, and her husband conveys all his interest in such land to trustees in trust for the sole and separate use of his wife; whatever estate, etc., the husband, as such, had in the lands in question, whether as tenant by the mere marital right or by curtesy initiate, was conveyed by the deed aforesaid in trust for the wife. Garland v. Pamplin, 32 Gratt. 305.

Confined to Extent of Husband's Interest.—A husband, who has no interest in his wife's real estate, except a life estate in a part of it for their joint lives, there having been no issue of the marriage, conveys her estate to a trustee for the benefit of the wife. *Held*, the deed of the husband conveyed no separate estate in any part of the property which did not terminate at her death; and she therefore could not dispose of it by will during her coverture. Stroud v. Connelly, 33 Gratt. 217.

No Merger in Wife's Legal Estate.—Under such a deed, the wife takes a separate estate in the interest which her husband had in the lands and her equitable estate is distinct from her legal reversionary estate in the fee, and does not merge therein. Garland v. Pamplin, 32 Gratt. 305.

3. NO MARRIAGE NEED BE CONTEMPLATED.—A separate estate may be made to a feme sole, which, upon marriage, will be good against the marital rights of the husband, although at the time it is made no particular marriage is contemplated. Haymond v. Jones, 33 Gratt. 317.

4. TRUSTEES.

Trustee Not Necessary.—The interposition of trustees seems at one time to have been considered necessary to protect the wife's separate interest. It has been long settled, however, that if no trustees be interposed by the settlement, the husband will be held, in equity, to be a trustee for the wife. Still, it is generally, if not always, better to have disinterested trustees; who will be appointed by a court of equity if necessary. Nixon v. Rose, 12 Gratt. 425; Dezendorf v. Humphreys, 95 Va. 473, 28 S. E. Rep. 880; Miller v. Miller, 92 Va. 510, 23 S. E. Rep. 891; Fox v. Jones, 1 W. Va. 205.

But though in equity a trustee is no longer necessary, it is still necessary to have one at law, and if one is not interposed, the marital rights of the husband will attach to the property, and the rights of the wife will not be recognized. If a trustee is interposed, he will have the legal title, and the rights of the husband will be excluded. Faulkner v. Faulkner, 3 Leigh 255.

By marriage articles, it is agreed, that, during the coverture, husband and wife shall enjoy their respective estates jointly, but that their estates shall be kept separate and distinct from each other, and that the property then belonging to each, shall remain under the control of each, and that the husband shall claim no part of the wife's estate, and the wife no part of the husband's estate, by virtue of the marriage; but *no trustee* is appointed to hold the wife's estate for her separate use; during the coverture, a sum of money belonging to the wife before the marriage, came to the husband's hand; he laid it out in chattels, which he declared were his wife's property; the husband dies. *Held*, the legal estate in the chattels so purchased, vested in the husband, and at his death devolved to his executors, so that they may maintain detinue for them against the widow. Faulkner v. Faulkner, 3 Leigh 255.

Appointment of New Trustees.—All the trustees appointed by a will to manage an estate for a married woman, having refused to act, a court of

equity will appoint a trustee in their room. Lee v. Randolph, 2 H. & M. 12.

B. POWER OF DISPOSITION.

1. PERSONALTY, AND RENTS AND PROFITS OF REALTY.—A married woman, as to personal property settled to her separate use, is to be regarded as a feme sole, and has a right to dispose of all her separate *personal* estate and the *rents and profits* of her separate real estate in the same manner as if she were a feme sole; unless the power of alienation is restrained by the instrument creating the estate. Burnett v. Hawpe, 25 Gratt. 481; Garland v. Pamplin, 32 Gratt. 305; Radford v. Carwile, 13 W. Va. 682; Justice v. English, 30 Gratt. 565; Bank of Greensboro v. Chambers, 30 Gratt. 202; McChesney v. Brown, 25 Gratt. 393; West v. West, 3 Rand. 373; Burging v. McDowell, 30 Gratt. 236; Lee v. Bank of U. S., 9 Leigh 200; Frank v. Lilienfeld, 33 Gratt. 377; Price v. Planters' Bank, 92 Va. 468, 23 S. E. Rep. 887; French v. Waterman, 79 Va. 617; Christian v. Keen, 80 Va. 369; Vizonneau v. Pegram, 2 Leigh 183; Penn v. Whitehead, 17 Gratt. 508; Haymond v. Jones, 33 Gratt. 317; Freeman v. Eacho, 79 Va. 43; Finch v. Marks, 76 Va. 207; Atkinson v. McCormick, 76 Va. 791; Mauzy v. Mauzy, 79 Va. 537; Dezendorf v. Humphreys, 95 Va. 473, 28 S. E. Rep. 880; Bain v. Buff, 76 Va. 371; Smith v. Fox, 82 Va. 763, 1 S. E. Rep. 200; Andes v. Roller, 98 Va. 620, 37 S. E. Rep. 297; Stace v. Bumgardner, 89 Va. 418, 16 S. E. Rep. 252; Harshberger v. Alger, 31 Gratt. 52; Hawley v. Twyman, 29 Gratt. 728; Green v. Claiborne, 83 Va. 386, 5 S. E. Rep. 376; Dillard v. Dillard (Va.), 21 S. E. Rep. 669; Patton v. Bank of Charleston, 12 W. Va. 587; Hughes v. Hamilton, 19 W. Va. 366; Weinberg v. Rempe, 15 W. Va. 829; Coatney v. Hopkins, 14 W. Va. 338.

The *jus disponendi* is an incident to the ownership of a separate estate, and can only be taken away, or limited, by express words, or by an intent so clear as to be the equivalent of express words. Radford v. Carwile, 13 W. Va. 682; Hughes v. Hamilton, 19 W. Va. 366; Weinburg v. Rempe, 15 W. Va. 829.

A married woman's power of disposition is as complete over the *produce* of her separate personal estate as over the principal. West v. West, 3 Rand. 373.

Where a personal property is given to a trustee for a married woman, "for life, to her sole and separate use, free from all claims of her husband, said estate or so much thereof as may be in existence at her death, to go to her children or their descendants if any there be, and all receipts given to the trustee by her for payment to her of either principal or interest should be to him a full discharge, it was held that she was entitled to use both principal and interest of the property at her discretion. Brown v. George, 6 Gratt. 424.

Where, by a mistake in the drafting of a deed, a married woman's power of alienation is restrained, but her intention was merely to have it conveyed to her separate use, since she has an equitable right to have the instrument reformed, she has the right to dispose of the property as if it were her separate estate. Patton v. Bank of Charleston, 12 W. Va. 587.

A married woman may bequeath her simple separate personal property. West v. West, 3 Rand. 373.

Power Limited to Extent of Her Interest.—But where a married woman has only a life estate in property conveyed to her separate use, she has no power to charge or convey the fee, and any attempt on her part to do so is void. Finch v. Marks, 76 Va. 207.

Conveyances "For Benefit of Wife and Child" Carry Whole Estate to the Wife, with the "Jus Disponendi."—Where property is conveyed to a trustee upon trust to pay over the income to a married woman "for the sole and separate use of herself and child or children," these words do not give any estate to the "child or children" but merely indicate the *motive* for the gift to the mother. Hence, she may charge it with her debts. Bain v. Buff, 76 Va. 371; Waller v. Catlett, 83 Va. 200, 2 S. E. Rep. 280; Walke v. Moore, 95 Va. 729, 30 S. E. Rep. 374; Jones v. Jones, 96 Va. 749, 32 S. E. Rep. 463; Fackler v. Berry, 93 Va. 565, 25 S. E. Rep. 887; Mauzy v. Mauzy, 79 Va. 537; Atkinson v. McCormick, 76 Va. 791; Seibel v. Rapp, 85 Va. 28, 6 S. E. Rep. 478; Smith v. Fox, 82 Va. 763, 1 S. E. Rep. 200; Penn v. Whitehead, 17 Gratt. 508; Richardson v. Seevers, 84 Va. 259, 4 S. E. Rep. 712; Wallace v. Dold, 3 Leigh 258; Stinson v. Day, 1 Rob. 435; Leake v. Benson, 29 Gratt. 153; Seamonds v. Hodge, 36 W. Va. 304, 15 S. E. Rep. 156; Wilmoth v. Wilmoth, 34 W. Va. 426, 12 S. E. Rep. 731.

But a conveyance in trust "for a married woman and her children" without more, carries a *joint* estate to the wife and children, not a separate estate to the wife. Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615.

No Difference between a Deed and a Will.—There is no difference between a deed and a will as to the construction to be put upon such words. Stace v. Bumgardner, 89 Va. 418, 16 S. E. Rep. 252, where the cases are reviewed.

2. CORPUS OF REALTY.

a. Generally.—But these incidents, liability to the payment of her debts, and the *jus disponendi*, extend no further than to all her separate personal property, and the rents and profits of her separate real estate accruing during coverture. Radford v. Carwile, 13 W. Va. 682; Weinberg v. Rempe, 15 W. Va. 829; Hughes v. Hamilton, 19 W. Va. 366.

As to the corpus of her separate real estate, she can dispose of that only in the mode, if any, prescribed by the instrument creating the estate, or, unless prohibited expressly or impliedly by such instrument, in the mode prescribed by law for the alienation of real estate by married women. Justis v. English, 30 Gratt. 565; McChesney v. Brown, 25 Gratt. 393; Burging v. McDowell, 30 Gratt. 236; Price v. Planters' Bank, 92 Va. 468, 23 S. E. Rep. 887; Christian v. Keen, 80 Va. 369; Chapman v. Price, 83 Va. 392, 11 S. E. Rep. 879; Hawley v. Twyman, 29 Gratt. 728; Taylor v. Cussen, 90 Va. 40, 17 S. E. Rep. 721; Green v. Claiborne, 83 Va. 386, 5 S. E. Rep. 376; Dillard v. Dillard (Va.), 21 S. E. Rep. 669; Patton v. Bank of Charleston, 12 W. Va. 587; Hughes v. Hamilton, 19 W. Va. 366; Radford v. Carwile, 13 W. Va. 572, 670.

Or by last will and testament, it would seem as provided for the first time by the Code of 1849, p. 516. Code Va. 1887, § 513; Justis v. English, 30 Gratt. 565; Christian v. Keen, 80 Va. 369; Chapman v. Price, 83 Va. 392, 11 S. E. Rep. 879; Green v. Claiborne, 83 Va. 386, 5 S. E. Rep. 376; Taylor v. Cussen, 90 Va. 40, 17 S. E. Rep. 721; Code of W. Va. 1868, ch. 66, §§ 1, 2 and 3; Code 1891, ch. 66, §§ 1, 2 and 3; Radford v. Carwile, 13 W. Va. 572, 659.

The common law effectually protected the corpus of her real estate, and her common-law disability to make any contract, or incur any debt, during the coverture, which will affect or charge the corpus of her real estate, is still in full force, whether such real estate be separate property, or not. It can only be affected, or charged by conveyance, or spe-

cific lien, in which her husband unites, and which she executes after privy examination, or by a vendor's lien, when it has been reserved. Weinberg v. Rempe, 15 W. Va. 829. Unless the instrument creating her separate estate expressly authorizes her to dispose of it or charge it otherwise. Radford v. Carwile, 13 W. Va. 683.

The corpus of a married woman's separate real estate is in no manner affected by the equitable doctrine of a separate estate, which was devised to prevent the acquisition by the husband of his marital rights to all her personal property and the rents and profits of her real property during coverture. Radford v. Carwile, 13 W. Va. 682.

Rents and Profits Converted into Realty.—While the rents and profits of a wife's separate real estate remain subject to her power of disposition as personal estate so long as they continue in that form, yet, when they are, by the wife, or by her direction, converted into realty, such realty can be disposed of only as other separate real estate of a married woman. She may have the realty, acquired by means of such rents and profits, conveyed to her separate use, subject to any restrictions she may choose to prescribe in regard to the mode of alienation, or, if she prefer it, without restriction at all. McChesney v. Brown, 25 Gratt. 398; West v. West, 3 Rand. 377.

Real Estate Exchanged for Separate Real Estate.—Where property, constituting the separate estate of a married woman, is exchanged for other property of a similar character, the property thus acquired becomes subject to all the trusts and powers created by the original instrument, just as if such property had been the subject conveyed by such deed. McChesney v. Brown, 25 Gratt. 398.

Proceeds of Sale of Separate Real Estate Affected with Same Trusts.—The proceeds arising from the sale of land settled to the separate use of a married woman are saddled with the same trusts as the land, and these trusts follow them into any other land in which they may be invested. Marks v. Spencer, 81 Va. 751; Warwick v. Warwick, 31 Gratt. 70.

Where the husband uses trust funds specifically dedicated to the payment of liens on his wife's separate estate, and afterwards assigns property to his wife in satisfaction thereof, under the doctrine of equitable conversion, this property will be impressed with the same character, *i. e.*, will be her separate estate. Smith v. Bradford, 76 Va. 758.

Commissioner's Report Conclusive in Appellate Court, if Not Excepted to in Lower Court.—Where the commissioner reports that, the subject of deed of trust was paid for by the trustee with money held by him as trustee for the married woman, such report is conclusive in the appellate court, if not excepted to in the lower court, as to the source of such money. Taylor v. Cussen, 90 Va. 40, 17 S. E. Rep. 721.

Nor Can She Contract to Convey It.—As a married woman has no power to convey her separate real estate, except in strict pursuance of the powers conferred by the deed or by law, no more can she make a contract for such conveyance, which a court of equity can enforce. Hawley v. Twyman, 29 Gratt. 728; McChesney v. Brown, 25 Gratt. 398.

b. Power to Devise.

Old Doctrine.—A feme covert could not, prior to Code 1849, devise her separate real estate unless a power to do so was reserved by articles before marriage or by the instrument creating the estate. West v. West, 3 Rand. 373; Lee v. Bank of U. S., 9 Leigh 200; Dillard v. Dillard (Va.), 21 S. E. Rep. 669; McClintic v. Ocheltree, 4 W. Va. 249.

Even where she was authorized to dispose of her equitable separate realty by last will executed with certain formalities, she was not authorized to dispose of it by will *not* in conformity to the power. McClintic v. Ocheltree, 4 W. Va. 249.

The will of a married woman disposing of both real and personal separate property, should be probated in the proper court as a will of personalty, but *not* as a will of realty, since that might give it validity after the lapse of the time allowed for contesting a will. West v. West, 3 Rand. 373.

By Statute in Virginia.—The Code 1849, ch. 122, § 3 now carried into § 2513 of the Code, expressly confers upon a married woman power to devise her separate estate. This express power under the statute to devise is equivalent to express power in the instrument so to devise. Hence, where a married woman has a separate estate and the instrument creating the estate does not restrain her power of alienation, she has, by virtue of the statute, complete power of alienation by will. It is not necessary that the instrument creating the estate should contain an express power in her to alien. Kiracofe v. Kiracofe, 93 Va. 591, 25 S. E. Rep. 601; Stroud v. Connelly, 33 Gratt. 217; Justis v. English, 30 Gratt. 565; Christian v. Keen, 80 Va. 369; Chapman v. Price, 83 Va. 392, 11 S. E. Rep. 879; Green v. Claiborne, 83 Va. 386, 5 S. E. Rep. 376; Taylor v. Cussen, 90 Va. 40, 17 S. E. Rep. 721; Dillard v. Dillard (Va.), 21 S. E. Rep. 669.

In West Virginia.—Code 1891, §§ 1, 2 and 3; Radford v. Carwile, 13 W. Va. 572, 659.

c. Conveyance in Statutory Method.—A married woman, although she cannot dispose of her separate real estate by her sole act, may dispose of it by deed, her husband joining and she being privily examined according to statute, even though nothing be said in the instrument creating the separate estate, as to her power to dispose of it. Lee v. Bank of U. S., 9 Leigh 200; Price v. Planters' Bank, 92 Va. 468, 23 S. E. Rep. 887; Averett v. Lipscombe, 76 Va. 404.

In Griffin v. Birkhead, 84 Va. 612, 5 S. E. Rep. 685, a conveyance by husband and wife of the wife's equitable separate estate to a trustee and by him to the husband was upheld; FAUNTLEROY, J., saying "there is nothing in the fact that he was the husband of the grantor and that the subject of the grant was her separate estate, for which he was her implied trustee, which constitutes *per se*, evidence of imposition, fraud, or undue influence; nor is it material or indispensable that there should have been a valuable consideration for the deed."

Effect of Conveyance by Husband and Wife.—A conveyance from husband and wife will transfer a good equitable title and operate as an imperative direction to the trustee to hold the estate to the use of the purchaser and convey it as such purchaser may direct. Averett v. Lipscombe, 76 Va. 404.

Must Be Acknowledged by Wife upon Privy Examination.—A deed of conveyance of her separate estate by a married woman and her husband, which was not acknowledged by the wife upon privy examination, confers no equitable title on the grantee, which can be enforced against the grantor. Hawley v. Twyman, 29 Gratt. 728. See monographic *note* on "Acknowledgments" appended to Taliaferro v. Pryor, 12 Gratt. 277.

Husband Must Join.—A deed of trust executed by a married woman and her trustee on her separate

real estate, without the concurrence of her husband is void, when not expressly allowed by the instrument creating the estate. Taylor v. Cussen, 90 Va. 40, 17 S. E. Rep. 721.

d. By Authority of Instrument Creating the Estate.—It is competent for the grantor of real estate in trust for the separate use of a feme covert, to give her power to dispose of it either by deed or will, and then she may dispose of it, accordingly, by her own sole act. Lee v. Bank of U. S., 9 Leigh 200; Frank v. Lilienfeld, 33 Gratt. 377; Muller v. Bayly, 21 Gratt. 521; Freeman v. Eacho, 79 Va. 43; Etheridge v. Parker, 76 Va. 247.

Where property is conveyed to the sole use of a married woman, and the trustee is authorized to convey the property upon the request of the *cestui* executed with certain formalities, all that is required is that she shall make the request with the required formalities. The authority of the trustee to convey is absolute. The conveyance by the trustee will operate as a grant from the original grantors and not as a grant from the wife and therefore no privy examination, joinder of the husband or other statutory formality, not required by the instrument creating the estate, is necessary. Norvell v. Hedrick, 21 W. Va 523; Laidley v. Knight, 23 W. Va. 735.

Absolute Power of Alienation, Equivalent to Fee Simple.—If the instrument confers on a married woman the power to dispose of her equitable separate estate by deed or will, attested in the manner indicated, in fee or for a less estate, as if she were a feme sole, she takes the absolute property in the separate estate, and she may delegate to another the power of disposing of it, as though she were *sui juris* and owner of the fee. Dillard v. Dillard (Va.), 21 S. E. Rep. 669.

Power to Sell Does Not Confer Power to Execute Deed of Trust.—Where power is given to the trustees upon the written request of the *cestui que trust*, to sell the subject of the trust and reinvest upon the same trusts, this does not empower the trustee to execute a deed of trust or mortgage on the property, even with the concurrence of the *cestui que trust*, much less of his own volition. Green v. Claiborne, 83 Va. 386, 5 S. E. Rep. 376.

Where a marriage contract reserves to the wife a power to give certain slaves to whomsoever she shall *appoint*, she is not authorized to direct a *sale* or *emancipation* of the slaves. Ellis v. Baker, 1 Rand. 47.

A Specific Lien Can Only Be Created in the Same Way as a Conveyance.—To create a specific lien on her real estate, by way of mortgage or deed of trust, the same mode of conveyance would be requisite as in case of the absolute sale of such estate. Frank v. Lilienfeld, 33 Gratt. 377; Hughes v. Hamilton, 19 W. Va. 366; Weinberg v. Rempe, 15 W. Va. 829.

Construction of Deed of Settlement.—A deed of settlement made before marriage, and conveying real and personal property to a trustee for the separate use of the intended wife, provides that after the marriage she shall have power, by written instrument under her hand and seal, attested by three or more witnesses, in the nature of an appointment of a will and testament, to dispose of the property as freely as if she were a feme sole. *Held*, this is a power to dispose by will only, and not by deed. Williamson v. Beckham, 8 Leigh 20.

The execution of a deed by a married woman is a substantial compliance with a provision of the trust deed making a request from her in writing a prerequisite to a sale of her separate estate by the trustee. Walke v. Moore, 95 Va. 729, 30 S. E. Rep. 374.

It is a necessary inference from his conveyance of the land, that the trustee "deemed" it for the benefit of the feme covert, in accordance with the terms of the instrument creating the separate estate. Walke v. Moore, 95 Va. 729, 30 S. E. Rep. 374.

Defective Execution of Conveyance—Formal Defects Cured.—Where power is given a married woman by writing under her hand and seal, attested by two witnesses, to direct the trustee to sell or encumber it, and, in executing the required direction to the trustee, she fulfils all the other requirements, except that, though she annexes a scroll to the signature, she fails to recognize it in the body of the instrument, so that, in legal effect, the instrument is unsealed, a court of equity will relieve against such a defective execution of the power, since the execution is defective in *form* only and not in *substance*, and it is manifest from the surrounding circumstances, that she intended to execute the power, and that the failure was the result of mere inadvertence or mistake. The court distinguished this case from that of the defective *conveyance* by a married woman under statutory authority where relief would not be afforded. Freeman v. Eacho, 79 Va. 43.

But Not Defects of Substance.—Where the instrument creating an equitable separate estate directs that the corpus of the realty may be disposed of by a writing under the hand and seal of the *cestui que trust*, attested by at least three credible witnesses, directing the trustee to convey the property, but none of these formalities are observed, except that the deed is under the hand and seal of the *cestui que trust*, it is not such an attempted but defective execution of a power as will be aided by a court of equity: BUKKS, J., saying: "Aid is extended where the defect is in matter of form, never where it is in matter of substance. In the case before us the instrument is not only inappropriate, and the execution of it not according to the form prescribed, in that it is not attested by the requisite number of witnesses, but it is not attested at all. This is more than a mere informality. Attestation in some form, at least, or to some extent, would seem to be requisite. I regard it as essential to the due execution of the power in cases like the one before us. In marriage settlements the object generally is two-fold—to protect the wife against the control and influence of her husband, and also against her own weakness and incapacity,—and I am not disposed, by construction and the active assistance of the court, to break down the safe-guards which she has deliberately thrown around herself and her property." Justis v. English, 30 Gratt. 565; McChesney v. Brown, 25 Gratt. 393.

Power of Disposition Cannot Arise from Any Act or Laches of Trustee.—The power of disposition, if not given by the instrument, can arise from no act or laches of the trustee; who, no more than the wife or her husband, can defeat the provisions of the settlement. Nixon v. Rose, 12 Gratt. 425.

Assent of Trustee.—Although the separate estate is conveyed to a trustee, his assent is not necessary to a valid alienation or charge by the wife, unless it is required expressly, or by strong implication, in the instrument under which the property is derived. Burnett v. Hawpe, 25 Gratt. 481; Patton v. Bank of Charleston, 12 W. Va. 587; Coatney v. Hopkins, 14 W. Va. 338.

It is not necessary for the trustee of a married

woman to unite in any way in the deed creating a specific lien on her separate real estate. Hughes v. Hamilton, 19 W. Va. 366.

Where a deed conveyed land to a trustee to hold for the separate use of a married woman, "expressly reserving, however, to her the right to sell, and unite with her husband and her said trustee in conveying all or any part of said lands, whenever she might elect to do so," and she and her husband made a deed of trust on the land, acknowledged by them properly, to which the trustee was not a party; but, by an underwriting under his hand and seal of same date with the trust, he agreed that the above trust deed might be executed, and, in the event that a sale of the above-named lands should have to be made, he would unite in the deed conveying them, provided the said sale was made according to the terms of the trust deed, and the instrument was recorded, it was held, that, though informal for the want of the trustee as a formal party, and not passing the legal title, yet it created a lien on the land as an equitable mortgage. Bensimer v. Fell, 35 W. Va. 15, 12 S. E. Rep. 1079.

Liability of Trustee.—Where the consent of the trustee is not made necessary to enable a married woman to dispose of, or charge her separate estate, he cannot be held liable for any improper alienation of it on her part, nor can the mere fact that he was a party to the transaction, giving his consent, impose upon him any additional responsibility. Burnett v. Hawpe, 25 Gratt. 481.

Husband May Attack an Unauthorized Conveyance.—The husband is not estopped to deny the validity of a deed, when there is no proof of any false representation or concealment on his part, when the loan, secured by said deed, was effected, and none of the essential elements of an estoppel are established by the evidence. Taylor v. Cussen, 90 Va. 40, 17 S. E. Rep. 721.

When Feme Covert Not Estoppel to Set Up After-Acquired Title.—A married woman, who unites with her trustee in a conveyance of the trust property, merely as a matter of form, and makes no warranty of title or averment as to her estate, is not estopped from relying on an after-acquired title. Nye v. Lovitt, 92 Va. 710, 24 S. E. Rep. 345, 2 Va. Law Reg. 39.

C. POWER TO CHARGE.

1. GENERALLY.—As the greater includes the less, the absolute power of alienation in the wife includes the power, at her will and pleasure, to encumber and charge her separate estate with the payment of debts, and equity will make good the charge against the estate. Garland v. Pamplin, 32 Gratt. 305; Price v. Planters' Bank, 92 Va. 468, 23 S. E. Rep. 887; Penn v. Whitehead, 17 Gratt. 503; Salamone v. Keiley, 80 Va. 86; Crockett v. Doriot, 85 Va. 240, 3 S. E. Rep. 128.

She may charge it as principal or surety, for her own benefit, or that of another. She may appropriate it to the payment of her husband's debts. She may even give it to him if she pleases, no improper influence being exerted over her. Burnett v. Hawpe, 25 Gratt. 481; Bank of Greensboro v. Chambers, 30 Gratt. 202; Christian v. Keen, 80 Va. 369; Muller v. Bayly, 21 Gratt. 521; Freeman v. Eacho, 79 Va. 43; Bain v. Buff, 76 Va. 371; Smith v. Fox, 82 Va. 763, 1 S. E. Rep. 200; Darnall v. Smith, 26 Gratt. 878; Patton v. Bank of Charleston, 12 W. Va. 587; Hughes v. Hamilton, 19 W. Va. 366.

Unless such power is denied, limited or in some way qualified, expressly or impliedly, by the instrument creating the estate. Frank v. Lilienfeld, 33 Gratt. 377.

The liability of the separate estate to the payment of all debts, incurred by a married woman, is also incident to ownership of the separate estate; and it can only be taken away, or limited by express words, or by an intent so clear as to be the equivalent of express words. Radford v. Carwile, 13 W. Va. 662; Hughes v. Hamilton, 19 W. Va. 366; Weinberg v. Rempe, 15 W. Va. 829.

The wife may be empowered by the terms of the instrument creating the estate, to charge it with her debts. Jones v. Degge, 84 Va. 685, 5 S. E. Rep. 799.

2. INTENTION TO CHARGE.

Intention to Charge Indispensable.—The contract of the wife does not *per se* and of necessity create such a liability. To give it that operation, it is necessary that it should be entered into with reference to, and on the credit of, the separate estate. There must be an intention to make the estate liable. Frank v. Lilienfeld, 33 Gratt. 377; Burnett v. Hawpe, 25 Gratt. 481; Darnall v. Smith, 26 Gratt. 878; Bank of Greensboro v. Chambers, 30 Gratt. 202; Harshberger v. Alger, 31 Gratt. 52; McDonald v. Hurst, 86 Va. 885, 11 S. E. Rep. 536; Crockett v. Doriot, 85 Va. 240, 3 S. E. Rep. 128; Woodson v. Perkins, 5 Gratt. 345.

The liability of the separate estate of a married woman can only arise out of the supposed intention of the wife. And no pecuniary engagement can be charged upon the wife's estate which is not connected by agreement, either express or implied, with said estate. Darnall v. Smith, 26 Gratt. 878; Bank of Greensboro v. Chambers, 30 Gratt. 202; Harshberger v. Alger, 31 Gratt. 52.

In Radford v. Carwile, 13 W. Va. 572, GREEN, J., said in substance that the "intention" of the feme covert is of importance only to show that in making her engagements she was creating a debt of her own and not acting as the agent of her husband, and when once it is established that she was acting for herself, no "intention" or even *express declaration* that her separate estate should not be held bound, will be availing, though such declaration would otherwise be very persuasive evidence that she was contracting the debt not for herself but for her husband.

Her intention must be gathered from the facts and circumstances of each particular case. Darnall v. Smith, 26 Gratt. 878.

So, in Taylor v. Cussen, 90 Va. 40, 17 S. E. Rep. 721, it was held that a deed of trust executed by a married woman would not create a lien on her separate estate where the notes secured were not signed by the wife, and the loan was not for her benefit, and it was clear that her sole object was to create a specific lien on her real estate, these circumstances negativing the necessary *intention to charge*.

Intention Implied from Mere Execution of an Obligation.—The intention, however, need not be expressed; it may be implied, so whenever a feme covert, having a separate property, executes an obligation for the payment of money as principal or surety, it is to be presumed, in the absence of evidence to the contrary, that it was her intention to charge such property with the debt. Leake v. Benson, 29 Gratt. 153; Burnett v. Hawpe, 25 Gratt. 481; Garland v. Pamplin, 32 Gratt. 305; Ropp v. Minor, 33 Gratt. 97; Frank v. Lilienfeld, 33 Gratt. 377; Price v. Planters' Bank, 92 Va. 468, 23 S. E. Rep. 887; Bain v. Buff, 76 Va. 371; Miller v. Miller, 92 Va. 510, 23 S. E. Rep. 891; Harshberger v. Alger, 31 Gratt. 52; McDonald v. Hurst, 86 Va. 885, 11 S. E. Rep. 536; Salamone v. Keiley, 80 Va. 86; Jones v. Degge, 84 Va. 685, 5 S. E. Rep. 799.

In Duval v. Chelf, 92 Va. 489, 23 S. E. Rep. 893, it was held that this presumption is a matter of law, unless the contrary intention is expressed in the contract, and the married woman will not be heard to deny that such was her intention. Code Va. 1887, § 2295; Acts 1895-6, p. 486; Price v. Planters' Bank, 92 Va. 468, 23 S. E. Rep. 887.

But this presumption arising from the mere execution of an obligation can be, and is repelled by an explicit and uncontradicted denial of the fact that she, at the time, *knew* or *believed* that she had *any* separate estate. McDonald v. Hurst, 86 Va. 885, 11 S. E. Rep. 536.

The question is not whether the contract or engagement is in writing, but whether the transaction out of which the demand arose had any reference to, or was made upon the faith and credit of the separate estate. Geiger v. Blackley, 86 Va. 328, 10 S. E. Rep. 43; Radford v. Carwile, 13 W. Va. 572, 580.

If the husband and wife are living together, and the wife, having a separate estate, purchase goods for herself or her family, or contract for services, it is not necessarily implied that she intends a charge upon her estate. It is rather to be inferred, in the absence of proof, direct or circumstantial, to the contrary, that, in making the purchase or contracting for the services, credit was given to the husband, and that she was acting as his agent. Harshberger v. Alger, 31 Gratt. 52.

Whilst the presumption will be that the contract was made for and on behalf of the husband, yet, if a married woman, having separate property, enter into a pecuniary engagement, whether by ordering goods or otherwise, which, if she were a feme sole, would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband but for herself, and on the credit of her separate estate, and it was so intended by her and so understood by the person with whom she was contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her equitable separate estate liable; and the question whether the obligation was contracted in this manner depends upon the facts and circumstances of each case, and, therefore, if the facts and circumstances are such as to lead to the conclusion that she was contracting, not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation. Geiger v. Blackley, 86 Va. 328, 10 S. E. Rep. 43. But this intention must be clear. Radford v. Carwile, 13 W. Va. 572, 657.

Liable on an Open Account.—A married woman's equitable separate estate will be held liable on an open account for wages due for labor performed in the cultivation of her separate estate, where the land was occupied by herself and husband, who was an invalid and the owner of only a small amount of personal property, as a home and such cultivation was for her benefit and necessary for her support and the enjoyment of the estate. Miller v. Miller, 92 Va. 510, 23 S. E. Rep. 891.

If she is living apart from her husband, with a separate estate, and especially if, under articles of separation, it has been stipulated that the husband is not to be bound for her debts, it must be inferred that she intended to charge her own estate. Harshberger v. Alger, 31 Gratt. 52.

Engaging in Trade.—A married woman having a separate estate, may engage in trade with the consent of her husband, and may to the extent of her power over it, subject her estate to the payment of the debts; and she will be entitled to the profits of the trade as against her husband and his creditors, to the extent, at least, to which such profits may not be due to the labor, skill, capital or credit furnished by her husband. Penn v. Whitehead, 17 Gratt. 503.

In such a case the wife is entitled to have the debts of the business paid out of the assets in exoneration of her separate life estate. Penn v. Whitehead, 17 Gratt. 503.

Must Have Some Separate Estate.—It is indispensable that there be such separate estate existing in her and subject to her *jus disponendi* when she signs the instruments by which it is claimed she intended to bind her separate estate. McDonald v. Hurst, 86 Va. 885, 11 S. E. Rep. 536.

Must Know of Its Existence.—She must have *known* that she had some equitable separate estate at that time. McDonald v. Hurst, 86 Va. 885, 11 S. E. Rep. 536.

Need Not Know the Extent of Her Interest.—Where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shows an intention to bind the interest which belongs to her, then, though she may be mistaken as to the extent of the estate vested in her, the law will say that such estate as she may have, shall be bound by her own act. Garland v. Pamplin, 32 Gratt. 305.

Extent of Charge, Question of Intention, Presumptions.—As the charge is a mere question of intention, the wife may extend it to the whole, or confine it to a part of her separate estate. If no specified part is appointed for the payment of the debt, the fair implication is, that the whole estate was intended to be made liable. If, on the other hand, only a part of the estate, expressly or by fair inference, is designed to be charged, no liability whatever can attach to the residue. Darnall v. Smith, 26 Gratt. 878; Garland v. Pamplin, 32 Gratt. 305; Bank of Greensboro v. Chambers, 30 Gratt. 202.

If Part Only Expressly Charged, Charge, Prima Facie, Confined to That Part.—Where a married woman expressly binds a *part* of her separate estate and afterwards assigns enough of that fund to satisfy the engagement, if the plaintiff's bill alleges that the engagement was intended to bind her whole separate estate and the assignment was intended merely as a collateral security, the burden of proof is on him to show the fact. Darnall v. Smith, 26 Gratt. 878.

Fund Expressly Assigned Must Be First Exhausted.—But even if the complainant proves that her intention was to bind her whole estate, it was his duty to follow the fund expressly assigned first and it devolves upon him to account for his failure to do so. Darnall v. Smith, 26 Gratt. 878.

Liable for Her Torts.—In Salamone v. Keiley, 80 Va. 86, the equitable separate estate of a married woman was held liable for her tort, in violating the right of lateral support of adjacent property, RICHARDSON, J., saying: "When she embarked on that enterprise, she impliedly engaged to do the duty which the law imposed on her in such a case, namely, to use due care and skill, and to answer for all liability resulting from her default. Had she been *sui juris*, there could have been no question as to the implied engagement, and her liability for the injury to Salamone's property, and her amenability therefor at law. In equity, however, *quoad* her separate estate, she is *sui juris*. By her default in not using due care and skill in improving her separate estate, she impliedly charged that estate

with her liability, and that estate may be pursued in equity for the satisfaction of that liability."

After-Acquired Separate Estate Not Liable.—Equitable separate estate, acquired after her engagements have been entered into, cannot be subjected for their payment; for, neither she nor the party with whom she entered into the engagements can be presumed to have dealt with reference to what did not exist when the engagements were made. Filler v. Tyler, 91 Va. 458, 22 S. E. Rep. 235; Crockett v. Doriot, 85 Va. 240, 3 S. E. Rep. 128.

3. GENERAL CHARACTERISTICS OF MARRIED WOMEN'S ENGAGEMENTS.

Engagement Must Conform to the Statute of Frauds.—But such contract, to be binding on her separate estate, must be in writing, when it binds her to pay the debt of her husband, or any other person. Radford v. Carwile, 13 W. Va. 683; Hughes v. Hamilton, 19 W. Va. 366.

But in other cases the engagement need not be in writing. Geiger v. Blackley, 86 Va. 328, 10 S. E. Rep. 48; Radford v. Carwile, 13 W. Va. 572, 580.

Character of Consideration Necessary.—The consideration, which will support her debt or contract so as to make her separate estate liable, need not enure to her own benefit, or that of her separate estate, but it may enure for the benefit of her husband, or of any third person, or simply be a prejudice to the other contracting party. Radford v. Carwile, 13 W. Va. 683; Hughes v. Hamilton, 19 W. Va. 366; Dages v. Lee, 20 W. Va. 584.

The extension of time of payment of a pre-existing debt owed by her husband, is a sufficient consideration to charge the separate estate of a married woman, where she becomes her husband's surety on a promissory note. Hughes v. Hamilton, 19 W. Va. 366.

But if she went surety for her husband, or any one else, by signing a note as surety for a just debt of her husband, or such third person, and no new consideration existed for such debt, such as extension of the time of payment, such surety debt could not be charged on her separate estate, simply because, if she had been a feme sole, such note could not have been enforced against her: the contract of suretyship being in such case *nudum pactum*. And though she had sealed as well as signed such note, it could not have been enforced against her separate estate, because, though she would have been bound at law as a feme sole by her having sealed the note, yet this would be, only because she would be estopped from showing, that it was a *nudum pactum*. As her bond as a married woman is void at law, such estoppel could not be relied on in equity; and her separate estate ought not, in such case of suretyship, to be held bound in equity. Radford v. Carwile, 13 W. Va. 609.

All Engagements Binding Except a Gratuitous Bond.—The debts of a married woman, for which her separate estate is liable, arise from any transaction, out of which a debt would arise, if she were a feme sole, except that she is not liable for a bond or covenant, which she has signed and sealed, but which was given without any consideration; she not being estopped from denying the consideration in a court of equity. Radford v. Carwile, 13 W. Va. 683; Hughes v. Hamilton, 19 W. Va. 366; Dages v. Lee, 20 W. Va. 584; Camden v. Hiteshew, 23 W. Va. 236.

4. OPERATION OF MARRIED WOMEN'S ENGAGEMENTS.

Do Not Operate as the Execution of a Power, but Pari Passu.—The engagement of a married woman does not operate as the execution of a power, so that, where she enters into several such engagements, they do not rank according to the priorities of their dates, as would be the case if they acted as appointments under a power, but they are paid *pari passu*. French v. Waterman, 79 Va. 617; Radford v. Carwile, 13 W. Va. 572, 581.

Only Priority That Obtained by Diligence in First Bringing Suit.—The creditors of a feme covert have no priority over each other, unless it be acquired by superior diligence in proceeding to obtain satisfaction. * * But in all cases the general creditors would have priority of payment out of such separate estate between each other according to the time or times their suits are brought, or petitions filed, that is to say, the general creditor, who first brought his suit would be entitled to priority of payment out of the proceeds of the sale of the personal property and the rents of the realty, and the second, next, and so on, and the same as to date of filing petitions. Hughes v. Hamilton, 19 W. Va. 393. Unless one of them has obtained a specific lien. Radford v. Carwile, 13 W. Va. 572, 607; Howe v. Stortz, 27 W. Va. 555; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932.

General Engagements Do Not Constitute Liens.—A general debt of a feme covert is no more a lien or charge upon her separate estate before suit brought to subject it to the debt, than is a general debt of a feme sole a lien or charge upon her estate or property. This is manifestly so from the fact that before suit brought to subject the separate estate of a feme covert to the payment of such debt she may sell and convey her separate real estate in the manner prescribed by law and sell her personal property, and the purchaser thereof will take and hold it as his own, independent of such debt, whether he had notice of the existence of the debt or not. Hughes v. Hamilton, 19 W. Va. 395; Howe v. Stortz, 27 W. Va. 555; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932.

A married woman's general engagement such as a negotiable note does not constitute a specific lien upon her estate, so that if the property is aliened to a *bona fide* purchaser for valuable consideration, before any suit is instituted on it, the debt evidenced by it is lost, and a bill to enforce it will be dismissed on demurrer. French v. Waterman, 79 Va. 617. See also, Walters v. Farmers' Bank of Va., 76 Va. 12.

After Suit Brought They Become Quasi Liens.—The debt of a general creditor of a feme covert after suit brought by said creditor to subject such separate estate to the payment of his debt becomes a *quasi* lien at least upon such separate estate and for the satisfaction thereof. Hughes v. Hamilton, 19 W. Va. 395.

In such proceeding perhaps all rights acquired from or under the feme covert to the separate property sought to be subjected in this suit to the payment of the debt pending the suit, are subject to any decree, which may be made in the suit, except so far as a purchaser may be protected by the 13th section of chapter 139 of the Code of West Virginia 1891. Hughes v. Hamilton, 19 W. Va. 395.

But in Bruff v. Thompson, 31 W. Va. 16, 6 S. E. Rep. 352, this dictum was disapproved and it was held by two judges out of three that in a proceeding in equity to subject the personal estate of a feme covert to the payment of a debt, in which the property is not seized, levied upon or otherwise taken into custody, the plaintiff does not acquire any spe-

cific lien upon such property. Certainly he acquires no such lien simply by the institution of his suit. Hence, a purchaser for value and without fraud will not be liable to the plaintiff for the property so purchased or its value, whether he had or had not notice of the pendency of the suit at the time of his purchase. GREEN, J., dissenting.

5. PERSONAL LIABILITY.

No Personal Liability Attaches to a Married Woman from Her Engagements—A wife is exempt from all personal liability, and from all personal decrees and judgments upon her contracts. Her undertaking, so far as it is recognized by the courts, is not that she will pay the debt, but that her separate estate shall be answerable for it. (And that is bound so far only as she agreed it should be bound.) Darnall v. Smith, 26 Gratt. 878; Justis v. English, 30 Gratt. 565; Garland v. Pamplin, 32 Gratt. 305; Price v. Planters' Bank, 92 Va. 468, 23 S. E. Rep. 887; Filler v. Tyler, 91 Va. 458, 22 S. E. Rep. 235; Armstrong v. Pitts, 13 Gratt. 235; Walters v. Farmers' Bank of Va., 76 Va. 12; Pickens v. Kniseley, 36 W. Va. 794, 15 S. E. Rep. 997. Dissenting opinion of GREEN, J., in Bruff v. Thompson, 31 W. Va. 23, 6 S. E. Rep. 352.

6. JURISDICTION OF EQUITY.

a. Generally.—A married woman's general engagements, made with reference to her separate estate, while they will not bind her personally nor constitute liens on the estate, will nevertheless create a liability of a general character which a court of equity will enforce. Frank v. Lilienfeld, 33 Gratt. 377; Price v. Planters' Bank, 92 Va. 468, 23 S. E. Rep. 887; Bruff v. Thompson, 31 W. Va. 23, 6 S. E. Rep. 352.

A court of equity is the appropriate tribunal for the purpose of charging a married woman's equitable separate estate with the payment of her engagements. Walters v. Farmers' Bank of Va., 76 Va. 12; Armstrong v. Pitts, 13 Gratt. 235, 240; Salamone v. Keiley, 80 Va. 86; Howe v. Stortz, 27 W. Va. 555.

"A general creditor of a feme covert may subject the separate estate of the feme covert to the payment of his debt; but he cannot do so with us by obtaining a personal judgment in a court of law against the feme covert, but his remedy is by bill in a court of equity to subject such separate estate to the payment of his debt, not because his debt is a lien or charge upon such separate estate, any more than a debt would be against the estate of a feme sole, but because the debt is just, and it is just and equitable, that such separate estate should be subjected to the payment of the debt; and a court of equity affords the remedy and the only remedy, by proceeding directly to subject such separate estate to the payment of the debt according to the rules and principles governing courts of equity. This proceeding in equity to subject the separate estate of the feme covert to the payment of her just debts must, I think, necessarily be considered in the nature of a proceeding *in rem*." Hughes v. Hamilton, 19 W. Va. 394; Howe v. Stortz, 27 W. Va. 555.

A married woman may go into a court of equity for an injunction to prevent a sale of equitable separate estate under execution, though she have an adequate remedy at law by interpleader under § 2999, Code Va. 1887.

The equitable separate estate of a married woman is the creature of a court of equity, and an injunction will always be granted, where necessary, to protect, aid, or enforce any equitable estate, or interest, which she may have. Courts of equity, having such jurisdiction before the enactment of the statute now found in section 2999 of the Code of 1887, still retain it, although the statute may furnish a complete and adequate remedy at law. Courts of equity having once acquired jurisdiction never lose it, because jurisdiction of the same matters is given to law courts, unless the statute giving such jurisdiction uses prohibitory or restrictive words. Filler v. Tyler, 91 Va. 458, 22 S. E. Rep. 235.

Court Must Protect Interest of Married Women.—Though a married woman is to be treated as a feme sole, so far as the capacity to charge her estate with her pecuniary engagements is concerned, yet if, in a litigation involving that question, the husband does not choose to defend her interests, and the trustee is negligent of his duty, it is incumbent upon the court to direct such enquiries as will prevent the sacrifice of her rights. Darnell v. Smith, 26 Gratt. 879.

b. Parties.

Other Creditors.—A general creditor of a married woman should not make other general creditors parties to his suit to subject her separate estate, nor should he make creditors having a lien on her real estate parties since their lien is on the corpus of the real estate while that of general creditors, after suit brought, is on the personalty and the rents and profits of the realty, hence their liens are on different subjects and the enforcement of the specific liens may destroy the lien of the general creditors on the rents and profits. If, however, the specific liens covered the personalty as well as realty these lienors should be made parties, in order that a court of equity may marshal the respective claims, the lien creditors having a lien on realty and personalty and the general creditors a lien only on the personalty. Howe v. Stortz, 27 W. Va. 555; Hughes v. Hamilton, 19 W. Va. 366, 392.

The Trustee.—Nor is the trustee under such deed of trust a proper party, though, if the general creditor, who has brought suit, has reasonable ground to believe that the trustee is about to pay the surplus to the married woman instead of to him, equity will grant an injunction. Howe v. Stortz, 27 W. Va. 555.

Indorser of Negotiable Note.—It is proper in such case to make an endorser of a feme covert's negotiable note, a party to a suit to subject her separate estate, and though such attempt fail by reason of her having aliened her separate estate before the bill was filed, still it is proper for the court of equity having once properly obtained jurisdiction to go on and render a decree against such indorser. Walters v. Farmers' Bank of Va., 76 Va. 12.

Answer by Trustee Sufficient.—Even when the married woman fails to answer, if her trustee does so, his answer sufficiently puts the complainant upon proof of all his material allegations. Darnall v. Smith, 26 Gratt. 878.

c. Extent of Liability.

Personalty and Rents and Profits of Realty.—"To satisfy a general engagement of the wife (and by general engagement I here mean an engagement made with reference to her separate estate, so as to make it liable in a general sense, but which does not amount to a specific lien of any sort upon such estate), the personal property, where the interest of the wife is absolute and there is no restraint upon the alienation of such property, imposed by the instrument creating the separate estate, may be sold by decree of the court, and, under like conditions, the rents and profits of the separate real estate may be subjected; and to that end, following the analogy of the law so far,

such real estate may be leased from time to time, by order of the court, until the debt, out of the rents, be discharged." Frank v. Lilienfeld, 33 Gratt. 377; French v. Waterman, 79 Va. 617; Hughes v. Hamilton, 19 W. Va. 366; Bruff v. Thompson, 31 W. Va. 23, 6 S. E. Rep. 352; Radford v. Carwile, 13 W. Va. 572, 674; Howe v. Stortz, 27 W. Va. 555.

In Radford v. Carwile, 13 W. Va. 572, 780, GREEN, J., was of opinion that only the rents and profits of the real estate accruing during coverture were to be subjected.

Proceeds of Sale of Land.—Although the corpus of the realty of a married woman cannot be subjected to the payment of her debts, yet if the corpus is sold by a decree of court to satisfy a lien on the corpus, such sale will convert the separate realty into separate personalty and any surplus remaining after satisfying such lien may be applied to the other debt. Charleston, etc., Lumber Co. v. Brockmyer, 18 W. Va. 586. A sale by a trustee under a deed of trust will effect a like conversion. Howe v. Stortz, 27 W. Va. 555.

A feme sole having contracted an engagement of marriage conveys, with the assent of her prospective husband, land and slaves, in trust "for the sole and separate use of herself during her life, and the profits thereof to be applied to her sole and separate use, and the support, maintenance and education of her only child, Lorenzo, and any other child or children she may hereafter have, at her discretion, free from, etc., and for the use of such children as she may leave at her death, equally to be divided." Her husband contracts debts during and after the coverture, with the trustee and other persons. *Held:*

1. The trust property is not liable to be sold for the payment of such debts contracted by the husband beyond the profits of the trust estate, although some of them were contracted for necessaries furnished for the support and maintenance of the *cestuis que trust.*

2. That the trust subject is liable for the payment of a debt contracted for medical services, rendered the slaves and the beneficiaries.

3. *Quære:* Whether the trust subject is liable beyond the profits for fees of counsel employed by the *cestuis que trust* and trustee.

4. That in such a case, if the profits of the trust fund prove inadequate for the purposes of the trust, it is the duty of the trustee or the *cestuis que trust* to invoke the aid of a court of equity. Doswell v. Anderson, 1 P. & H. 185.

Where real estate is given to a married woman as her separate estate, to enjoy the rents thereof during her life, for her support and that of her children, and the power to sell the estate was only given her on condition that the proceeds be invested, and held under the same limitations, if she aliens it for valuable consideration, her creditors under her general engagements are only entitled to her ratable proportion of any surplus of the annual profits of the trust subject after providing for her support and that of the children, and if, there is no such surplus, such creditors' bill should be dismissed upon demurrer. French v. Waterman, 79 Va. 617.

Corpus of Realty.

Old Doctrine.—But in no case, should the real estate or any part thereof be sold by decree to satisfy the debt of the wife unless such debt be one secured by specific lien on such estate, created in a mode which conforms to the mode required for a valid disposition by her of that estate. If the creditor desires to bind the real estate in such a way as shall authorize the sale of it for the satisfaction of his debt, let him take the appropriate security within the power of the wife to give. If he fails to do this, equity cannot provide him a security which he has neglected to provide for himself. Frank v. Lilienfeld, 33 Gratt. 377; French v. Waterman, 79 Va. 617; Hughes v. Hamilton, 19 W. Va. 366; Radford v. Carwile, 13 W. Va. 572, 674; Howe v. Stortz, 27 W. Va. 555.

New Doctrine.—But in Price v. Planters' Bank, 92 Va. 468, 23 S. E. Rep. 887, a new doctrine was laid down contrary to a long line of decisions, that where there is no equitable separate personal estate of the wife applicable to the discharge of her general engagements, or, if so, it is insufficient for that purpose, and the rents and profits of the real estate constituting her equitable separate estate will never discharge the debts, or not do so within a reasonable time, it is proper to decree a sale of the land for that purpose. BUCHANAN, J., dissenting. See also, Miller v. Miller, 92 Va. 510, 23 S. E. Rep. 891; Dezendorf v. Humphreys, 95 Va. 473, 28 S. E. Rep. 880; Acts 1895-6, p. 486.

Power of Court No Greater Than That of Married Woman Herself.—A court, dealing with a separate estate, must ascertain and measure the power which the married woman can exert over it. It must act within the limit prescribed to her by the instrument under which she holds her separate estate. If she cannot convey or encumber it, neither can she by any general engagement fasten upon her property an inchoate charge which may by her voluntary act, or through the instrumentality of the courts in the ordinary discharge of their functions, be elevated into a lien or encumbrance. The law which limits the power of the beneficiary over the subject has at the same time circumscribed the power which can be exerted by the courts. Dezendorf v. Humphreys, 95 Va. 473, 28 S. E. Rep. 880.

d. Effect of Subsequent Discoverture.

Does Not Impair the Effect of Her Engagements.—The right to subject the personalty and the rents and profits of the realty to the payment of the general engagements of a married woman, is not confined to the period of coverture, they will continue liable after the termination of the coverture, whether by her own death or that of her husband, or otherwise, unless the estate is determined by the event that terminates the coverture. Price v. Planters' Bank, 92 Va. 468, 23 S. E. Rep. 887; Miller v. Miller, 92 Va. 510, 23 S. E. Rep. 891.

But Gives Them No Greater Effect.—The subsequent discoverture of a feme covert cannot *per se* give any other or greater force and effect to her prior engagements than they had during the coverture. Such engagements did not bind her personally either at law or in equity, so as to warrant a personal judgment or decree against her. They affected her separate estate to the extent and only to the extent of her then existing powers over it. They had no other operation. Her subsequent discoverture could not, upon any known principle, operate by estoppel or otherwise to enlarge the liabilities of that estate imposed by the engagements when entered into. Ropp v. Minor, 33 Gratt. 97; Hawley v. Twyman, 29 Gratt. 728.

e. Necessary Allegations of Bill.—A bill to charge the equitable separate estate of a married woman, must allege that she had separate property at the time of the contract and that she contracted with reference to it, otherwise, it is bad on demurrer. McDonald v. Hurst, 86 Va. 885, 11 S. E. Rep. 536.

As to the necessity for alleging that she contracted with reference to her separate estate, see Duval v. Chelf, 92 Va. 489, 23 S. E. Rep. 893, and Code 1887, § 2295, Acts 1895-6, p. 406, where it is held that she is conclusively presumed to intend to bind her separate estate by the execution of any writing, which may bring such allegation within the meaning of § 3245 of the Code, that allegations not traversable may be omitted.

7. STATUTE OF LIMITATIONS.

The statute of limitations is applied to claims against a married woman's equitable separate estate by analogy. Harshberger v. Alger, 31 Gratt. 52.

Does Not Apply to Draft of a Married Woman.—Where a married woman draws a draft on her trustee, on account of her separate estate, such draft operates as an equitable assignment *pro tanto*, and the statute of limitations does not apply, since a direct trust is created in favor of the payee. Bain v. Buff, 76 Va. 371.

Bond, Though Void as Bond, Good as Evidence against Her Estate till Barred as a Bond.—Claims against a married woman's separate estate, evidenced by bonds executed by her, are not barred by the statute of limitations as simple contract debts, on the ground that they are void as bonds on account of the coverture of the obligor, since the bonds, though void at law, are valid in equity as evidence against her estate. Garland v. Pamplin, 32 Gratt. 305.

D. RESTRAINTS ON ALIENATION.

(1) **Generally.**—Nothing is now better settled than that the *jus disponendi* may be severed from the separate estate of a feme covert. Nixon v. Rose, 12 Gratt. 425; Ropp v. Minor, 33 Gratt. 97. It is subject to such limitations and restrictions as may be contained in the instrument creating the separate estate, which may give it *sub modo* or withhold it altogether. McChesney v. Brown, 25 Gratt. 393; Burging v. McDowell, 30 Gratt. 236; Lee v. Bank of U. S., 9 Leigh 200; Green v. Claiborne, 83 Va. 386, 5 S. E. Rep. 376.

Restraint May Be Either Express or Implied, but Must Be Clear.—Contrary to the course of the common law, in the creation of these equitable estates, restraint, either absolute or qualified, may be imposed on the power of alienation and its incidents, and the intention to restrain may be either express or implied, but in either case it must be clear. Bain v. Buff, 76 Va. 371; Smith v. Fox, 82 Va. 763, 1 S. E. Rep. 200; Averett v. Lipscombe, 76 Va. 404; Price v. Planters' Bank, 92 Va. 472, 23 S. E. Rep. 887; Weinberg v. Rempe, 15 W. Va. 829.

Law Favors Intention to Exclude.—Nor is it necessary that the power of alienation should be excluded in express terms. It may be excluded by implication. Its exclusion is often, if not generally, necessary to effectuate the objects of the settlement and to protect the wife as well from her own weakness, as from the power and influence of her husband. The law therefore favors the intention to exclude it and will give effect to such intention whenever it can be ascertained by a fair construction of the settlement. Nixon v. Rose, 12 Gratt. 425; Lee v. Bank of U. S., 9 Leigh 200; Haymond v. Jones, 33 Gratt. 317; Dezendorf v. Humphreys, 95 Va. 473, 28 S. E. Rep. 880.

A bequest in trust to a married woman in the following words: "And as it is my wish to guard in the most ample manner against the imprudent sale or other disposition of the aforesaid property, during the natural life of E (the married woman), it is hereby wholly and solely confided to the discretion of the aforesaid trustees in what manner the said E shall receive and enjoy the profits arising from the hires or other disposition of the slaves aforesaid," deprives the married woman separately, or jointly with her husband of the power to alienate the slaves during her coverture, but the trustees may permit E and her husband to take possession of the slaves, and thus enjoy the profits of them. Nixon v. Rose, 12 Gratt. 425.

May Be Implied from Scheme of Settlement.—If by a fair construction of the instrument, the exercise of these powers would be inconsistent with the plan and scheme of the settlement and would defeat the plain intent pervading the deed, *e. g.*, to secure a home for the wife, they must be considered as much forbidden as if expressly denied. BURKS, J., in Bank of Greensboro v. Chambers, 30 Gratt. 202; Bailey v. Hill, 77 Va. 492; Ropp v. Minor, 33 Gratt. 97; Penn v. Whitehead, 17 Gratt. 503.

When such intention appears, or can be gathered from the whole instrument—the language used, the scheme of settlement, or the facts and circumstances of the particular case, to be gathered from the instrument—equity will respect it and enforce the restraint that may be imposed. Price v. Planters' Nat. Bank, 92 Va. 472, 23 S. E. Rep. 887.

But Mere Addition of Words Showing Intention to Exclude Rights of Husband Insufficient.—The mere addition of the words, "so that neither said property nor its proceeds shall be liable for the contracts or debts of the husband" is not sufficient. They are merely added *ex abundanti cautela* to exclude the rights of the husband, not to limit the powers of the wife. Averett v. Lipscombe, 76 Va. 404; Christian v. Keen, 80 Va. 369.

Such Restrain Extends to Any Anticipation of the Profits.—In Ropp v. Minor, 33 Gratt. 97, it was held that such restraint on alienation, implied from the purpose of the instrument, applied also to any anticipation of profits derived from such estate, so far as they might be required for the wife's comfortable support, but not to so much of said profits as were not so necessary.

(2) **Effect of Expression of One Mode of Alienation.**

Realty, Formally Held Exclusive.—A feme covert, holding separate property in real estate by deed or will prescribing a peculiar mode of disposition (in this case by will) cannot dispose of it in any other mode, although the deed or will does not negative such other mode expressly, on the ground that the intention of such a provision was to guard against improvidence of the wife. Williamson v. Beckham, 8 Leigh 20.

In McClintic v. Ocheltree, 4 W. Va. 249, although the rule in Williamson v. Beckham, 8 Leigh 20, was expressly approved, yet it was mere dictum, since in the latter case it was held that the expression of one method, was the exclusion of all other methods of alienation, although in general the separate estate might have been so aliened, while in the principal case it was applied merely to the extent that a designated method did not confer the power to alienate by will, a method which it was expressly said, was not incident to equitable separate estates at that time or till the Code of 1849.

Disapproved in Later Cases.—In Lee v. Bank of U. S., 9 Leigh 200, the rule of "*expressio unius est exclusio alterius*" was disapproved in its general application to the separate real estate of a married woman, and it was held that an *express* power of disposition of real estate *by will* in a particular manner is nothing more than a dispensation from one species of disa-

bility and no proof of an intention to take away existing legal rights. In this case however there was internal evidence in the deed that in giving the married woman power to dispose of the estate by will, it was not the intention of the grantor to exclude the power to convey by deed, for power was expressly given her to direct the trustee to sell the estate, and in case of sale, the trustee to hold the proceeds, subject to her separate use and order, this being held to take away the force of the argument in Williamson v. Beckham, 8 Leigh 20.

The decision in Williamson v. Beckham was expressly approved however, on the ground that the deed in this case in one clause gave the wife abso lute power of alienation, *to be exercised however after the death of her husband* and in another clause power to dispose of it *by will*, manifestly meaning before the death of her husband, so that the maxim *exclusio unius*, etc., would well apply to the wife's power of alienation before her husband's death. TUCKER, P., dissenting and reiterating his opinion as expressed in Williamson v. Beckham, 8 Leigh 20.

In Woodson v. Perkins, 5 Gratt. 345, where, in the deed of settlement, the wife was invested with the full power of disposing of, or charging her personal estate to all intents and purposes as if she were a feme sole, and a subsequent clause empowered the trustee to convey the property secured by said deed in such manner as she should from time to time, notwithstanding her coverture, by writing under her hand and seal, attested by three or more credible witnesses, or by her last will and testament, direct, it was held that this, though it may have enlarged her power, did not operate to restrain or bind the general power of disposition which she retained over her personal estate by the terms of the former clause. Lee v. Bank of U. S., 9 Leigh 200.

In Frank v. Lilienfeld, 33 Gratt. 377, where the amplest powers were conferred on the wife, over the whole of her separate estate, by express terms, but a later clause directed a particular method by which she might alienate the property, viz., by a writing in the nature of a will, or by direction to the trustees, in writing and executed with certain formalities, it was held that, as a large part of the estate consisted of a stock of goods, and it was plainly the intention of the grantor that the business should be carried on, it could not have been intended that the two particular modes of alienation should be exclusive of all others, since that construction would be impracticable.

A Question of Construction.—But after all it is a question of construction to be determined on the particular facts and circumstances of each case, remembering that while in the creation of a separate estate, restriction on the power of alienation express or implied, may be inferred, the intention to do so must, in either case, be clear. Christian v. Keen, 80 Va. 369.

In this effort the court will be guided by the paramount rule which requires that in the construction of every instrument, it must be so construed as, if possible, to give effect to every part of it, and in order to discover the intention of the parties, it will look, not only to the terms of the instrument, but to the subject-matter and the surrounding circumstances. While, therefore, the maxim can be no longer allowed the controlling force which seems to have been accorded it in Williamson v. Beckham, 8 Leigh 20, in determining the mode to be observed by the wife in the disposition of the property settled to her separate use, the fact that a particular mode has been prescribed may still be looked to as one circumstance tending to show the extent of the powers of alienation given her. Green v. Claiborne, 3 Va. 386, 5 S. E. Rep. 376.

When power is given a married woman to dispose of her real estate by written direction to the trustee, this method is not exclusive of the methods incident by the general law to such estate, in the absence of anything in the deed or the surrounding circumstances to warrant such a conclusion. Christian v. Keen, 80 Va. 369.

Present Rule.—Where the instrument creating the separate estate prescribes one mode of alienation by the wife, the prescribing of that mode is not to be construed as an intention to exclude alienation by her in any other manner, unless an intention to to do so can be clearly gathered from the face of the instrument. Price v. Planters' Nat. Bank, 92 Va. 472, 23 S. E. Rep. 887; Smith v. Fox, 82 Va. 763, 1 S. E. Rep. 200; Radford v. Carwile, 13 W. Va. 682; Weinberg v. Rempe, 15 W. Va. 829.

Personalty.—"It was contended, that the grant of a power to convey in one mode, indicates an intention to prohibit all other modes of alienation: on the principle that *expressio unius est exclusio alterius*. This is the great argument relied upon, in cases of separate personal property; and there may be some plausibility in it, when applied to such property. We have seen, that where personal property is the subject, the mere grant of a separate estate, nothing being said as to the power of disposition, gives the wife the power of alienation in any mode she may please, as if she were a feme sole. It might, therefore, be said with some appearance of reason, that the express grant of a power, which the wife would have had without the express grant, indicates an intention to confine her to that power; since the express grant would otherwise be superogatory. How far this argument may be conclusive in cases of personal property, it is not necessary to decide in this case; for this is a case of real estate. I will observe, however, that there has been some conflict of opinion, among the judges of the English courts, upon the force of this argument when applied to personal property; and I am decidedly of opinion, that the weight of authority is against the argument." Lee v. Bank of U. S., 9 Leigh 208.

E. HUSBAND'S MARITAL RIGHTS.

(1) As Sole Distributee.

Attaches Where Wife's Separate Estate is Merely for Her Life.—If the property be settled to the sole and separate use of the wife, without more, the husband, during the coverture, has no interest in the property, real or personal, so settled; but if the wife die, the husband surviving is entitled to qualify as her administrator and is the sole distributee of her personal estate. Andes v. Roller, 98 Va. 620, 37 S. E. Rep. 297.

But a deed of gift of slaves to a married woman, "*to her own special use*, and afterwards *to her heir or heirs*," with a clause providing that, "if she shall die without heir or heirs, or without a will disposing of the said slaves and their increase, they shall return to the donor or his heirs," conveys the property to the *separate* use of the wife, so that, after the death of the husband, she is entitled to hold the slaves and their increase against his administrators. Smith v. Smith, 6 Munf. 581.

(2) Curtesy.—A husband, if he survives his wife and the common-law requisites exist, is entitled to

curtesy in any real estate held by her as her equitable separate estate, which may remain at her death undisposed of by her during the coverture, or by will, under a power to that effect vested in her by the instrument creating the separate estate, just as in any other real estate of inheritance owned by her, unless his marital rights are excluded by such instrument. Jones v. Jones, 96 Va. 749, 32 S. E. Rep. 463; Chapman v. Price, 83 Va. 392, 11 S. E. Rep. 879; Kiracofe v. Kiracofe, 93 Va. 591, 25 S. E. Rep. 601; Winkler v. Winkler, 18 W. Va. 455, 467.

Whether they are excluded or not depends upon the intention of the grantor. This may appear from the instrument creating the separate estate in the wife, or may result from the nature of the transaction. Where the separate estate is created by a stranger, the intention to exclude must be plain and unequivocal, or the husband will be entitled to curtesy. Jones v. Jones, 96 Va. 749, 32 S. E. Rep. 463.

Where the Estate Is Derived from the Husband.—A husband has not an estate as tenant by the curtesy in land conveyed by him in such manner as to create an equitable separate estate in his wife, whether the conveyance be made directly to her or to another person for her, in the absence of a reservation in the conveyance of his right thereto at her death. Jones v. Jones, 96 Va. 749, 32 S. E. Rep. 453; Dugger v. Dugger, 84 Va. 130, 4 S. E. Rep. 171; Sayers v. Wall, 26 Gratt. 354; Irvine v. Greever, 32 Gratt. 411; McChesney v. Brown, 25 Gratt. 393.

Where Estate Is Disposed of by Deed or Will.—Where a married woman can and does dispose of her equitable, separate estate, by will or otherwise, the husband is deprived of curtesy. Chapman v. Price, 83 Va. 392, 11 S. E. Rep. 879; Kiracofe v. Kiracofe, 93 Va. 591, 25 S. E. Rep. 601; Hutchings v. Commercial Bank, 91 Va. 68, 20 S. E. Rep. 950.

Where Intention of Settler Is Clearly Expressed to the Contrary.—Where the intention of the settler is clearly expressed, the estate may be so limited as to give the wife the inheritance and deprive the husband of curtesy. Chapman v. Price, 83 Va. 392, 11 S. E. Rep. 879.

F. EFFECT OF STATUTES.

(1) **In Virginia.**—"Section 2294 of the Code of Va. 1887, maintains what is known as the equitable separate estate of a married woman unaffected by the statutory provisions whereby the statutory separate estate of the wife is created and preserved." CARDWELL, J., in Andes v. Roller, 98 Va. 620, 37 S. E. Rep. 297.

In the second section of the Married Woman's Act, April 4, 1877, Acts of 1887 and 1888, p. 248, the latter part of this section reading, "And provides further that the sole and separate estate created by any gift, grant, devise or bequest shall be held according to the terms and powers, and be subject to the provisions and limitations thereof and to the provisions and limitations of this act, so far as they are in conflict therewith," should read in the last line "so far as they are *not* in conflict therewith." Hutchings v. Commercial Bank, 91 Va. 68, 20 S. E. Rep. 950.

Whether a separate estate is an equitable separate estate or a statutory separate estate must be determined from the language and provisions of the instrument, to be construed in each case. If the instrument grants powers or imposes restrictions not granted or imposed by the statute, but which are yet consistent with the rules and principles of equity, the estate will be construed to be an equitable, and not a statutory separate estate, and that which, prior to the passage of the "Married Woman's Act," was held to be an equitable separate estate, retains that character, is controlled by the provisions of the settlement by which it was created, and is governed by the rules and principles applicable to such estate. Jones v. Jones, 96 Va. 749, 32 S. E. Rep. 463; Dezendorf v. Humphreys, 95 Va. 473, 28 S. E. Rep. 880.

(2) **In West Virginia.**—"The above rules governing equitable separate estates will apply to the separate estate of a married woman held under the third section of chapter 66 of the Code of West Virginia, except: 1. She holds the legal instead of the mere equitable title to such separate property. 2. She can devise such real estate. 3. If living separate and apart from her husband, she may sell and convey her real estate without her husband joining in the deed or contract of sale; and is liable for all her debts contracted while she was so living apart from her husband. 4. Whether if living with her husband, she can sell her real estate, if her husband joins her in the written contract and conveyance, without her being privily examined, is questionable; and we express no opinion on this point, it not arising in the case. 5. Whether this section has any effect on the question, whether a husband has a right to curtesy, or as distributee, or administrator of his wife in reference to her separate estate, is doubtful; and we express no opinion on this point." Radford v. Carwile, 13 W. Va. 684.

By Code of W. Va., 1868, ch. 66, what constituted a married woman's equitable separate estate, was converted into her statutory separate estate. Clay v. City of St. Albans, 43 W. Va. 539, 27 S. E. Rep. 368.

Sec. 1, ch. 66, Code W. Va. 1868, providing that all property theretofore conveyed to a married woman by any person other than her husband, as her sole and separate property, shall be and remain her sole and separate property, applies only to what was her equitable separate estate at the time of its passage, not to property which did not constitute such estate. Laughlin v. Fream, 14 W. Va. 322.

The statutes which merely give to the wife a separate legal estate, instead of the separate equitable estate she formerly held, do not by implication invest her with the power to make contracts generally, which would be recognized by a court of law, or in other words do not remove her legal incapacity to make contracts generally. Such statutes do not invest her with the power to contract generally, so as to bind her personal as well as her separate estate, and therefore do not make her liable to suits at law on her contracts generally, but while such statutes do not enlarge her powers nor remove her legal disability they do not restrict or change the right of a court of equity to enforce the payment of a debt out of her separate legal estate, under the same circumstances under which, before the passage of such statutes, they would have enforced the payment of such debt out of her separate equitable estate. Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790.

V. STATUTORY SEPARATE ESTATE.

A. MARRIED WOMAN'S ACT IN VIRGINIA.—This act makes radical changes in the legal capacity and property rights of married women in this state. By it she becomes the absolute owner of all the real and personal property "which she shall own at the time of her marriage, and the rents, issues and profits thereof," and also of all the real and personal property or estate thereafter acquired, in any of the following modes: that is, "by gift, grant, purchase,

inheritance, devise or bequest," or as a separate and sole trader, subject only to curtesy consummate in her husband in the event that all the prerequisites shall exist, and he shall survive the wife. Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335.

The Married Woman's Act of April 4, 1877, only secured to married women property thereafter acquired, and does not affect the husband's marital rights in her property acquired before that date. Beecher v. Wilson, 84 Va. 813, 6 S. E. Rep. 209.

The Married Woman's Act leaves the rights, duties and obligations of the husband and wife as at common law, except in so far as the act itself has changed or modified them. Richmond Ry., etc., Co. v. Bowles, 92 Va. 738, 24 S. E. Rep. 388.

To Be Construed Liberally.—This act being obviously an enabling act, should not be construed strictly, as in derogation of the common law, nor technically, but fairly, so as to carry out the intention of the legislature, which is to secure to the feme covert, as separate estate, free from the debts, liabilities and disposal of the husband, all of the property acquired at the times and in the ways pointed out in said act, and not in anywise to affect or change the personal relations of husband and wife which enter into the status of marriage. Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335.

Does Not Impair Vested Rights.—Nor do we perceive that there is anything in the act which necessarily impairs any vested right. For, whilst the inevitable effect of any fair construction of the act is to destroy curtesy initiate and to deprive the husband of the right to reduce the choses in action of the wife, including herein a legacy or distributive share, into possession, yet it is believed that neither of these inchoate rights is a vested right which may not be intercepted by act of the legislature and taken from the husband. In Breeding v. Davis, 77 Va. 639, this was distinctly held to be the case as to curtesy initiate where the land descended upon the wife after the passage of the Married Woman's Act. Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335; Keagy v. Trout, 85 Va. 390, 7 S. E. Rep. 329.

B. WHAT CONSTITUTES SUCH ESTATE.—The first section secures a separate estate to the woman in the property *owned by her at the time of the marriage*, and the rents, issues and profits thereof, and *also* in the property acquired by her *during marriage as a separate and sole trader*, while the second section secures to her such separate estate in *all* property acquired by her *after and during marriage* in any of the modes designated in that section. Williams v. Lord, 75 Va. 398.

Property Acquired in Any of the Specified Modes.—The Married Woman's Act of April 4, 1887, secures to a married woman not only property acquired by her as a sole trader, but *any* property acquired after the date of that act, whether by gift, grant, purchase, inheritance, devise or bequest, hence debts secured by a deed of trust, purchased by her, constitute a part of her separate estate. Williams v. Lord, 75 Va. 390.

So a bond acquired by assignment for value. Tate v. Perkins, 85 Va. 169, 7 S. E. Rep. 328.

A separate estate under the third section of chapter 66 of the Code W. Va., is created simply by a conveyance of land to her, though it is not conveyed for her sole and separate use. Radford v. Carwile, 13 W. Va. 684.

Money collected by the husband on demands due the wife after the passage of the Married Woman's Act of April 4, 1887, is the separate estate of the wife. Riggan v. Riggan, 93 Va. 78, 24 S. E. Rep. 920.

Assignment.—Any assignment of property to a married woman in West Virginia since April 1, 1869, gives her a separate estate; nothing but a simple conveyance or assignment being necessary. Williamson v. Russell, 18 W. Va. 612.

A Policy of Insurance.—By the act of assembly "securing to married women, on conditions, all property acquired by them before or after marriage," approved April 4, 1877, a policy of insurance is payable to a married woman is her property for her sole and separate use, and she may bequeath the same as if she were unmarried, and it is not liable to the debts or liabilities of her husband. He has no interest in it whatever, and it is in no way subject to his control. Hayes v. Va. Mut. Prot. Ass'n, 76 Va. 225.

Property Purchased by Wife.—Property purchased by a married woman from a person other than her husband is her separate property, although purchased on credit, and paid for out of profits arising from its use by her, and although, when purchased, she had no separate estate. Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. Rep. 570.

Or where she pays for it out of her separate means. Walker v. Peck, 39 W. Va. 325, 19 S. E. Rep. 411.

Where real estate is conveyed directly to a married woman by a vendor, the deed showing on its face that the consideration for said real estate is to be paid by said vendee in deferred payments, said vendee executing her notes to the vendor for said deferred payments, the first of which payments appears to have been made by said vendee out of the proceeds of ice gathered and put up on said land by the husband of vendee, acting as her agent, neither said ice, nor a horse nor other property purchased with the proceeds of said ice, should be held liable to be levied upon and sold as the property of said husband for his debts, since it is the separate property of the wife. Robinson v. Neill, 34 W. Va. 128, 11 S. E. Rep. 999.

Where a conveyance of real estate is made to a married woman by a person other than her husband, and the purchase money therefor is paid by the wife, partly out of money earned by her by keeping a boarding house, with the consent of her husband, he taking no part in said business, and furnishing none of the means to carry it on, partly by money realized by her by releasing a contract which she had made with another party, and partly with money borrowed on her own individual note, she is entitled, under the statute, to hold the same to her sole and separate use, free from the disposal of her husband, and not liable for his debts. Stewart v. Stout, 38 W. Va. 478, 18 S. E. Rep. 726.

Where property is purchased with money furnished by a third party for the benefit of a married woman, or with the proceeds of her separate estate, such property will be her separate estate and not liable for her husband's debts. Atwood v. Dolan, 34 W. Va. 563, 12 S. E. Rep. 688.

Where the land is purchased directly with money derived from the wife's estate and the deed is made direct to her, even though the title bond is taken in the name of her husband, when it does not appear that the wife ever knew it was so taken, much less that she assented to or approved of its being so taken, the presumption of a gift to the husband is rebutted. Even if the deed had been made to her husband, a resulting trust would have arisen in her favor and a court of equity would have compelled

a conveyance of the legal title from her husband to her. Hamilton v. Steele, 22 W. Va. 348.

Right of Wife to Subrogation.—Where a decree was rendered for the sale of a tract of land at public sale, and there was but one judgment lien upon it at the time, and, by the consent of the judgment creditor and the debtor, the land was, by the commissioner, sold to the wife of the debtor, and, out of her own separate estate, she, without fraud, paid for the land, by paying the said judgment and costs of the suit, and afterwards another judgment was recovered against the debtor, while the wife is not entitled to hold the land under her purchase, yet she is entitled to be subrogated to the rights of the creditors in the said judgment which she discharged. Hutson v. Sadler, 31 W. Va. 353, 6 S. E. Rep. 921.

Burden of Proof.—It is the settled law of this state, that, in a purchase of property by a wife during coverture, the burden is upon her to prove distinctly that she paid the purchase money with funds not derived from her husband. Evidence that she purchased the property or that it was conveyed to her amounts to nothing, unless it is accompanied by clear and full proof that she paid for it with her own separate estate; and in the absence of such proof the presumption is that her husband furnished the money and the property will be subject to his debts. McMasters v. Edgar, 22 W. Va. 673; Stockdale v. Harris, 23 W. Va. 499; Herzog v. Weller, 24 W. Va. 199; Yates v. Law, 86 Va. 117, 9 S. E. Rep. 508; Walker v. Peck, 39 W. Va. 825, 19 S. E. Rep. 411; Grant v. Sutton, 90 Va. 771, 19 S. E. Rep. 784. Parol proof is admissible however for this purpose. Marks v. Spencer, 81 Va. 751; Cronie v. Hart, 18 Gratt. 739.

A recital in a deed of postnuptial settlement, that the consideration was furnished by the husband, is not conclusive; it only shows that the money passed through his hands, not that he furnished it. Marks v. Spencer, 81 Va. 751.

Must Be Acquired in One of the Specified Modes.—Money "saved by the wife by her own extraordinary exertions" prior to the enactment of the Code of Va. 1887, which added the words "or in any other manner whatever" to the sources originally designated in the "Married Woman's Act" of April 4, 1887, *i. e.*, "gift, grant, purchase, inheritance, devise, or bequest," was not acquired by any of the means which would make it her separate estate, so that in the absence of any averment in her answer that the wife was a sole trader, such property will belong to the husband. Grant v. Sutton, 90 Va. 771, 19 S. E. Rep. 784.

Damages for a Tort to the Wife.—Damages for a tort to the person of a married woman recovered in a joint action by husband and wife belong to the husband and are not the separate estate of the wife under the "Married Woman's Act," April 1877, since property thus acquired is not included in any of the modes of acquisition enumerated in the statute "gift, grant, purchase, inheritance, devise or bequest." Norfolk, etc., R. Co. v. Prindle, 82 Va. 122.

By § 2284, Code Va. 1887, damages recovered by a married woman for any wrong to her, are her separate estate. Norfolk, etc., R. Co. v. Dougherty, 92 Va. 372, 23 S. E. Rep. 777.

When Property is "Acquired."—The word "acquired" in the "Married Woman's Act" refers to the actual possession and control of the property, not the acquisition of mere title, so, where a feme sole becomes entitled to a legacy, and marries, both before the passage of the act, though she loans the legacy out, if she does not actually get *possession* till after April 4, 1877, the legacy will be held her separate estate. Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335.

So where the wife is entitled to a distributive share prior to April 4, 1877, but the husband does not reduce it into possession till after that date, it is the wife's separate property, and the husband's rights are cut off. Keagy v. Trout, 85 Va. 398, 7 S. E. Rep. 329.

Land Equitably Converted into Personalty after the Statute.—Though land has been converted into personalty under a decree of court, since the passage of the Code of 1868, it retains its character of realty and does not become the separate estate of the married woman. Pickens v. Kniseley, 36 W. Va. 794, 15 S. E. Rep. 997.

Resulting Trust in Favor of Wife.—Where property has been purchased with the wife's money, and, without her knowledge or consent, the deed is made in the husband's name, a resulting trust arises in her favor, which will be enforced by a court of equity. Standard Mercantile Co. v. Ellis (W. Va.), 37 S. E. Rep. 593.

Unless it is shown that she intended the money as a gift or loan to her husband, the establishment of which fact devolves on the husband, or those claiming under him. Berry v. Wiedman, 40 W. Va. 36, 20 S. E. Rep. 817.

Mere lapse of time is not sufficient to establish a gift on her part, in so far as his collateral heirs are concerned, if he has indulged her in the belief of ownership, and allowed her to improve the property with her separate estate. Berry v. Wiedman, 40 W. Va. 36, 20 S. E. Rep. 817.

The wife will not be estopped from setting up such trust by permitting the legal title to remain in her husband's name unless it appear that credit was extended to the husband on the faith of his apparent ownership. Standard Mercantile Co. v. Ellis (W. Va.), 37 S. E. Rep. 593.

In Smith v. Turley, 32 W. Va. 14, 9 S. E. Rep. 46, it was intimated that a resulting trust would ordinarily arise where a husband purchased land in his own name with the separate estate of his wife, without her knowledge or consent, but under the circumstances of that case, such a trust would not arise on account of the long lapse of time and the lack of clear proof.

In order to raise a resulting trust in favor of the wife, her money must have been applied by the husband at the time of the purchase; if merely applied *afterwards*, to make payments on the land, no trust will arise. Beecher v. Wilson, 84 Va. 813, 6 S. E. Rep. 209; Smith v. Turley, 32 W. Va. 14, 9 S. E. Rep. 46.

A resulting trust will not arise in favor of a wife merely by presumption from the receipt and possession of her property by her husband, where there is no proof that it was applied to the purchase of property conveyed to him. Throckmorton v. Throckmorton, 91 Va. 42, 22 S. E. Rep. 162.

Resulting Trust in Favor of Husband.—The doctrine generally, if not universally recognized, is, that when a conveyance of real estate is made to one person, and the consideration paid by another, it is presumed that the party advancing the money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf. But when the conveyance is taken to a wife or child, or to any other person for whom the purchaser is under an obligation to provide, no such presumption attaches. On the contrary, the presumption in such case is that the purchase was designed as a gift or advance-

ment to the person to whom the conveyance is made. But this presumption is one of fact and not of law and may be rebutted by parol evidence or circumstances showing a contrary intention. Irvine v. Greever, 32 Gratt. 411; McGinnis v. Curry, 13 W. Va. 29; Hamilton v. Steele, 22 W. Va. 348; Lockhard v. Beckley, 10 W. Va. 87; Deck v. Tabler, 41 W. Va. 332, 23 S. E. Rep. 721.

The acts and declarations of the husband which accompany the transaction, so as to be a part of the *res gestæ*, are admissible to show his intention in making the gift or settlement, and to raise a resulting trust. Deck v. Tabler, 41 W. Va. 332, 23 S. E. Rep. 721.

The *prima facie* presumption that a gift was intended has become a well-established rule of property, and requires, to rebut it, clear and convincing evidence; otherwise, the ownership will be left where the conveyance has placed it. Deck v. Tabler, 41 W. Va. 332, 23 S. E. Rep. 721.

C. TRUSTEES.

Powers.—If a deed to a trustee to hold property for the sole and separate use of a married woman, does not, expressly or by necessary implication, authorize the trustee to sell or incumber the trust subject, any deed or mortgage executed by him, conveying the property, or placing an incumbrance upon it, will be void. Seborn v. Beckwith, 30 W. Va. 774, 5 S. E. Rep. 450.

If a person borrows money, for a married woman, and executes a note therefor to the lender, and signs his own name thereto, designating himself as trustee for her, she will not be bound by such note. Seborn v. Beckwith, 30 W. Va. 774, 5 S. E. Rep. 450.

Where the trustee for a married woman with power to sell and reinvest at his discretion, sells to a third person on conditions which such party fails to comply with, and thus forfeits the contract, no unauthorized dealing by the feme covert with such third party can entitle him to hold the land against the trustee. Williamson v. Paxton, 18 Gratt. 475.

To Discharge a Lien on the Land.—Where land, subject to a lien, is conveyed to the sole and separate use of a married woman it is competent for the trustee to sell a part of the land to discharge the lien, so that the *cestui* may enjoy the residue. Parker v. Clarkson, 4 W. Va. 407.

By Statute in West Virginia Trustee Must Join in Conveyance.—Under sec. 4, ch. 66, Code 1891, a conveyance by a wife and husband of land held by a trustee in trust for the wife is invalid, the trustee not joining in it. Johnson v. Sanger (W. Va.), 38 S. E. Rep. 645.

The clause of section 4, ch. 66, Code 1891, requiring a trustee holding land for the use of a married woman to join her in its conveyance, has application to conveyances to a trustee vesting the estate before the enactment of that clause, except those made before the constitution of 1872. Johnson v. Sanger (W. Va.), 38 S. E. Rep. 645.

Appointment of New Trustees.—Where the trustee of the separate estate of a married woman is dead, equity has jurisdiction to order a conveyance of the property from the heirs of the deceased trustee to another trustee, or, under the statute, to the married woman herself. Forsyth v. City of Wheeling, 19 W. Va. 318.

D. POWER OF DISPOSITION.

1. GENERALLY.—A wife may dispose of her separate personal estate, or the proceeds of the sale of her separate real estate, in any manner she pleases. She may apply it to the payment of her husband's debts, or, if she chooses, she may give it to her husband. McGinnis v. Curry, 13 W. Va. 29.

2. PRESUMPTION OF GIFT TO HUSBAND.—Where the husband uses the wife's money, the presumption is that she *gave* it to him, and did not *loan* it, in the absence of proof that it was understood to be *loaned* and that *then* and subsequently they both regarded it as a debt and intended to stand to each other in the relation of debtor and creditor. Beecher v. Wilson, 84 Va. 813, 6 S. E. Rep. 209; Throckmorton v. Throckmorton, 91 Va. 42, 22 S. E. Rep. 162. See also, Smith v. Turley, 32 W. Va. 14, 9 S. E. Rep. 46.

Hence, in the absence of a contract to repay moneys of the wife used by the husband, such moneys will not constitute a valuable consideration for a postnuptial settlement on the wife. Beecher v. Wilson, 84 Va. 813, 6 S. E. Rep. 209. The fact that he afterwards treats it as a loan, will not rebut the presumption of a gift. Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep. 1.

This presumption is not removed by the Married Woman's Act of April 4, 1877, since that does not prevent a wife from giving her property to her husband if she pleases. Beecher v. Wilson, 84 Va. 813, 6 S. E. Rep. 209. And her ignorance of the law does not invalidate the transaction. Osburn v. Throckmorton, 90 Va. 311, 18 S. E. Rep. 285.

Where advancements are made by their wives to the members of a firm and no evidence of indebtedness is taken nor anything heard of the matter for ten years, such advancements will be held as gifts to the husbands and not as loans. Maxwell v. Hanshaw, 24 W. Va. 405.

While a *bona fide* loan by a wife to her husband out of her separate estate will be valid in equity, yet it must be a loan, an indebtedness by express promise of repayment made at the time of the loan for when he receives her money no *implied* promise of repayment, legal or equitable, arises, as would be the case were they not husband and wife, but the law in such cases presumes she intended a gift. Bennett v. Bennett, 37 W. Va. 396, 16 S. E. Rep. 628.

If a wife invests the proceeds of her separate estate, in her husband's name, in a home for herself and the family, this investment will be a gift to him, and no resulting trust can arise to her, nor can he subsequently, when seriously embarrassed, convey property to her in consideration of this gift, formerly made to him. McGinnis v. Curry, 13 W. Va. 29.

A husband, with the knowledge and consent of his wife, at different times, receives, or she delivers to him, the proceeds of the sale of her realty, gives her no note or written obligation to repay it, mingles it with his means, uses it in his business for years, keeps no written account of such moneys (nor does she), then becomes insolvent, and some eight or ten years after his receipt of the money purchases real estate in the name of his wife, and it is alleged by him and her that it was paid for with the money so received; and several years afterwards he and she unite in a deed of trust to secure a very considerable debt on said real estate, such debt being a loan to the husband, and before such purchase a judgment is rendered against him for a debt. The lot is liable to the judgment. Kanawha Valley Bk. v. Atkinson, 32 W. Va. 203, 9 S. E. Rep. 175.

Where a wife delivers money or property of her own to her husband, which he uses in his business, the presumption is that such delivery was intended as a gift; and in order to constitute such delivery a loan, as against the creditors of the husband, the wife must prove an express promise of the husband

to repay, or establish by the circumstances that it was a loan, and not a gift. Zinn v. Law, 32 W. Va. 447, 9 S. E. Rep. 871; Miller v. Cox, 38 W. Va. 747, 18 S. E. Rep. 960.

When the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves that the transaction should be considered, or was intended as a loan to the husband by the wife, and not a gift, will not, as against the creditors of an insolvent husband, rebut the presumption of a gift. Zinn v. Law, 32 W. Va. 447, 9 S. E. Rep. 871.

Where a wife hands over the proceeds of the sale of her sole and separate realty to her husband and it is appropriated by him with her consent and approbation, and he neither gives nor promises to give his wife any consideration therefor, this will be held a complete gift to the husband of such property in the absence of any contract, express or implied, to return it and will constitute no consideration for a subsequent conveyance years afterward to the wife. McGinnis v. Curry, 13 W. Va. 29, 55.

Where a married woman directs a sum due by her husband to a certain firm of which she is a member before marriage, to be incorporated with and charged to her private account with that firm, it will be presumed that she intended to assume its payment to the exoneration of her husband. Browning v. Browning (Va.), 36 S. E. Rep. 108.

Proceeds of Wife's Equitable Separate Estate.—So far from money, the proceeds of separate property of the wife, being subject, so soon as it reaches her hands, to the marital rights, of the husband, it does not become so even when it reaches the hands of the husband: and if it comes to his hands, and he uses it without the wife's consent, express or implied, he becomes indebted for it, and his estate is liable for the debt. May v. Boisseau, 12 Leigh 512.

Where, by deed of marriage settlement, executed before marriage, the husband conveys real estate to a trustee, to use of wife for life, and upon trust to permit the wife to take the rents and profits, during the coverture, to her sole and separate use, in full satisfaction of all rights of dower: and the husband, during the coverture, receives all the profits, and applies them to his own use, though the wife frequently demands them, and he acknowledges they are due to her, and promises her that they shall be paid; but he dies without paying them. Upon a bill by the wife and her trustee against the husband's administrator, *held*, she is entitled to an account of the rents received by the husband in his lifetime, and a decree for the amount thereof out of the husband's estate, but interest should not be allowed on estimated rents and profits. Roper v. Wren, 6 Leigh 38.

Acquiescence by Wife.—A wife, who lived with her husband, and was maintained by him, cannot, after his death, demand an account of profits, which he received, of a separate estate settled upon her; no such demand having been made by her in his lifetime. Moore v. Ferguson, 2 Munf. 421.

The court distinguished the case of Roper v. Wren, 6 Leigh 33, from that of Moore v. Ferguson, 2 Munf. 421, on the ground that, in the latter the wife acquiesced in her husband's receipt of the profits, did not demand them of her husband, nor did he promise to give them to her, as in the principal case. Roper v. Wren, 6 Leigh 38.

Bona Fide Debt Valid.—Where it is clearly shown that a married woman holds a *bona fide* debt against her husband, she is entitled to the same legal rights as any other creditor, except as to remedy. Righter v. Riley, 42 W. Va. 633, 26 S. E. Rep. 357.

E. POWER TO CHARGE.

Same Rules Govern as in Case of Equitable Estates.—In West Virginia the same rule as to what debts the separate estate of a married woman is liable for, applies to her *statutory* separate estate as to her equitable separate estate; *i. e.* any that she would have been liable for if a feme sole, except a bond without consideration. Camden v. Hiteshew, 23 W. Va. 236.

Law Governing Married Woman's Power to Contract.

Personalty.—The extent to which a married woman may bind herself or her separate personal estate is *prima facie* determined by the law of the state in which the contract is made. Dulin v. McCaw, 39 W. Va. 721, 20 S. E. Rep. 682; Wick v. Dawson, 42 W. Va. 43, 24 S. E. Rep. 587.

Land.—The law of the state where the land, the separate property of the married woman, is situated, must determine the question of its liability to be subjected to the payment of claims against her. Wick v. Dawson, 42 W. Va. 43, 24 S. E. Rep. 587.

Bond.—A bond executed by a married woman as surety for a debt of her husband is valid to bind her separate estate. Williamson v. Cline, 40 W. Va. 194, 20 S. E. Rep. 917.

A married woman may, in an action at law or in equity, plead want of consideration against a sealed obligation given by her during coverture. Williamson v. Cline, 40 W. Va. 194, 20 S. E. Rep. 917.

Joint Note with Her Husband—Where a married woman executes a joint and several note with her husband for the payment of money, her separate estate may be subjected in equity to the payment of the debt, although her husband may own a small amount of land which is insufficient to pay the debt. Skidmore v. Jett, 39 W. Va. 544, 20 S. E. Rep. 573.

Although the married woman be sued jointly with her husband on such note, and a demurrer is sustained as to the husband, and the bill is dismissed as to him, the cause may proceed to final decree against the separate estate of the wife. Skidmore v. Jett, 39 W. Va. 544, 20 S. E. Rep. 573.

Debt Incurred in Separate Business.—Under section 12, ch. 66, Code 1891, a debt incurred by a married woman in separate business will not bind any of her separate estate, other than that used in such business, unless it be by writing executed, acknowledged, and recorded as in that section required. Oney v. Ferguson, 41 W. Va. 568, 23 S. E. Rep. 710.

The husband of an insane wife cannot bind the corpus of her separate real estate to the payment of improvements put thereon. Hanley v. Nat. Loan & Inv. Co., 44 W. Va. 450. 29 S E. Rep. 1002.

Engagements Need Not Be in Writing.—It is not at all necessary that a married woman's engagements should be in writing in order to bind her separate estate. Tavenner v. Barrett. 21 W. Va. 656.

Where a married woman the owner of separate estate residing in Illinois, is indebted to another for the support and education of her daughter, and fully recognized such indebtedness before the war, and during the war executed a bond to her as compensation, although such bond be void, as made with an enemy, yet her estate will be held liable for a reasonable compensation. Wright v. Graham, 4 W. Va. 430.

By Code 1891 in West Virginia.—Under section 12, ch. 66, Code 1891, to sustain a charge on the separate

estate of a married woman, when contested, it must appear that the debt is valid under that section. The creditor must show this. Schamp v. Security Savings & Loan Ass'n, 44 W. Va. 47, 28 S. E. Rep. 709.

Where it appears that money is borrowed for the purpose specified in the second clause of section 12, ch. 66, Code 1891, *i. e.*, for improvements on, or payment of purchase money of, her separate estate, the instrument charging a married woman's separate estate must specify the purpose of the loan. Schamp v. Security Savings & Loan Ass'n, 44 W. Va. 47, 28 S. E. Rep. 709.

A contract entered into by a married woman and her husband for the purpose of improving her separate estate, and expressly charging the property and the improvements thereon for the payment of such debt is binding on such property and improvements. Fouse v. Gilfillan, 45 W. Va. 213, 32 S. E. Rep. 178.

F. INTENTION TO CHARGE.—When a married woman has separate estate, legal or equitable, and executes a note, bond or other instrument for the payment of money, it is presumed, as a matter of law, unless the contrary intention is expressed in the contract, that she intended to make such estate liable for its payment, and she will not be heard to deny that such was her intention. She must have intended something when she executed it, and that something must have been to charge her separate estate with its payment; otherwise her act would be meaningless, under the law as it was when this contract was made. Now, by the express terms of the statute, such contracts, made since the 1st day of May, 1888, are deemed to be made with reference to such estate. Code 1887, § 2295; Duval v. Chelf, 92 Va. 489, 23 S. E. Rep. 893.

By Statute in West Virginia.—But under Acts 1891, ch. 109, sec. 12, Code, ch. 66, in order to charge the separate property of a married woman, there must be an *expressed intention* in the instrument, to make her estate thus liable, in order for such an instrument to constitute a charge on her separate estate, except where the charge is for wages of a domestic or for necessaries. Hence, in Harvey v. Curry (W. Va.), 35 S. E. Rep. 838, it was held that purchase money notes secured by a mortgage on the property would only be a charge on the property embraced in the mortgage, in the absence of any *expressed* intention on the face of the note or mortgage to charge her property generally. BRANNON, J., dissented.

G. REMEDY.

1. IN WEST VIRGINIA.—A claim against the separate estate of a married woman could, in West Virginia, be enforced only by a suit in equity, and by no personal decree, until the passage of section 15 of chapter 3 of Acts of 1893, p. 6, amending chapter 66 of the Code. Wick v. Dawson, 42 W. Va. 43, 24 S. E. Rep. 587; Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790; Hogg v. Dower, 35 W. Va. 200, 14 S. E. Rep. 995.

A clause in the decree that it is to be levied of her separate estate and goods and chattels, not limiting it to the property before the court in the suit, does not cure the error. This, before chapter 3, sec. 15, Acts 1893. Turk v. Skiles, 38 W. Va. 404, 18 S. E. Rep. 561.

In an action at law upon a note by husband and wife, if the female defendant interposed a plea of coverture which was proper in form and substance, it was error to reject the same. Rogers v. Lynch, 44 W. Va. 94, 29 S. E. Rep. 507.

Attachments against Such Estate.—In Dulin v. McCaw, 39 W. Va. 721, 20 S. E. Rep. 681, it was held that the phrase "*in rem*" in sec. 16, ch. 66, of the Code W. Va. 1891, relating to attachments against the separate estate of married women means "*quasi in rem*," *i. e.*, that no *personal* judgment can be rendered against her, and that nobody's title but hers could have been affected by any sale of the property, not that the property could be seized and sold under the attachment without proceeding against the married woman personally by order of publication as a nonresident. Osborn v. Glasscock, 39 W. Va. 749, 20 S. E. Rep. 702.

Realty.—Land which is the separate estate of a married woman cannot be sold for a debt contracted by her during coverture, but can only be rented during the coverture. Hogg v. Dower, 35 W. Va. 200, 14 S. E. Rep. 995.

The general creditors of a married woman can only subject the rents of her real estate to the payment of her debts so long as she is legally entitled to the same. Cox v. Horner, 43 W. Va. 786, 28 S. E. Rep. 780.

May Be Sold under a Vendor's Lien.—Where a deed conveying land to a married woman as separate estate reserves a lien or charge upon it for the purchase money, the fee or corpus may be sold for its payment. Burbridge v. Sadler, 46 W. Va. 39, 32 S. E. Rep. 1028; Charleston L. & M. Co. v. Brockmyer, 18 W. Va. 586.

But if a sale of the corpus has been had under such vendor's lien, it would convert the separate realty into personalty and any surplus after satisfying the vendor's lien can be applied to a mechanic's lien. Charleston L. & M. Co. v. Brockmyer, 18 W. Va. 586.

May Now Be Enforced at Law.—Under Acts 1893, ch. 3, sec. 15, a married woman may be sued in a court of law for a legal demand, and there is no longer jurisdiction in equity to charge her separate estate, as before that act, for such legal demand, that act having superseded it. If the demand be of an equitable nature, so as to warrant equity jurisdiction in the case of a feme sole, there would be jurisdiction in equity against such separate estate. Oney v. Ferguson, 41 W. Va. 568, 23 S. E. Rep. 710; Williamson v. Cline, 40 W. Va. 194, 20 S. E. Rep. 917.

A judgment on such a contract under said act binds as a lien the corpus or entire body of her estate in realty owned by a married woman. Williamson v. Cline, 40 W. Va. 194, 20 S. E. Rep. 917.

Section 15, ch. 3, Acts 1893, was intended to be prospective in its action, and an action at law under that section could be maintained, and a common-law judgment rendered, against a married woman, on a note executed by her husband and herself, dated the 18th day of March, 1884, and payable six months after date. Rogers v. Lynch, 44 W. Va. 94, 29 S. E. Rep. 507.

In a suit in equity to subject the separate estate of a married woman to the payment of her debts, where it appears that she owns personal and real estate, and the personalty is more than sufficient to pay the indebtedness, the personalty should first be subjected before resorting to the realty, since the statute, sec. 15, ch. 3, Acts 1893, authorizing an execution to issue on a judgment against a married woman and be collected against her separate personal property, as though she were a feme sole. And this is true though this statute was passed after the suit was instituted, though before decree, such statute affecting the remedy merely. Fitzgerald v.

Phelps & Bigelow Windmill Co., 42 W. Va. 570, 26 S. E. Rep. 315.

Rights of Lien Creditor.—When a deed of trust creditor has become the *bona fide* owner in fee of a married woman's real estate, he has the right to intervene in a suit instituted by a general creditor of such married woman seeking to rent such property, for the purpose of resisting such renting. Cox v. Horner, 43 W. Va. 786, 28 S. E. Rep. 780.

2. IN VIRGINIA.—As the law was prior to the Code of 1887, a married woman who was the owner of separate estate, statutory or equitable, could enter into engagements for the payment of which her separate estate could be subjected, but upon which no personal judgment or decree could be rendered against her. Duval v. Chelf, 92 Va. 489, 23 S. E. Rep. 893.

By secs. 2288 and 2289, Code Va. 1887, a married woman may make contracts with reference to her statutory separate estate as if sole and she may be sued upon them in the same manner, and there shall be the same remedies in respect to them against her and her said estate, as if she were unmarried, and a *personal* judgment or decree may be rendered against her which may be enforced against her and any separate estate she has or may subsequently acquire (but only against such estate) in the same manner as if she were unmarried. Duval v. Chelf, 92 Va. 489, 23 S. E. Rep. 893.

The court can make no order for the sale of her separate estate whether real or personal, but the judgment must be enforced against such estate by a bill in equity or execution in the same manner as it would be enforced against her property if she were unmarried. Duval v. Chelf, 92 Va. 489, 23 S. E. Rep. 893.

3. AFTER-ACQUIRED SEPARATE ESTATE.—Separate property acquired under the statute *after* the making of a contract by a married woman is not bound by the contract. Crockett v. Doriot, 85 Va. 240, 8 S. E. Rep. 128.

Since the liability of a married woman's separate estate for her debts, rests on her actual or presumed intention and is not a general personal liability, separate estate, acquired after the debts were contracted is not bound by them. Pickens v. Kniseley, 36 W. Va. 794, 15 S. E. Rep. 997.

By Statute in West Virginia.—But a contract of a married woman, made since the enactment of ch. 3, Acts 1893, such as binds her separate estate may be enforced against her separate estate, whether owned by her at the time of the contract, or afterwards acquired, the same as if she were a feme sole. Williamson v. Cline, 40 W. Va. 194, 20 S. E. Rep. 917.

By Statute in Virginia.—By sec. 2288 and 2289, Code Va. 1887, a personal judgment may be rendered against her, which may be enforced against her and any separate estate she has, or *may subsequently acquire* (but only against such estate) in the same manner as if she were unmarried. Duval v. Chelf, 92 Va. 489, 23 S. E. Rep. 893.

If the contract was made by the married woman prior to the Code of 1887, when she was the owner of statutory separate estate and with the intention of charging that estate with its payment, the contract can be sued on in a court of law and a personal judgment rendered against her under the provisions of the Code, but although a personal judgment may be had against her, only such separate estate as she owned when the contract was made or so much thereof as is owned by her when the lien of a judgment and execution attaches, can be subjected to its payment. A change in the remedy for the enforcement of the contract does not change the rights of the parties under it. Duval v. Chelf, 92 Va. 489, 23 S. E. Rep. 893.

4. THE DECLARATION.

What Declaration Must Show.—The common-law rule as to the disability of married women to make contracts remains in full force in this state, except so far as it has been modified by statute. In order, therefore, to maintain an action at law upon a contract made by her during coverture under her statutory power to contract, it is necessary for the declaration, or other pleading filed in the cause, to aver, not only that she made the promise sued on, but to aver also such a state of facts as will show that her promise is such a one as, by the statute, she is rendered competent to make. Duval v. Chelf, 92 Va. 489, 23 S. E. Rep. 893.

5. LAW GOVERNING THE REMEDY.—But the mode of enforcing her liability against a married woman, as to the form of the remedy, mode of proceeding and execution of the judgment, is to be governed by the law of the forum where the suit is instituted, and when that law has been changed *since* the institution of the suit, though the change be remedial, the law in force at the time of the institution of the suit should govern. HOLT, J., dissenting, as to the last proposition. Dulin v. McCaw, 39 W. Va. 721, 20 S. E. Rep. 681; Wick v. Dawson, 42 W. Va. 43, 24 S. E. Rep. 587. Unless it contravene the law or policy of the forum. Wick v. Dawson, 42 W. Va. 43, 24 S. E. Rep. 587.

The Act of 1891, Code W. Va. 1891, ch. 66, sec. 11, declaring that "no married woman shall become the security, indorser or guarantor of, or for, her husband" had no retroactive effect, and being repealed by the Act, Feb. 16, 1893, it could not be said, after such repeal, that such a contract of a married woman contravened the law or policy of West Virginia, said statute being both enacted and repealed *pendente lite*. Wick v. Dawson, 42 W. Va. 43, 24 S. E. Rep. 587.

H. HUSBAND'S MARITAL RIGHTS.—A married woman's separate property is not subject to the control of her husband, nor liable for the payment of his debts, and a court of equity will protect her rights. Hall v. Hyer (W. Va.), 37 S. E. Rep. 594.

As Distributee.—Where personal property is given to a married woman by will, "to be her separate estate, free from the debts and control of her present or any future husband," the property is vested in her absolutely and upon her death intestate, it passes to her husband, as her sole distributee, subject to the payment of her debts and funeral expenses. It makes no difference whether the estate is statutory or equitable. Andes v. Roller, 98 Va. 620, 37 S. E. Rep. 297.

VI. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

LIABILITY OF HUSBAND.

1. ON WIFE'S ANTENUPTIAL CONTRACTS.—Upon marriage, the husband, at common law, became liable for all the debts of the wife, contracted before the marriage. Powell v. Manson, 22 Gratt. 177; Coles v. Hurt, 75 Va. 380.

Liability Continues Only during Coverture.—This rule, however, is subject to an important qualification, viz., that to charge the husband, judgment must be recovered against him during the cover-

ture; and here no judgment was recovered during the coverture. Hawthorne v. Beckwith, 89 Va. 786, 17 S. E. Rep. 241.

A husband is not liable for his wife's debts after her decease. Tabb v. Boyd, 4 Call 453.

The husband of the legatee of a life interest, which terminates by the death of the legatee, before a decree to subject them for a *devastavit* of their testator, is not liable for the life estate so terminated. Sheldon v. Armstead, 7 Gratt. 264.

2. ON WIFE'S POSTNUPTIAL CONTRACTS.—A husband is not liable to a real estate agent for commissions for selling his wife's lands, in the absence of any proof of an agreement on the part of the husband that he would pay them. Hansbrough v. Neal, 94 Va. 722, 27 S. E. Rep. 593.

It seems that a husband who permits his wife to engage in trade on her separate account is personally liable at law for the debts contracted by her in carrying on the business, unless there be an understanding with the creditors to the contrary, or the property is legally vested in other trustees than himself to enable her to carry on the trade; but a court of equity, it is conceived, will protect the husband from his legal responsibility and confine the creditors to the assets in the trade. Penn v. Whitehead, 17 Gratt. 526.

Where, in the absence of the husband in a foreign country, a check for $500, is sent to the wife which was collected by her, in the absence of all evidence bearing upon the intention of the party in sending the check, the presumption is, the intention was, not a gift to the wife, but a loan on the credit of her husband, for which he is liable. Ficklin v. Carrington, 31 Gratt. 219.

Husband's Liability for Necessaries.—Since a husband is only liable for "necessaries" furnished to his wife, and a divorce can only be considered "necessary" where it is obtained for cruelty or reasonable apprehension of bodily hurt, it follows that he is liable for attorney's fees only in case of divorce obtained on these grounds, which are grounds only for a divorce *a mensa*. Peck v. Marling, 22 W. Va. 708.

Husband Living Apart under Deed of Separation.—Where the husband lives apart from his wife under a deed of separation he is not liable for services rendered his wife, by one who had a full knowledge of the circumstances, which rebut any presumption that the services were rendered in reliance upon the personal credit of the husband. This is the case whether the deed be valid or invalid. Harshberger v. Alger, 31 Gratt. 52.

3. EFFECT OF ANTENUPTIAL SETTLEMENT.—A mere antenuptial settlement will not relieve the husband of the obligation cast upon him by the law, to discharge the debts of the wife, provided the claim is asserted, and the recovery had during the existence of the coverture. This responsibility arises upon the marriage, and only ceases with its termination. Powell v. Manson, 22 Gratt. 177.

An agreement before marriage between husband and wife that the property of each shall be exclusively liable for the debts of each, will be construed as a trust for the benefit of the wife's antenuptial creditors, of which the husband will be held the trustee, and equity alone will have jurisdiction to enforce it, whether it be regarded as her equitable separate estate charged by the contract with the payment of her antenuptial debts or, whether the husband's marital rights attached to it thus charged. Coles v. Hurt, 75 Va. 380.

Such a contract will not affect the rights of creditors of the wife, for he being liable for the wife's antenuptial debts, this contract, though good between the parties, will not intercept this legal right of the creditors. Coles v. Hurt, 75 Va. 380.

Where, pending a suit in equity against a female defendant, to recover a debt alleged to be due by her, she marries, and the husband is made a party defendant, though there was an antenuptial settlement, by which all the wife's property was conveyed in trust for her separate use, and she renounced all interest in that of the husband, the husband is still liable for the debts of the wife contracted before marriage, and the decree may be against both of them. Powell v. Manson, 22 Gratt. 177.

But while the contract cannot bind the creditors interested, against their will, they may give effect to it if they elect to do so. As has been stated, it creates a trust for the benefit of the creditors. They may reject or accept it at their option. If they reject it, they may proceed at law to enforce their claims and the contract will not impede them. If they accept it, their remedy is in equity to enforce the trust against the property, not to obtain a personal decree. Coles v. Hurt, 75 Va. 380.

VII. CRIMINAL LIABILITY.

Of Married Women, Presumption.—Where a married woman consents to, and actively assists in the preparation for a felony, though not present at the commission, if she does these acts *in the presence* of her husband, a *prima facie* presumption will arise that she acted under his coercion and control, and she will not be responsible. But if the facts and circumstances show that she was not acting under his control but of her own free will, this presumption is rebutted and she will be responsible for her acts. Uhl's Case, 6 Gratt. 706.

Joint Indictment.—Husband and wife may be jointly indicted for a single act of retailing ardent spirits. Com. v. Hamor, 8 Gratt. 698. So for assault and battery. Com. v. Ray, 1 Va. Cas. 263.

Separate Judgment.—In such case, if they are convicted the fine cannot be assessed jointly and a joint judgment rendered against both, but the fine should be assessed, and judgment rendered, separately. Com. v. Hamor, 8 Gratt. 698; Com. v. Ray, 1 Va. Cas. 262.

Fine May Be Levied Out of Separate Estate.—A writ of *fi. fa.* upon a judgment for a fine against a married woman for a misdemeanor, may be levied out of her separate estate. Gill v. State, 39 W. Va. 479, 20 S. E. Rep. 568.

VIII. PLEADING AND PRACTICE.

A. SUITS BETWEEN HUSBAND AND WIFE.

1. AT COMMON LAW.—At common law neither husband nor wife could sue each other, on account of the legal unity of husband and wife. Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335. This is true of an action at law, whatever may be their rights in equity. Roseberry v. Roseberry, 27 W. Va. 759.

Plea.—Such a defence should be pleaded in bar and not in abatement, since it shows a total absence of any cause of action. Roseberry v. Roseberry, 27 W. Va. 759.

2. BY STATUTE IN WEST VIRGINIA.—The common-law rule was not changed by the Code W. Va. 1868. Roseberry v. Roseberry, 27 W. Va. 759.

3. BY STATUTE IN VIRGINIA.—But where this idea of legal unity has been so far severed by the "Mar-

ried Woman's Act, April 4, 1877, that she may contract and be contracted with, HINTON, J., in Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335, was of opinion that she could sue her husband as well as another, at law, upon any contract made with him, after the passage of the act.

After Termination of Coverture.—After the termination of the coverture by death, the widow may maintain an action of detinue against her deceased husband's personal representative for her separate property unlawfully withheld from her, whether acquired from her husband or others. Good v. Good, 39 W. Va. 357, 19 S. E. Rep. 382.

B. SUITS BY HUSBAND AND WIFE.

1. GENERALLY.

Authority of Counsel to Bind Wife.—Where decrees by default in favor of husbands and wives gave interest upon interest, but the counsel of the parties directed the clerk to correct the error by indorsement on any executions that might be issued upon them, which was done, it was held that the counsel had full authority to direct the correction, and to bind the wives as well as their husbands; and thus to correct the error. Hill v. Bowyer, 18 Gratt. 364.

The Bill is the Bill of the Husband Alone.—A bill by husband and wife, in right of the wife, is the bill of the husband; and the wife is only joined for conformity. The coverture of the wife is not, therefore, an excuse for delay in bringing the suit. Harrison v. Gibson, 23 Gratt. 213; McCullough v. Dashiell, 85 Va. 37, 6 S. E. Rep. 610; Blackwell v. Bragg, 78 Va. 529; Hillis v. Hamilton, 10 Gratt. 300.

How Far Binding on Wife.—A bill by the husband and wife is the husband's suit only and the wife is joined for conformity, to be bound only so far, as in justice she ought to be bound, hence she is not bound by any proceedings or admissions of her husband in the cause, especially if these affect her inheritance. Dandridge v. Minge, 4 Rand. 397.

Modified by Statute.—At common law a suit by husband and wife was a suit by the husband alone; and this was so because the wife was not considered *sui juris*, and could never sue in her own name, but only by her next friend. This rule has been abrogated by the West Virginia statute, and therefore it is not true, in West Virginia, that a suit by husband and wife is the suit of the husband alone; it is the joint suit of both. Fox v. Manufacturers' Fire Ins. Co., 31 W. Va. 374, 6 S. E. Rep. 929.

2. THE DECLARATION.

Suits by Husband and Wife Jointly, Interest of Wife Must Be Shown.—Where suit is brought by husband and wife, the interest of the wife in the subject-matter of the suit must be averred or shown in the declaration, otherwise the declaration is fatally defective. Shirley v. Bonham, 5 W. Va. 501.

In all cases in which she is joined her interest must be expressly stated or set out in the declaration. This, however, can only be taken advantage of by demurrer to the declaration, as the mere joining her in the suit in absence of a demurrer would be matter presumptive that she was the meritorious cause of the action, and that the same was carried on for her benefit, and the defect in the declaration could be supplied in the proof. Hunter v. Strider, 41 W. Va. 321, 23 S. E. Rep. 567.

Where it is averred in the declaration that the bond sued on by husband and wife, was executed to the wife, her interest in the suit is sufficiently shown. Hawver v. Seibert, 4 W. Va. 586.

After Husband's Death.—While the husband is alive, a failure to set out the wife's interest can only be availed of by demurrer or motion to reject the defective bill of particulars. But after the husband's death, the wife must prove her interest, otherwise she would be nonsuited on a demurrer to evidence. But an assignment from the husband directly to the wife is competent evidence to prove her interest. Hunter v. Strider, 41 W. Va. 321, 23 S. E. Rep. 567.

Unchanged by Statute.—This was the common-law rule of pleading in case of joinder of husband and wife, and has in no wise been changed by statute except to enlarge the powers of the wife. Hunter v. Strider, 41 W. Va. 321, 23 S. E. Rep. 567.

3. THE PLEA.

Coverture of Plaintiff as a Defence.—In an action by a married woman for the loss of her property if it does not appear upon the face of the declaration that she is a married woman the question as to her right to maintain the action can only be raised by a plea and not by motion to exclude or reject her evidence. Quarrier v. B. & O. R. R. Co., 20 W. Va. 424.

4. PARTIES.

a. Wife's Antenuptial Choses in Action.—All choses in action accruing to the wife during coverture, must be sued on *jointly* by husband and wife. May v. Boisseau, 12 Leigh 512; Harcum v. Hudnall, 14 Gratt. 379.

The criterion by which to determine whether the wife may join in the action is whether the right of action would survive to her upon the death of her husband in her lifetime. Harcum v. Hudnall, 14 Gratt. 379.

A wife cannot sue alone for damages on an insurance policy, her husband must join and the recovery will belong to him, by virtue of his marital rights. Haxall v. Shippen, 10 Leigh 536.

b. Wife's Postnuptial Choses in Action.—As to choses in action accruing to the wife *during* coverture, the husband may either sue alone or join his wife. May v. Boisseau, 12 Leigh 512; Harcum v. Hudnall, 14 Gratt. 379.

When a bond is executed to the feme during coverture, it is the property of the husband; and in a court of law, he may sue alone on the bond, or he may join the wife. Perkins v. Clements, 1 P. & H. 141.

Where a bond is executed to the wife, it is not error for the husband to be joined as coplaintiff. Hawver v. Seibert, 4 W. Va. 586.

c. Promises to Husband and Wife Jointly.—Whereever the action is on an express contract with husband and wife, the wife, may be joined, unless the consideration averred in the pleading, or shown in proof on the trial, be one in which the wife cannot be intended to have an interest; and in every such case, if the interest of the wife be not disaffirmed by the husband by the appropriation of the cause of action to his sole use, the wife surviving will be entitled to it. May v. Boisseau, 12 Leigh 512.

d. Torts against Wife.

For Injuries to Wife's Person.—The wife may join with the husband where she is the meritorious cause of action, and where the right of action would survive to her, if the husband died before the amount of damages was received. City of Wheeling v. Trowbridge, 5 W. Va. 353.

Thus, a wife is properly joined where the damages are for personal injuries to the wife herself. Wheeling v. Trowbridge, 5 W. Va. 353.

No Recovery for Special Damage to Husband.—Where the action is by husband and wife for a wrong to

the wife there can be no recovery for what is special damage to the husband. City of Wheeling v. Trowbridge, 5 W. Va. 353.

The husband is still entitled to the services of his wife, the wife is still entitled to support at the hands of the husband; hence an instruction to the jury that they should take into consideration, in estimating the damages for a tort to the wife, the loss of time or the pecuniary expense incurred, is erroneous. These are properly recoverable by the husband and do not constitute any part of the separate estate of the married woman. Richmond Ry., etc., Co. v. Bowles, 92 Va. 738, 24 S. E. Rep. 388.

Unless it be averred in the declaration and shown in the proof that she was a *sole trader*. Atlantic, etc., R. Co. v. Ironmonger, 95 Va. 625, 29 S. E. Rep. 319.

Special Damages to the Husband.—But where the husband alone is entitled to the damages, and in case of his death they would go to his personal representative, then the husband should sue alone. City of Wheeling v. Trowbridge, 5 W. Va. 353.

So where the husband claims special damages for the loss of the society, comfort, assistance, etc., of his wife, the wife cannot be joined. Wheeling v. Trowbridge, 5 W. Va. 353.

e. Concerning Wife's Realty.

For the Title to the Land.—Where husband and wife sue, in right of the wife, for the title to a tract of land, the conveyance should be decreed to be made to the wife only. Argenbright v. Campbell, 3 H. & M. 144.

For Injuries to Wife's Realty.—Where the fee-simple land of the wife is held by the husband in right of his wife, and permanent damages be done to the land, as by the cutting down of timber on it, suit may be brought by the husband and wife for the damages inflicted, or, if he choose, the husband may bring such suit alone. Hutchinson v. Parkersburg, 25 W. Va. 226.

The husband must join even in actions relating to the wife's real property and the recovery belongs to him. Haxall v. Shippen, 10 Leigh 536.

A husband who has the legal title to an undivided moiety of a tract of land, and a life interest in the other moiety in right of his wife, can bring an action for damages done to the land without joining his wife, and will be entitled to any damages so recovered; in any case, advantage could only be taken of the nonjoinder of the wife, by plea in abatement. Hutchinson v. Parkersburg, 25 W. Va. 226.

Rents and Profits of Realty.—The husband can maintain an action for the rents and profits of realty, held in actual possession by a coparcener with his wife, without joining his wife. Dold v. Geiger, 2 Gratt. 98.

f. Concerning Wife's Personal Chattels.—The husband may bring an action alone for the recovery of his wife's personal property taken during coverture. Hutchinson v. Parkersburg, 25 W. Va. 226.

The wife need not be joined with her husband in an action of trover for a slave belonging to her. Lowry v. Mountjoy, 6 Call 55.

g. Concerning Wife's Separate Property.

1. IN WEST VIRGINIA.—By ch. 66; § 12, W. Va. Code 1868, a married woman may sue without joining her husband, where the action concerns her separate estate. Rader v. Neal, 13 W. Va. 373.

The statutes of W. Va., ch. 66 of Code, authorize a married woman, though living with her husband, to maintain an action at law for the recovery of the possession of her separate real property without uniting her husband in the action. Mathews v. Greer, 21 W. Va. 694; McKenzie v. Railroad Co., 27 W. Va. 306.

Interpleader.—By virtue of § 3, ch. 66, W. Va. Code 1891, and § 13 of same chapter, a married woman, where the action concerns her separate estate, may avail herself of the summary statutory remedy of interpleader, and is not obliged to have recourse to the tedious alternative of a chancery suit. Miller v. Peck, 18 W. Va. 75; Robinson v. Neill, 34 W. Va. 128, 11 S. E. Rep. 999.

Where Wife Has Merely Equitable Title.—But the husband, by a conveyance from himself to his wife, has the bare legal title and the wife, having the possession and the entire beneficial interest in the property may maintain an action for damages of a permanent nature done to her property, without joining her husband, the trustee. The mere possession being sufficient to enable her to maintain an action alone for a mere nuisance or disturbance of her possession. McKenzie v. Railroad Co., 27 W. Va. 306. In such case the husband has the bare legal title, while the wife has the whole beneficial interest, hence the wife may bring an action of detinue either in her own name or may join her husband for conformity. Robinson v. Woodford, 37 W. Va. 377, 16 S. E. Rep. 602.

The latter branch of the above proposition was merely a dictum and two judges dissented, and in Hunter v. Strider, 41 W. Va. 321, 23 S. E. Rep. 567, the court held that the wife must join her husband where she has merely the equitable title and her husband holds the legal title. In such case, if the husband die, the action will survive to the wife.

But in Clay v. City of St. Albans, 43 W. Va. 539, 27 S. E. Rep. 368, the dictum in Robinson v. Woodford, *supra*, was approved and the law laid down as follows: "A wife, or she and her husband, may maintain trespass for damages to both the possession and the inheritance, where there is a conveyance of the land to a trustee to permit her to have possession and use of land, though she is vested with only the equitable title."

A conveyance from husband to wife is admissible evidence to prove the title of the wife in an action at law by her. McKenzie v. Ohio, etc., R. Co., 27 W. Va. 306; Hunter v. Strider, 41 W. Va. 321, 23 S. E. Rep. 567.

May Still Join Her Husband.—Our statute (section 12, ch. 66, Code), providing that a married woman may sue and be sued, without joining her husband, where the action concerns her separate property, was intended to remove the wife's disability to sue alone, and not impose any disability on her common-law rights or remedies. It is not error for the wife to join her husband with herself as plaintiff in an action concerning her separate property, although she may in such action sue alone. Fox v. Manufacturers' Fire Ins. Co., 31 W. Va. 374, 6 S. E. Rep. 929; Hunter v. Strider, 41 W. Va. 321, 23 S. E. Rep. 567; Robinson v. Woodford, 37 W. Va. 377, 16 S. E. Rep. 602; Clay v. City of St. Albans, 43 W. Va. 539, 27 S. E. Rep. 368.

If there is any conflict between the interests of husband and wife, then it is necessary for her to sue alone in order to protect her interests, and in other cases it may be advisable for her to sue alone, as she has the undoubted power to do in all the three classes of cases mentioned in the statute: (1) where the action concerns her separate property; (2) where the action is between herself and her husband; (3) where she is living separate and apart from her hus-

band. Fox v. Insurance Co., 31 W. Va. 374, 6 S. E. Rep. 929.

But whether she will do so or not is a matter for her own election, and one of which the defendant cannot complain, since a suit by her and her husband would be as much a bar or estoppel against another suit for the same cause of action as would a suit by herself alone. Fox v. Manufacturers' Fire Ins. Co., 31 W. Va. 374, 6 S. E. Rep. 929; McKenzie v. Railroad Co., 27 W. Va. 306.

2. IN VIRGINIA.

Act of April 4, 1877.—By the Married Woman's Act, April 4, 1877, a married woman is required to join her husband with her in any action for the recovery of any chose in action to which she is entitled, *e. g.*, a policy of insurance. Hayes v. Va. Mut. Prot. Ass'n, 76 Va. 225; Farley v. Tillar, 81 Va. 275.

The amendment to that act, March 14, 1878, made no change in the foregoing respects. Hayes v. Va. Mut. Prot. Ass'n, 76 Va. 225.

Even where the suit is instituted by the wife for the protection of her separate property against creditors of her husband, the husband must be joined, under Acts 1876-7, p. 333. Burson v. Andes, 83 Va. 445, 8 S. E. Rep. 249.

Husband a Merely Formal Party.—Where a married woman is suing on a bond which is part of her separate estate, since it is only necessary to join the husband for conformity to the statute, it is no ground of demurrer to insert an allegation to that effect in the declaration. Tate v. Perkins, 85 Va. 169, 7 S. E. Rep. 328.

Where the wife sues a partnership touching her separate, statutory estate and merely joins her husband for the sake of conformity to the statute, it is no ground for a demurrer that the husband is a member of the partnership, and a confession of judgment by the firm is valid, since the suit is the suit of the wife and the husband is a mere formal party. Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335.

Judgment Should Be against Wife Alone.—Where the husband is joined as plaintiff merely because the statute requires the remedy—the *wife's* remedy—to be prosecuted in that way, and he has no legal interest in the subject, he is not liable for costs, but the judgment should be against the wife only. Hayes v. Va. Mut. Prot. Ass'n, 76 Va. 225; Nicholas v. Austin, 82 Va. 817, 1 S. E. Rep. 132.

Under Code 1887.—Under § 2284, Va. Code 1887, giving the wife all the damages recovered for a wrong to her, and § 2288, providing that she may sue, as to her separate estate, as if she were unmarried, the husband is not a proper party to an action for such damages, and before the statute allowing abatement of the suit as to parties improperly joined, Acts 1893-4, p. 489, it was a fatal defect. Norfolk, etc., R. Co. v. Dougherty, 92 Va. 372, 23 S. E. Rep. 777.

Suing by Next Friend.—While it is irregular for a married woman over twenty-one years of age to sue by her next friend, it is not ground for arresting the judgment or setting aside the verdict, but the court should enter an order discharging the next friend and directing the suit to proceed in the name of the married woman alone. Richmond Ry., etc., Co. v. Bowles, 92 Va. 738, 24 S. E. Rep. 388.

h. In Equity.—Independent of statute the husband must join his wife in a suit in equity touching the wife's real estate, where it is not her equitable separate estate and his interests are not adverse to hers. Wyatt v. Simpson, 8 W. Va. 394.

Concerning Wife's Equitable Separate Estate.—A suit by a feme covert to recover a part of her equitable separate estate should be brought by the feme covert as sole plaintiff, by her next friend and the husband should be made a party defendant so that he may, if he so desires, contest that it is her separate estate, although he is sometimes, in such cases, made a coplaintiff. Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335.

Effect of Desertion by Husband.—A suit for alimony being brought by a wife against her husband, who has deserted her and left the commonwealth, and a sum of money being obtained for her by her attorney at law by a compromise of that suit, *held* that on a bill in equity, in the name of the feme by her next friend, against the attorney for the money so obtained by him, a decree may be rendered for the same, although the husband be no party to the suit. Spencer v. Ford, 1 Rob. 648.

Liability for Costs.—In a suit brought in the name of a feme by her next friend, a decree in her favor being reversed, and the bill ordered to be dismissed as to the appellant, he will recover his costs, both in the appellate court and the court below, as well as against the next friend as against the feme. Spencer v. Ford, 1 Rob. 648.

5. EFFECT OF DEATH.

a. Death of Husband.—In a suit by husband and wife, for the recovery of personal property, in her right, if the husband dies, the right survives to her; and on her death, the suit should not be revived in the name of his administrator. Vaughan v. Wilson, 4 H. & M. 452.

The action on an acknowledgment in the following words: "Borrowed of Mrs. E. H. B. $750," the said Mrs. E. H. B. being a feme covert, survives to the wife on the death of her husband, and no debt due from the husband can be set off against it. Such an acknowledgment imports *prima facie* that the money was the wife's and not the husband's, and there being no opposing testimony the presumption becomes conclusive. May v. Boisseau, 12 Leigh 512.

Criterion.—The criterion by which the question whether the action survived to the wife is to be resolved, is furnished by ascertaining, whether, in the particular case, had the husband sued in his lifetime, he might have sued in the joint names of himself and his wife. If the claim be such, that the husband must, or might have joined his wife in the action for it, then, if it remain at his death outstanding and unappropriated by him, the action survives to, and may be brought by the wife. May v. Boisseau, 12 Leigh 512.

b. Death of Wife.—A suit brought by husband and wife, to recover a demand in right of the wife, abates by her death. Archer v. Colly, 4 H. & M. 410.

6. SAVING IN FAVOR OF MARRIED WOMAN.

Generally.—A married woman will not be barred of remedy either by the statute of limitations, lapse of time, alleged acquiescence, or imputed laches. Va. Code 1887, § 2917; Justis v. English, 30 Gratt. 565; Irvine v. Greever, 32 Gratt. 411.

The rights of a married woman in equity will not be lost by the lapse of time, where she is under the disability of coverture during the whole period. Waller v. Armistead, 2 Leigh 11.

The claim of a wife against her husband is not barred by the statute of limitations during coverture, if at all, until twenty years from the original inception or written renewal thereof, in spite of inadvertent admissions to the contrary in Bank v. Atkinson, 33 W. Va. 203, 9 S. E. Rep. 175, and Miller v.

Cox, 38 W. Va. 747, 18 S. E. Rep. 960, where the wives held no note or other evidence of debt against their husbands, and attempted, after a long lapse of time, to set up debts against their husbands after they had become insolvent. Righter v. Riley, 42 W. Va. 633, 26 S. E. Rep. 357.

Adverse Possession.—There can be no adversary possession against a married woman during coverture. No conveyance or partition of land will be presumed against a married woman. Buford v. North Roanoke Land & Imp. Co., 90 Va. 418, 18 S. E. Rep. 914.

In Merritt v. Hughes, 36 W. Va. 356, 15 S. E. Rep. 56, it was held that, by the statute, ch. 104, § 4, W. Va. Code 1891, placing an extreme limitation on the bringing of an action twenty years from the accrual of the action even in cases of persons under disability, since such a statute is to be construed favorably to persons under disability, a married woman and her husband may bring her action at any time during coverture, even after the expiration of the general period of bar, provided the extreme limit of twenty years has not passed. Otherwise if her coverture continued for more than twenty years, she would be barred by the lapse of ten years. This does not mean that if, after ten years of possession by the grantee, the coverture ceases, there must not be suit within five years after its cessation under § 8, of ch. 104, *supra*.

But in Caperton v. Gregory, 11 Gratt. 505, it was held, that, where the right of action accrues to a married woman during coverture, after the regular period of the statute has run against husband and wife jointly and the coverture still continues, the husband and wife cannot sue between the expiration of the period of limitation and the termination of the coverture, but that on the termination of the coverture, the saving in favor of a married woman, operates to revive her right of action.

Recordation of Writings.—The saving in favor of married women of three months after disability removed for the recordation of the writing when incumbered property has been removed, in § 7, ch. 74, W. Va. Code, does not apply where a married woman is the *grantor* not the *beneficiary*, nor does it apply where the property is her separate estate. Osborn v. Glasscock, 39 W. Va. 749, 20 S. E. Rep. 702.

As to Separate Estate.—A married woman, as to her separate estate, is not under any such disability as to extend the time in which she may redeem such separate real estate when it has been sold for delinquent taxes. Williamson v. Russell, 18 W. Va. 612.

The statute of limitations begins to run against the wife from the time she knows of the collection by her husband of claims due her, which constitute her separate estate. Riggan v. Riggan, 93 Va. 78, 24 S. E. Rep. 920.

Ignorance of Her Rights—Ignorance of her rights under the Married Woman's Law is no excuse for failure to assert her claim to her separate property. Throckmorton v. Throckmorton, 91 Va. 42, 22 S. E. Rep. 162.

C. SUITS AGAINST HUSBAND AND WIFE.

1. PARTIES.

Concerning Wife's Separate Estate.—By ch. 66, § 12, W. Va. Code 1868, a married woman may be sued without joining her husband, where the action concerns her separate property. Rader v. Neal, 13 W. Va. 378.

Wife Must Be Joined Where Action Concerns Her Separate Realty.—A wife, living with her husband on land, and claiming the land as her separate estate under a right derived from a person other than her husband, prior to commencement of the action, cannot be turned out of possession by a writ of possession, in an action of ejectment against her husband, to which she was not a party. In such case she is, as to her claim, a person distinct from her husband, and must be made a party to the action, like any other person, in order to bind her by the judgment. Bushong v. Rector, 32 W. Va. 311, 9 S. E. Rep. 225.

In such a case equity has jurisdiction by injunction to restrain the execution of the writ of possession as to her. The parties will be left without prejudice from the decree, to test their titles at law. Bushong v. Rector, 32 W. Va. 311, 9 S. E. Rep. 225.

A judgment in ejectment is not conclusive against a husband, but he may enjoin it in equity, where he holds the land in right of his wife, and the wife has an equitable defence which he could not set up at law. Sperry v. Gibson, 3 W. Va. 522.

Where the interest of a husband is conveyed to certain persons by commissioners in a chancery suit, and they lease the premises to the husband, and, on his holding over the premises, recover judgment and execution against him in unlawful detainer, but in the meanwhile his wife enters on the premises, claiming the greater part of them, as her separate estate, if they bring unlawful entry, etc., against her, her title will properly be brought in question and a justice of the peace will not have jurisdiction, she not having been a party to the chancery suit or the lease to her husband or the judgment against him in unlawful detainer and not being concluded thereby. Hughes v. Mount, 23 W. Va. 130.

Contracts in Name of Husband.—A husband, trustee for his wife, contracts for the purchase of land for her; but the contract is in his own name. He is put in possession, but he fails to comply with the terms of the contract. In a proceeding by unlawful detainer by the vendor to recover possession, the wife is not a necessary nor proper party in the action. Williamson v. Paxton, 18 Gratt. 475.

2. PLEA.

Coverture as a Defence.—The contract of a married woman at common law was absolutely void, and no action upon such contract would lie against her. It follows, then, that a plea that the contract was made by the defendant while she was under coverture must be pleaded in bar of the action, because, if true, it destroys all right of action at law upon the contract; but if she entered into the contract while sole, and subsequently married, she must plead this in abatement and not in bar, because her defence does not deny any liability, but she simply objects that her husband should be made a joint defendant with her. Stockton v. Farley, 10 W. Va. 171; Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790; McChesney v. Brown, 25 Gratt. 393; Lee v. Bk. of U. S., 9 Leigh 200; Pickens v. Kniseley, 36 W. Va. 794, 15 S. E. Rep. 997; Peck v. Marling, 22 W. Va. 708; Crockett v. Doriot, 85 Va. 240, 3 S. E. Rep. 128; Bruff v. Thompson, 31 W. Va. 16, 6 S. E. Rep. 352; Wynn v. Louthan, 86 Va. 946, 11 S. E. Rep. 878.

3. JUDGMENTS.—All judgments rendered by courts of common law or by justices of the peace against a married woman on contracts, express or implied, made during coverture are null and void as against her and create no liens on her land. Tavenner v. Barrett, 21 W. Va. 656.

Whether such contract be in her own name or in the name of a company, under which she does busi-

ness, an execution or suggestion sued out upon such judgment is invalid and ineffectual for any purpose. White v. Foote Lumber & Manfg. Co., 29 W. Va. 385, 1 S. E. Rep. 572.

Judgment against Wife Living with Her Husband Void.—Where a judgment in an action of ejectment is obtained against a married woman and her husband for costs, such judgment cannot be enforced by suit in equity against the separate estate of the wife, where she is living with her husband, since in such case the judgment against her is void. BRANNON, P., dissenting. Thorn v. Sprouse, 29 W. Va. 706, 20 S. E. Rep. 676.

Under Married Woman's Act in Virginia.—At trial of unlawful detainer against a married woman, under the Married Woman's Act, April 4, 1877, her husband being joined, it is not error for the court to instruct the jury that no verdict or judgment can be rendered against him in the action; nor that, if they believe from the evidence that she, as such sole trader, had rented and taken possession of the property, and unlawfully withholds it from the plaintiff, they shall find for plaintiff; but that the burden is on plaintiff to prove these facts. Nor is it error to reject an instruction that, under said act, every contract of a married woman is invalid, unless joined in by her husband. Farley v. Tillar, 81 Va. 275.

Joint Torts by Husband and Wife.—A joint action of trespass, assault and battery, lies against husband and wife for an assault committed conjointly by both. Roadcap v. Sipe, 6 Gratt. 213.

The court distinguished the action of assault and battery from that of slander on the ground that there could not be a joint utterance of a slander, hence there could be no *joint* action against husband and wife, but an assault and battery can be committed jointly, and husband and wife may be sued *jointly*. Roadcap v. Sipe, 6 Gratt. 213.

In a joint action of assault and battery against husband and wife for a joint assault, there may be a verdict and judgment against the one, and in favor of the other. Roadcap v. Sipe, 6 Gratt. 213.

Husband Defending for Wife.—Where the husband is already necessarily a party and he makes defence for the wife, and there are no special circumstances requiring that the wife should defend separately, it is not necessary for the court to appoint a next friend to defend the suit for her. Coles v. Hurt, 75 Va. 380.

Where the wife has been properly summoned and is before the court in her husband's name, and no objection is made in the court below, but an answer filed for all the defendants, the husband will not be allowed to say in the court of appeals that it was his answer and not that of his wife that was filed. Berry v. Wiedman, 40 W. Va. 36, 20 S. E. Rep. 817.

4. EFFECT OF DECREE AGAINST A MARRIED WOMAN.—A married woman, when she is a party to a suit is as much bound by the decree as any other party. McCullough v. Dashiell, 85 Va. 37, 6 S. E. Rep. 610.

Where the husband files a bill and the court orders him to file an amended bill making his wife a party, and in the amended bill she is joined as a party plaintiff by her next friend, and the court orders her to be made a coplaintiff with her husband and the name of the next friend be stricken out, and she does not appeal from this decision, but the defendant appeals from the final decree and the decree is reversed, she is bound and the matter is *res adjudicata*, she cannot afterwards file a bill by her next friend to set aside the decree on the same grounds set up in the former bill. McCullough v. Dashiell, 85 Va. 37, 6 S. E. Rep. 610.

D. COMPETENCY AS WITNESSES.

1. WHEN INCOMPETENT.

Incompetent to Testify for or against Each Other.—Where husband or wife is directly interested in the result of a suit the other is incompetent to testify therein. Burton v. Mill, 78 Va. 468; Statham v. Ferguson, 25 Gratt. 28; McDevitt v. Frantz, 85 Va. 740, 8 S. E. Rep. 642; Witz v. Osburn, 83 Va. 227, 2 S. E. Rep. 33; Perry v. Ruby, 81 Va. 317; Dugger v. Dugger, 84 Va. 130, 4 S. E. Rep. 171; DeFarges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805; Warwick v. Warwick, 31 Gratt. 70; Radford v. Fowlkes, 85 Va. 820, 8 S. E. Rep. 817; Lindsay v. McCormick, 82 Va. 479, 5 S. E. Rep. 534; Murphy v. Carter, 23 Gratt. 477, 486; Nicholas v. Austin, 82 Va. 817; Crabtree v. Dunn, 86 Va. 953, 11 S. E. Rep. 1058; Keagy v. Trout, 85 Va. 390, 7 S. E. Rep. 329; Wheeling v. Trowbridge, 5 W. Va. 353; Sitlingtons v. Brown, 7 Leigh 271; Bowman v. Reinhart, 89 Va. 435, 16 S. E. Rep. 279; Thornton v. Gaar, 87 Va. 315, 12 S. E. Rep. 753; Johnson v. Fry, 88 Va. 695, 12 S. E. Rep. 973; Hoge v. Turner, 96 Va. 624, 32 S. E. Rep. 291. Nor is this incapacity removed by ch. 172, Code Va. 1873. Radford v. Fowlkes, 85 Va. 820, 8 S. E. Rep. 817; Thornton v. Gaar, 87 Va. 315, 12 S. E. Rep. 753; Scott v. Rowland, 82 Va. 484, 4 S. E. Rep. 595. Or by the Code W. Va. 1868, ch. 130, except as to suits between husband and wife. Hill v. Proctor, 10 W. Va. 59, 83; Lawrence v. DuBois, 16 W. Va. 443, 457; Zane v. Fink, 18 W. Va. 693, 741; Rose v. Brown, 11 W. Va. 122, 133; Watkins v. Wortman, 19 W. Va. 78.

This applies to suits by a creditor to impeach a postnuptial conveyance from husband to wife on account of fraud. Hoge v. Turner, 96 Va. 624, 32 S. E. Rep. 291, and cases cited.

The admissions of a feme covert are not sufficient to establish an account against her husband, though it be for articles furnished her before the marriage. Sheppard v. Starke, 3 Munf. 29.

Where land is conveyed to husband and wife and the survivor of them, neither is competent to testify in a suit touching the validity of the deed. Scott v. Rowland, 82 Va. 484, 4 S. E. Rep. 595.

Husband and Wife Joint Makers of a Note.—Where husband and wife are joint makers of a note, neither is a competent witness, notwithstanding no relief is prayed for in the bill, as against the husband. Jones v. Degge, 84 Va. 685, 5 S. E. Rep. 799.

Tort to the Wife's Person.—A husband is so interested in a suit brought jointly by himself and wife for a tort to the person of the wife, even under the "Married Woman's Act" of April 4, 1877, that the wife is incompetent to testify. Norf., etc., R. Co. v. Prindle, 82 Va. 122.

Wife's Separate Estate.—A husband cannot be a witness for or against his wife, in a question touching even her separate estate in which he has no interest. Murphy v. Carter, 23 Gratt. 477; William & Mary College v. Powell, 12 Gratt. 372.

Need Not Be a Party to the Record.—Where the husband or wife is not a party to the record, but yet has an interest directly involved in the suit, and is thereby incompetent to testify, the other is also incompetent. Murphy v. Carter, 23 Gratt. 477; Hill v. Proctor, 10 W. Va. 59, 82; Zane v. Fink, 18 W. Va. 693, 741; Hoge v. Turner, 96 Va. 624, 32 S. E. Rep. 291.

As Subscribing Witness to a Deed.—A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is

conveyed to his wife, either for the purpose of proving the due execution of the deed when called in question, or for the purpose of having it admitted to record. Johnston v. Slater, 11 Gratt. 321.

Effect of Dissolution of Marriage.—Nor is it material that the relation of husband and wife no longer exists, when the party is offered as a witness, for the incompetency still remains, though the marriage has been dissolved by death or a divorce *a vinculo*. William & Mary College v. Powell, 12 Gratt. 372; Marks v. Spencer, 81 Va. 751; Smith v. Bradford, 76 Va. 758.

Other Party Also Incompetent.—In a controversy between an unmarried woman on the one part, and husbands and wives on the other, in relation to a transaction between them, in which all are interested, as the husbands and wives are incompetent, from their relation to each other, to testify in their own behalf in the case, the unmarried woman is not a competent witness in her own behalf. Statham v. Ferguson, 25 Gratt. 28. See also, Lindsay v. McCormick, 82 Va. 479, 5 S. E. Rep. 534; Jones v. Degge, 84 Va. 685, 5 S. E. Rep. 799; Smith v. Bradford, 76 Va. 758; Johnson v. Fry, 88 Va. 695, 12 S. E. Rep. 973.

Communications between Husband and Wife.—Communications between husband and wife are privileged, and neither can be made to testify as to them. This rule is independent of any consideration of interest or identity, and is upheld on the ground of public policy. The fact that they were living apart from each other, at the time when the communications were made, though not divorced, is immaterial. Murphy v. Com., 23 Gratt. 960; White v. Perry, 14 W. Va. 66.

In a suit by persons held in slavery against their master to recover their freedom, where he claims the plaintiffs as slaves by purchase of them from a deceased party, the widow of such deceased party is not a competent witness to prove a statement by her husband in his lifetime, that the mother of plaintiffs then held by him in slavery was an Indian woman, since such a communication is confidential although made without any injunction of secrecy. Robin v. King, 2 Leigh 140.

This rule is founded on public policy and not on interest, hence a cessation of the interest of husband or wife will not remove the incompetency. Zane v. Fink, 18 W. Va. 698.

Time for Objections.—The objection may be made even after four questions have been put to the husband on his examination in chief. Warwick v. Warwick, 31 Gratt. 70.

Objection May Be Made in the Appellate Court for the First Time.—And the objection may be made for the first time in the appellate court, since it affects the competency of the witness to testify at all. Rose v. Brown, 11 W. Va. 122, 133.

2. WHEN COMPETENT.—But there is no rule of law forbidding a husband to testify in a suit between third parties, touching transactions occurring after his wife's death, because the property in controversy once belonged to his wife, hence he is competent to prove notice to the defendant of the claims of his wife's heirs. Dugger v. Dugger, 84 Va. 130, 4 S. E. Rep. 171.

Facts Not Learned in Capacity of Wife.—The wife after the death of her husband is competent to prove facts coming to her knowledge from other sources and not by reason of her situation as wife, notwithstanding they relate to the transactions of her husband. White v. Perry, 14 W. Va. 66.

Husband or Wife Merely Formal Party.—And it does not apply where the husband is a party to the suit merely for the sake of conformity, but has no legal interest in the subject-matter; the wife in such cases may testify in her own behalf. Frank v. Lilienfeld, 33 Gratt. 377; Ratliff v. Vandikes, 89 Va. 307, 15 S. E. Rep. 864. As under the "Married Woman's Law," see Hayes v. Va. Mut. Prot. Ass'n, 76 Va. 225; Farley v. Tillar, 81 Va. 275; Nicholas v. Austin, 82 Va. 817, 1 S. E. Rep. 132; Thomas v. Sellman, 87 Va. 683, 13 S. E. Rep. 146.

Must Have Some Interest.—Where it does not appear that a promissory note in suit was ever delivered to the wife, the promisee, the wife having no interest in the note, her husband is a competent witness. Wright v. Smith, 81 Va. 777.

Liability for Costs Insufficient.—Even though the husband be liable for costs, this will not give him such an interest in the suit as to render his wife incompetent to testify. Hayes v. Va. Mut. Prot. Ass'n, 76 Va. 225.

Where Interest Has Ceased.—A husband will not be incompetent as a witness where, pending a suit by husband and wife for injury to wife's property the cause of action is assigned for value before any objection to her competency is made. Norf., etc., R. Co. v. Read, 87 Va. 185, 12 S. E. Rep. 395.

Husband Not Interested in That Suit.—In suits in which the husband is not immediately and certainly interested, but may be so eventually, the wife is a competent witness; but the jury are to judge of her credibility. Baring v. Reeder, 1 H. & M. 154.

In an action of trover by the plaintiff against defendant for goods which had been lent by the defendant to the wife of a third party and conveyed by her husband to the plaintiff, the wife of the third party is a competent witness, her husband not being interested in the event of *that* suit or at any rate equally interested on both sides. In the one case, where the defendant succeeds, being liable to the plaintiff on his warranty of sale, on the other hand if the plaintiff is successful, being liable to the defendant for the value of his goods sold to the plaintiff. Baring v. Reeder, 1 H. & M. 154.

May Testify in Their Own Behalf.—But neither by common law nor by statute is either incompetent to testify in his or her own behalf, only for or against each other. Hayes v. Va. Mut. Prot. Ass'n, 76 Va. 225; Norf., etc., R. Co. v. Prindle, 82 Va. 122; Armstrong v. Lachman, 84 Va. 726, 6 S. E. Rep. 129; Thomas v. Sellman, 87 Va. 683, 13 S. E. Rep. 146; Ratliff v. Vandikes, 89 Va. 307, 15 S. E. Rep. 864.

Where an action is brought by the husband and wife, and the wife is the meritorious cause of the action, the wife is a competent witness as to the general damages. Wheeling v. Trowbridge, 5 W. Va. 353.

3. STATUTORY CHANGES.

In West Virginia.—Chapter 130, Code of W. Va. 1868, only allows husband and wife to testify for or against each other in suits or actions between husband and wife. Hill v. Proctor, 10 W. Va. 59, 83; Zane v. Fink, 18 W. Va. 693, 741; Lawrence v. DuBois, 16 W. Va. 443, 457; Rose v. Brown, 11 W. Va. 122, 133; White v. Perry, 14 W. Va. 66.

In Zane v. Fink, 18 W. Va. 693, HAYMOND, J., was of opinion that this exception was not confined to suits in which they are the sole parties, but they are also competent, though there are other parties to the suit or action, to testify as to any matter in which the husband and wife only were interested, and in which the other parties, if any, had no interest.

This incompetency of husband and wife is re-

moved in West Virginia by the Act of 27th June, 1882, Acts 1882, p. 544, except as to confidential communications between them. Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932; Maxwell v. Hanshaw, 24 W. Va. 405.

Since the competency of evidence is to be determined as of the time it is read and not of the time it was taken, depositions of husband and wife taken before the above statute went into effect, but read after, are admissible. Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932.

In Virginia.—See Poll. Supp. to the Code Va., § 3346.

4. IN CRIMINAL CASES.—The Code and Act of March 3, 1898, Acts 1897-8, p. 753, do not apply to proceedings for a criminal offence committed by one spouse against the other, but as to such proceedings the common-law rule of evidence applies, under which they are allowed to testify against each other. Hence, where, under an indictment charging defendant with poisoning a well with intent to injure a named person and "other persons" it is made to appear that defendant's wife is one of such persons accustomed to drink out of such well, she is a competent witness against him. Davis v. Com., 99 Va. 838, 38 S. E. Rep. 191.

E. MULTIFARIOUSNESS OF BILL.—A bill by a married woman is not demurrable because she seeks, at the same time, the appointment of a trustee for her separate estate, and an injunction against a municipal corporation, to prevent it from opening a street through the trust property. Forsyth v. City of Wheeling, 19 W. Va. 318.

Where a bill, which only seeks to foreclose a mortgage executed by husband and wife on his personalty and his interest in a certain tract of land, is amended so as, in addition, to seek to charge her separate real estate with a judgment lien, it will be multifarious, and such amendment should not be allowed. Linn v. Patton, 10 W. Va. 187.

A party who has a vendor's lien on the separate real estate of a married woman, should not be made a party defendant to a bill seeking to subject such separate estate to a mechanic's lien, since the former is a lien on the corpus, and the latter only on the rents and profits, and the enforcement of one will destroy the other. Charleston L. & N. Co. v. Brockmyer, 18 W. Va. 586.

A bill is not multifarious because it seeks in the same bill to set up a demand against the separate estate of a married woman, and also to set up against an executor an assignment of assets in his hands, the debt being the same in each case and the property sought to be subjected also the same. Oney v. Ferguson, 41 W. Va. 568, 23 S. E. Rep. 710.

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164 *Buchanan v. Clark & als.

July Term, 1853, Lewisburg.

1. **Bonds—Joint Obligors—Case at Bar.**—G, B and K were principal obligors in a bond. B and K put money in the hands of G to pay the bond; and he bound himself to pay it, but failed to do so, and became insolvent. A judgment was recovered on the bond against the three, and B paid it. After the judgment G conveyed land to S to secure a debt due to him and another debt due to C. Upon a bill by B and K against S and C to subject the land conveyed in the deed to S to satisfy the debt B had paid, S stated in his answer that prior to the judgment he held the bond of G, B and K, and that he had delivered it up upon receiving the bond of G with the deed to secure it; but there was no proof of this. C in his answer, stated that he had before the judgment bought one-half the land from G, and made payments upon it; and had afterwards given it up and taken the bond of G for the amount, and taken the deed of trust to secure it. HELD:

1. **Same—Same—Agreement among Obligors as to Liability.***—It was competent for G, B and K to contract that as between themselves, G should be the principal and B and K his sureties; and that this had been done.
2. **Same—Same—Judgment—Payment by One Obligor—Subrogation.**†—That as between B and K and G, the former were entitled to be subrogated to the lien of the judgment creditor upon the land; and that they were equally entitled as against purchasers from G who did not show a better equity.

***Bonds—Joint Obligors—Agreement among the Obligors as to the Liability.**—Though as to a creditor, parties, *e. g.* partners, may be equally bound as to a certain debt, and though no understanding and agreement as between themselves can change the relation so as to impair the creditor's rights, yet it is also true that as between themselves the parties may assume the relation of principal and sureties. The principal case was cited in approbation of this point in Moore v. Holt, 10 Gratt. 298; Barnes v. Boyers, 34 W. Va. 806, 12 S. E. Rep. 709. See also, Johnson v. Young, 20 W. Va. 658, 664, 666.

Judgment is obtained on a note. The accommodation indorser or surety of the note then purchases real estate from the principal debtor who retains a lien for the purchase money. By the express terms of the contract, the surety assumes the payment of the judgment in part discharge of the purchase money for the land. It was held that, by this arrangement, the relation of the parties *inter se* were changed; that the surety became the real debtor, and *vice versa*, and that the original debtor had the right to require that the lien of the judgment should be enforced for his exoneration against the real debtor. Rhea v. Preston, 75 Va. 757, citing the principal case, and Schultz v. Hansbrough, 33 Gratt. 567, which itself cites the principal case as its authority.

†**Subrogation—Partners.**—In Sands v. Durham, 98 Va. 392, 36 S. E. Rep. 472, 6 Va. Law Reg. 248, it was held, that subrogation does not exist as between partners, where one partner, after dissolution, discharges a judgment against the firm out of his own funds. The court, in an opinion delivered by JUDGE CARDWELL, said that the principal case (*Buchanan v. Clark*) recognizes that partners ordinarily do not have the right of subrogation to the rights of the firm's creditor holding a security for a debt of the firm paid by one of the partners out of his own means; and that the right of subrogation in the principal case was placed solely on the ground that the parties had expressly contracted that as between themselves, one of them should be principal and the other two his sureties. The court then, citing the principal case as its authority, lays down the broad rule that the doctrine of subrogation does not ordinarily apply as between copartners; and that to entitle a partner, paying out of his private means debts against the firm, to be subrogated to the rights of the creditors whose debts he has so

3. **Same—Equities—Merger—Case at Bar.**—That the equity set up by S was not proved; and that the equity of C, if he had any, was merged in the deed of trust.

2. **Consolidation of Causes—Consent of Parties—Case at Bar.**—The bill alleged that G was seized of the several tracts specified in certain deeds exhibited; and that the deed of trust covered all the land; but this seemed to be a mistake. The record states that the cause came on to be heard by consent, and an interlocutory decree was entered directing a sale of the land in the bill mentioned. At a subsequent day of the same term it was suggested that there was another suit pending in the same court by another plaintiff against G and others, to subject the same land to sale; and by consent of parties the suits were amalgamated so far as to be heard together. And by like consent it was ordered that the decree for the sale of the land in the first suit should be considered as having been pronounced in both cases. A sale was made and the executor of S became the purchaser, and there being no exception to the report, it was confirmed. HELD:

165 *1. **Same—Same—Effect on Decree.**—The consent of the parties merely cured any irregularities as to the time of bringing on the first cause for hearing, the amalgamating the two causes, and in making the decree as entered in the first cause, a decree in both cases without a formal entry in each case. The consent did not extend to the decree directing the sale of the land, or cure any error therein.

2. **Judicial Sales—Priorities.**‡—It was error to decree a sale of the land before the priorities of the parties were adjusted; and until it had been ascertained what portion of the lands appearing by the deeds filed with the bill to belong to the debtor, was included in the deed of trust.

3. **Same—Order of Selling Land§—Case at Bar.**—The land not included in the deed of trust should have been first sold, and applied to the prior judgment; and if insufficient to discharge it, then the lands included in the deed of trust should have been sold, and so much of the proceeds thereof as, with the proceeds of the land not conveyed, amount to a moiety of the proceeds of all the said lands, should have been applied if necessary to the satisfaction of said judgment.

4. **Same—Proceeds—Case at Bar.**—The proceeds of the other moiety of the land should have been applied to satisfy the second judgment if it had priority over the deed of trust.

5. **Same—Reversal of Decree—Effect on Purchaser‖—Case at Bar.**—The final decree gave the proceeds

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paid, the relation ordinarily existing between copartners must have been changed by an agreement between them whereby they assume the relation of principal and surety.

At the following spring term of the supreme court (March, 1901), a rehearing was granted in the case of Sands v. Durham, the decision of which is reported in 6 Va. Law Reg. 839, 3 Va. Sup. Ct. Rep. 189. The previous decision was reversed by a unanimous court and the principle firmly laid down that *subrogation does exist as between parties, where one partner after dissolution discharges a judgment against the firm out of his own funds.*

JUDGE WHITTLE, in an ably-delivered opinion, reviews the Virginia cases showing that in no other jurisdiction has the doctrine of subrogation been more firmly adhered to or more liberally expounded to meet the exigencies of particular cases than in Virginia.

As regards the principal case, JUDGE WHITTLE said: "It will be observed, the court was dealing with a case of 'convention subrogation,' and confined its decision to the case in hand without intimation as to whether the *general doctrine of subrogation* would or would not obtain among partners." See also, on this special point, Wheatley v. Calhoun, 12 Leigh 264; 6 Va. Law Reg. 253-257.

On the general subject of subrogation in regard to sureties, see Powell v. White, 11 Leigh 309; Enders v. Brune, 4 Rand. 438; McClung v. Beirne, 10 Leigh 394; Watts v. Kinney, 3 Leigh 272, 23 Am. Dec. 266; Douglass v. Fagg, 8 Leigh 588; Edmunds v. Venable, 1 P. & H. 121; Robinson v. Sherman, 2 Gratt. 178, 44 Am. Dec. 381; Hill v. Manser, 11 Gratt. 522, and *foot-note*; Kendrick v. Forney, 22 Gratt. 748, and *foot-note*; Barger v. Buckland, 28 Gratt. 850; Eidson v. Huff, 29 Gratt. 338; Cromer v. Cromer, 29 Gratt. 280; Robertson v. Trigg, 32 Gratt. 76; Harnsberger v. Yancey, 33 Gratt. 527, and *foot-note*; Dobyns v. Rawley, 76 Va. 537; Hanby v. Henritze, 85 Va. 177, 7 S. E. Rep. 204; Barton v. Brent, 87 Va. 385, 13 S. E. Rep. 29; Pace v. Pace, 95 Va. 792, 30 S. E. Rep. 361; *foot-note* to Tarr v. Ravenscroft, 12 Gratt. 642.

‡**Judicial Sales—Priorities.**—See Lipscombe v. Rogers, 20 Gratt. 658, and *foot-note*; also, monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

§**Sale of Land Subject to Lien—Proceedings against Purchaser.**—In Miller v. Holland, 84 Va. 656, 5 S. E. Rep. 701, the principal case was cited among others as authorizing the proposition that when the mortgagor of land sells, at different times, portions of the mortgaged premises, the land retained by the mortgagor must first be subjected to the satisfaction of the mortgage lien, and, if this is not sufficient, the lands alienated are liable in the inverse order of their alienation. See also, on this point, Alley v. Rogers, 19 Gratt. 366, and *foot-note*, where there is a collection of authorities in point.

‖**Judicial Sales—Validity of—The Purchaser Must Be a Party.**—In Londons v. Echols, 17 Gratt. 19, it was said: "It would be contrary to natural justice, and to the practice which has prevailed in like cases, to conclude the purchaser, whose purchase has been confirmed and consummated by conveyance of the title, by a decision of these questions (*i. e.* as to validity of sale, etc.), before he has been brought before the court. The purchaser was brought before the court by supplemental proceedings in Pierce's Adm'rs v. Trigg's Heirs, 10 Leigh 406, and in Parker v. McCoy, 10 Gratt. 594, as well as in Hughes and Wife v. Johnston, 12 Gratt. 479, before cited: while, in Huston's Adm'r v. Cantril, 11 Leigh 136, Cocke's Adm'r v. Gilpin, 1 Rob. R. 26, and *Buchanan v. Clark, 10 Gratt. 164*, there was no necessity to resort to supplemental proceedings, because the purchaser was already a party in the cause. See also, Bank United States v. Ritchie, 8 Peters R. 128; Colclough v. Sterum *et al.*, 3 Bligh P. Cas. 181; Coger v. Coger, 2 Dana's R. 270; McKee's Heirs v. Hann, 9 Dana's R. 526; Parker's Heirs v. Anderson's Heirs, 5 Monr. R. 445."

See also, Dunfee v. Childs, 45 W. Va. 165, 30 S. E. Rep. 106, where the principal case is cited, and *foot-note* to Londons v. Echols, 17 Gratt. 15, where there is a collection of authorities in point.

Appellate Practice—Secondary Evidence—No Objection in Lower Court.—See the principal case cited in *foot-note* to Atkins v. Lewis, 14 Gratt. 30.

of all the land to the *cestuis que trust* in the deed, subject to satisfy the debt in the second suit, and directed a conveyance to the purchaser. It does not appear what the lands not included in the deed produced. Held: As the appeal brought up the whole decree, and suspended its execution, the claim of the purchaser must fall with the reversal of the decree, the purchaser not being a stranger to the controversy purchasing at a judicial sale, but the party chiefly benefited by the proceedings complained of.

In December 1840 George B. Keys and Wm. R. Buchanan filed their bill in the Circuit court of Washington county against Isaac C. Grant and others, for the purpose of subjecting certain lands to satisfy a judgment which had been recovered against them and Grant by James Cox. They charge in their bill that in the summer of 1839 the plaintiffs and Grant formed a partnership for the purchase of cattle for the eastern market; and that amongst 166 other purchases they bought *the cattle of James Cox, for which they executed to him their bond for thirteen hundred dollars. That the cattle purchased by them were sold; and thereafter Grant was supplied with money arising from the sales, for the purpose of paying the bond to Cox, as well as all other partnership debts. That being thus supplied with funds, he made an agreement with the plaintiffs, by which he bound himself to pay all the said partnership debts; and from that time it was understood that the plaintiffs should be bound only as his security for said debts. That Grant not paying the debt to Cox, an action was brought in the Circuit court of Washington against him and the plaintiffs, on said bond; and a judgment was recovered thereon by Cox in the spring of 1840, against all the parties. That Grant has become insolvent; and plaintiffs had executed a forthcoming bond, on which execution was awarded at the fall term of the court; which they would be compelled to pay.

They further charge, that at the time the judgment was rendered in the spring of 1840, Grant owned several tracts of land, as was shown by several deeds to him, which they exhibited with their bill. That in September 1840 Grant had executed a deed by which he conveyed all the land owned by him at the date of the judgment, to Francis Smith, in trust to secure a debt of five hundred dollars due to Smith, and to secure to David C. Clark the payment of a debt of one thousand six hundred and six dollars, for which John B. Clark was the surety. They insist that the judgment is a lien upon these lands, and that they are entitled to be substituted to the rights of the judgment creditor Cox, and to subject the lands for the amount they shall be compelled to pay. And making Grant, Smith and the two Clarks parties defendants, they pray for a decree against Grant for the amount they shall be compelled to pay to Cox; 167 and that the *lands held by Grant at the time the judgment was recovered and since conveyed to Smith, may be subjected to satisfy the decree.

The deeds exhibited with the bill showed the conveyance to Grant of six separate tracts of land; and the deed of trust from Grant to Smith seems to convey but four of these tracts. By an endorsement on this deed dated the 12th October 1840, Clark assigned his interest in this deed to Findley & Mitchell and Francis Smith.

Smith answered the bill. He says that the five hundred dollars secured to him by the deed from Grant to himself, was the balance of a debt of one thousand dollars which the plaintiffs and Grant had owed him; and five hundred dollars of it having been paid, he took Grant's note with David C. and John B. Clark as his sureties, for the balance, to be secured by the deed of trust; and gave up the note in which the plaintiffs were bound.

David C. Clark answered. He insisted that upon the case made by the bill the plaintiffs were not entitled to be substituted to the lien of Cox's judgment. He says that in 1838, by a written contract he purchased from the defendant Grant his lands for two thousand six hundred dollars; upon which contract he paid Grant seven hundred and eighty six dollars and seventeen cents. That on the 15th November 1839 he made a second agreement with Grant by which a partnership was formed by them in the tract of land aforesaid, valued in the contract at two thousand dollars. That before and after this last agreement he made various payments on account of said land, amounting in the whole to one thousand six hundred and six dollars. That matters thus stood until September 1840; Grant living on the land and being the managing partner in a great measure. That the partnership was then dissolved, on 168 the terms that *Grant should repay him the one thousand six hundred and six dollars which he had paid for the land; he reserving a lien thereon by deed of trust to secure him.

The first agreement referred to by Clark in his answer bears date November 24th, 1838; and by it Grant sells to Clark the lands owned by Grant adjoining Clark for two thousand five hundred dollars. The second agreement bears date the 15th of October 1839, and recites, that "Whereas said Grant has a tract of land on which he now lives, containing about seven hundred acres more or less, and being more than he can cultivate or wishes to possess, values the same at two thousand dollars, and agrees that David C. Clark shall have one-half of the whole at one thousand dollars, which said Clark agrees to give, and for which he has paid, the receipt for which is hereby acknowledged by said Grant." The agreement for a partnership was then set out; and it is provided that upon a dissolution of the partnership, one was to take the land at the price which might be agreed between them; and if Grant took it, he was to pay to Clark the one thousand dollars he had paid, and as much more as it

should be agreed he should give for the land.

The defendant filed with his answer four receipts of Grant; one dated November 27th, 1838, for seven hundred and eighty-six dollars and seventeen cents, purporting to be in payment of land sold him. The second was dated November 25th, 1839, for three hundred dollars, "towards my half of the land on which I now live;" and the two others were dated, one July 1st, 1840, and the other April 3d, 1840; the first, for one hundred and fifty dollars, and the second, for one hundred and fifty-six dollars, in the same terms. The receipts for the balance of the sum of one thousand six hundred and six dollars, he stated in his answer had been accidentally lost or mislaid.

The plaintiffs proved that Grant ad-
169 mitted he owed *the debt to Cox and had received the money to pay it; and that he had endeavored to obtain other security which would be satisfactory to Cox, and thus to release the plaintiffs, but he failed to obtain it. And they exhibited his written undertaking, dated May 16th, 1840, to settle all the unpaid debts of the partnership contracted for cattle during the year 1839. They also proved by Charles C. Gibson, a deputy sheriff of Washington county, that a few days after the expiration of the May term 1840 of the Circuit court of Washington county, a fieri facias was put into his hands, which was in the name of James Cox against Grant and the plaintiffs for thirteen hundred dollars, besides interest and costs; that the parties gave a forthcoming bond, which was forfeited, and that execution was awarded upon it. That a fieri facias was issued, upon which Buchanan paid seven hundred and forty-six dollars and eight cents, on the 28th December 1840. That in March 1841 a ca. sa. was issued, upon which the plaintiff were taken into custody, and that Buchanan made an arrangement with Gibson which satisfied the balance due on the judgment, amounting to seven hundred and fifty-seven dollars and twenty-five cents.

In October 1842 the court made a decree, in which it is stated that the cause came on by consent of parties to be heard upon the bill, &c., whereupon, it is adjudged, &c., that Connally F. Trigg, who is appointed a commissioner for that purpose, do sell the land in the bill mentioned, &c., and make report to the court.

It appears that there was another cause pending in the same court in the name of James Cox against Grant and others; and at the same term in which the foregoing decrees was made, an order was made in both causes, that it appearing to the court that the plaintiffs in these suits are attempting to subject the same lands,
170 *by consent of the parties it is ordered that the suits be amalgamated so far as to come on to be heard together. And by like consent it is further adjudged, &c., that the decree pronounced in the last cause during the present term, be considered as having been pronounced in both causes.

The two causes came on to be heard together on the 26th of May 1846, as the decree says upon the report of Connally F. Trigg, the commissioner appointed to sell the land, though that report is not in the record. It is however confirmed, and it was decreed that Trigg, who was appointed a commissioner for the purpose, do convey the said lands so sold by him to Wyndham Robertson executor of Francis Smith deceased, with covenants of special warranty. That Cox do recover against Grant the sum of two hundred dollars, the debt in the bill mentioned, with interest thereon from the 28th of July 1837 till paid, and his costs both in his action at law and his present suit, to be paid by Wyndham Robertson executor of Francis Smith, out of the proceeds of the land sold under the former order in these causes. That the bill of the plaintiffs Keys and Buchanan be dismissed with costs as to the defendants Robertson executor of Smith, and the Clarks; and that the said Robertson as executor of Smith, do retain the residue of the purchase money aforesaid of the said land first in extinguishment of the sum of five hundred dollars, with its interest secured to said Smith by the deed of trust in the pleadings mentioned, and the residue to be applied to the payment of the debt transferred to said Smith and Findley and Mitchell by David C. Clark. And that Grant pay to the plaintiffs, &c.

From this decree Buchanan applied to this court for an appeal, which was allowed.

J. W. Sheffey, for the appellant.
B. R. Johnston, for the appellees.

171 *ALLEN, J. This is a bill filed by the appellant and George B. Keys, to be subrogated to the lien of a judgment obtained against them and Isaac C. Grant by James Cox, and which it appears has been paid by the appellant. The bill avers that the complainants and Isaac C. Grant having formed a partnership in the summer of 1839, for the purchase of cattle for market, on the 25th of July 1839 executed to James Cox their joint and several single bill for one thousand three hundred dollars, the price of cattle purchased from him. That all the cattle being sold by them, Grant thereafter was supplied with funds resulting from the sales to pay the debts of the firm, including the debt to Cox; that he agreed and bound himself to pay the debts, and that it was understood from that time that the other parties were to be bound only as the securities of Grant in relation to the debts. Grant having failed to discharge the debt, the creditor sued and obtained judgment against all the parties to the note; and execution having issued, the amount was paid by the appellant. The bill avers that the judgment on the note was recovered against Grant and the complainants at the spring term of the Circuit court for Washington county in the year 1840. That on the 19th of September 1840 Grant executed to Francis Smith, as trustee for the benefit of John B. and David C. Clark, a deed of trust covering all the land owned by him. That shortly after-

wards it was ascertained he was in insolvent circumstances, and that he has since taken the oath of insolvency.

The allegation that Grant was supplied with the funds to pay the debt to Cox is not denied by Grant in his answer; and that fact and the agreement to pay the debts, are fully proved by evidence of his admissions and by his agreement of the 16th May 1840, filed as an exhibit in the cause. The recovery of the judgment at the time 172 alleged in the bill is neither *admitted or denied in the answers, and the complainants have neglected to file a copy. That it was prior in date to the deed of trust to F. Smith seems not to have been controverted in the court below, or in argument here; still the record should contain some evidence to show that it was recovered before the execution of the deed of trust. That proof, it seems to me, is furnished by the deposition of Chas. C. Gibson, the deputy sheriff, who deposes that a few days after the May term 1840 of the Circuit court for Washington county, an execution for the debt was placed in his hands by the clerk of said county, upon which he took a forthcoming bond, dated the 22d of June 1840. This, it is true, is secondary evidence, but the deposition is not excepted to for that cause, though so much of it as details the statements of the complainants in their own favor, was excepted to.

Conceding the judgment to be prior in point of time to the deed of trust, it is contended that the debt was the individual debt of each of the partners; that in paying it the complainants have merely paid their own debt, and such payment gives them no right to the application of the principle of subrogation as against a subsequent incumbrancer. As between the partners and the creditor they were all equally bound; and no understanding and agreement as between themselves, could change that relation so as to impair his rights. But there was nothing in that relation which would prevent the parties as between themselves, from assuming the relation of principal and securities. Grant agreed to pay the debt upon being furnished with the means; the funds were supplied, but he failed to apply them as he agreed to do. He admitted that he owed the debt himself, and by the memorandum signed by him, dated the 16th of May 1840, he bound himself to settle the unpaid debts of the firm contracted for cattle during 173 the year 1839, and the *costs incurred in collecting them. As between themselves, he stood in the position of principal primarily liable for the debt, and his copartners as his sureties. After they had complied with their engagement by supplying Grant with the funds to pay off the debts, upon his undertaking to discharge them, the debts became his, and they should have been discharged by him; for in substance though not in form the money was due from him alone. If the property had remained the property of Grant, there can be no doubt that a court of equity, in view of his express undertaking to treat the debt as his own and discharge his copartners therefrom, would have held him liable as principal debtor, and substituted them, if compelled to pay his debt, to the lien of the creditor's judgment on his property. And this equity of the complainants could not be impaired by a subsequent transaction of Grant with third persons, to which the complainants were strangers. Although the judgment is in fact extinguished by payment, yet it is kept alive in contemplation of equity for the benefit of the surety. Bank United States v. Winston's ex'or, 2 Brock. R. 254; Enders v. Brune, 4 Rand. 438; Powell v. White, 11 Leigh 309; McClung v. Beirne, 10 Leigh 394; Robinson v. Sherman, 2 Gratt. 178; Leake v. Ferguson, 2 Gratt. 419; Watts v. Kinney, 3 Leigh 272.

I do not think, therefore, that there is anything in the objection that the debt when contracted was a partnership debt, and that with respect to the creditor it retained its original character. As between themselves they occupied the relation of principal and securities; and the judgment being prior to the deed of trust, they are entitled to priority over it, unless the creditors secured by the deed can show a superior equity. This the defendants by their answers have attempted to make out. The deed of trust was given to secure a debt of one thousand six hundred and six 174 *dollars to David C. Clark, and to secure D. C. Clark and John B. Clark, the securities of Grant in a note that day executed to Smith, the trustee, for five hundred dollars, with interest from the 1st of December 1837. Smith in his answer avers that this five hundred dollars was part of a sum of one thousand dollars obtained long before the date of the deed of trust, from the said Smith by the complainants and the said Grant, for which they gave their note, on which five hundred dollars had been paid; and that the one thousand dollar note, with the names of complainants thereto, was given up to Grant on his giving the Clarks and the deed of trust as security in the place of the complainants.

These allegations are not responsive to any of the charges in the bill, and are entirely unsupported by evidence. It is therefore unnecessary to consider what would be their effect on the rights of the parties if made out by proof.

The answers of Grant and David C. Clark attempt to show how the debt of one thousand six hundred and six dollars, secured by the deed of trust to David C. Clark, originated. The account given of the alleged purchase of the whole land by David C. Clark in 1838 at the price of two thousand five hundred dollars; the subsequent partnership with Grant at which the land was valued at two thousand dollars; and the subsequent arrangement by which the partnership was dissolved, and Grant became a debtor in the sum of one thousand six hundred and six dollars, is not very intelligible, and the documentary evidence filed does not throw much light on the transaction.

By the agreement of November 24th, 1838, Clark became the purchaser of the lands at two thousand five hundred dollars, and paid seven hundred and eighty-six dollars and seventeen cents towards the price on the 27th November 1838. On the 15th of
175 *October 1839, an agreement was made between them, which recited that Grant had a tract of land on which he then lived, containing 700 acres, which he valued at two thousand dollars; and he agreed to let Clark have one-half at one thousand dollars, which he had paid. It does not appear what had become of the first sale of the whole to Clark at two thousand five hundred dollars. It is not alleged that there was an express rescission, but it is left to implication that the second agreement was understood to be a rescission: nor is any reason given why after a sale of the land at two thousand five hundred dollars and payment of part of the purchase money, it should be taken back and the purchaser permitted to take one-half of it at one thousand dollars. The receipts thereafter given tend to render the transaction still more obscure; for they purport to be given for money received in payment of Grant's half of the land; though it does not appear that after the 15th of October 1839 there was any contract between them by which Grant sold to Clark the half of the land retained by him. Whatever may have been the nature of the dealings between these parties, there is nothing to show that they were of such a nature as to give Clark an equitable lien on the property. Under the most favorable aspect of the case for Clark, and regarding all the transactions as taking place fairly, there was no debt due to him until their final arrangement setting aside their previous contracts and converting his advances as a purchaser and partner into a debt secured by a deed of trust then executed upon the whole of the land: and it seems to me he cannot go behind his deed. Before that arrangement no debt was due to him. His case is not as strong as that of the vendor to whom there is an actual debt due, for which he has an implied lien, as to whom it has been decided that when he takes a mortgage for the purchase money his
176 implied equitable lien for the *purchase money is superseded. Tayloe v. Adams, Gilm. 329; Little, &c. v. Brown, 2 Leigh 353. I think the creditors have not shown anything which entitles them to go behind the deed of trust; and the judgment being prior in date, the appellant, who by substitution is entitled to the benefit of it, must be first satisfied. But as the judgment only authorized a charge upon a moiety of the land, a moiety only can be subjected to sale for his benefit.

It has been supposed that the case of the Mutual Assurance Society v. Stanard, 4 Munf. 539, decides that where, after a judgment, the debtor conveys the whole of his land, and the deed provides for the sale thereof, the judgment is a charge upon the whole proceeds, and must be first satisfied. In that case no such question seems to have been considered by the court. It may have been known that a moiety of the property would be sufficient to discharge the judgment; and therefore the point may not have been made. The main question in the cause was whether the judgment could relate to the first day of the term, so as to overreach intermediate incumbrances. Having decided that the trustees took in subordination to the judgment, it became necessary to determine what effect this would have upon the rights of the parties; and the court, without deciding the general question whether the court of chancery could in all cases decree a sale of the land out and out, at the instance of the judgment creditor, directed that as the deed in that case had provided for a sale for the purposes of the trust, the whole should be sold by the trustees, who should in the first place pay the judgment out of the proceeds, and then proceed to the execution of the trust. The question as to the power of a court of chancery in such cases to sell out and out was not free from difficulty, as will appear from the remarks of Green, judge, in Blow
177 v. Maynard, 2 Leigh 29, 57; *and the case of the Mutual Assurance Society v. Stanard is an authority for the exercise of the power where a subsequent deed has been executed providing for the sale; but cannot be considered an authority for the other proposition, because it does not appear that it was necessary to decide it, or that it was considered.

It was decided in Haley v. Williams, 1 Leigh 140, that a judgment is a lien on the whole of the debtor's equitable estate; and the whole fund and not a moiety is to be applied to the judgment. In that case the legal title was in a trustee for the security of a debt having priority to the judgments. Green, judge, (whose opinion in this respect was concurred in by the other judges, as a decree was entered conforming to it,) stated that a court of equity, upon the principle that equity follows the law, would, if it were practicable, subject only a moiety; but that was impracticable; as equity could only enable the creditor to reach the equity of redemption by allowing him to redeem; which cannot be done with a proper regard to the rights of the mortgagee, without requiring him to redeem in toto, and not for a moiety only: And when redeemed, the judgment creditor has a right to stand in the shoes of the mortgagee, and to tack his judgment. The debtor would not ask to redeem without paying the judgment, as well as the mortgage debt, upon the principle that he who asks must do equity.

But where the legal estate is in the debtor at the date of the judgment, the creditor can only subject a moiety; and a subsequent alienation by the debtor cannot enlarge his rights. Even where the alienation is fraudulent, equity merely removes the fraudulent conveyance out of his way. Stileman v. Ashdown, 2 Atk. R. 477; Ibid. 607; McNew v. Smith, 5 Gratt. 84. And there would seem to be no good reason why a bona
178 fide *incumbrancer should be in a

worse condition than a fraudulent alienee. In McClung v. Beirne, 10 Leigh 394, there had been successive alienations, and this court by its decree subjected an equity of redemption remaining in the debtor in a portion of the property, to be sold out and out, under the authority of Haley and Williams; and sales of the residue of the property were decreed to be made until a moiety was sold. It seems to me that this is all the complainants can claim by virtue of the judgment lien in the present case.

The bill averred that Grant at the time of the judgment was seized of the several tracts of land described in sundry conveyances, copies of which were filed: And furthermore, that the deed of trust covered all the land owned by Grant at the date of the judgment. By a comparison of the lands described in the copies of the deeds to Grant, with the tracts described in the deed of trust, it appears that some lands described in the deeds to Grant were not included in the deed of trust.

On the 25th October 1842, the cause came on to be heard by consent, and an interlocutory decree was entered directing a sale of the land in the bill mentioned. This I understand to be a consent of parties for the hearing of the causes at that time; but not a consent to the decree of sale: That was the decision of the court. At a subsequent day of the same term, it being suggested that there was another suit pending in favor of James Cox against Grant and others, in which the complainant Cox was attempting to subject the same land to sale, by consent of parties, the suits were amalgamated so far as to come on and be heard together. And by like consent, it was ordered that the decree for the sale of the land before recited, should be considered as having been pronounced in both cases. A sale was afterwards made, and there being no exception to the report, the same was confirmed; 179 *and the court proceeded to pronounce upon the rights of the parties, and distribute the proceeds. In these proceedings there were errors not affected or cured by the consent of the parties. That consent merely cured any irregularities as to the time of bringing on the first cause for hearing, the amalgamating the two causes, and in making the decree as entered in the first case, a decree in both cases, without a formal entry in each case. The error, if any, in decreeing a sale as the cause then stood, was not cured. There should not have been a decree for a sale until the priorities of the parties were adjusted, and until it had been ascertained what portion of the lands appearing by copies of deeds filed with the bill to belong to the debtor were included in the deed of trust. The lands not so included should, according to the case of McClung v. Beirne, ubi supra, have been first sold and applied to the prior judgment; and if insufficient to pay it, then the lands embraced by the deed of trust should have been sold and so much of the proceeds thereof as would, with the proceeds of the lands not conveyed, amount to a moiety of the proceeds of all of said lands, should have been applied, if necessary, to the indemnity of the complainants. The record in the other suit, though heard with this case, is not before us. If as it would seem from the recitals in the decree, a judgment has been rendered for that claim, and it was entitled to priority over the deed of trust, it should have been satisfied out of the other moiety of the proceeds arising from a sale of the lands: And the residue should have gone to the benefit of the parties provided for in the trust deed. The decree gives the latter the proceeds of all the lands, whether embraced by the deed of trust or not, subject to the claim for the two hundred dollars. The lands seem to have been sold as one tract; and it cannot be ascertained from what appears in this 180 record, what the *lands not embraced in the trust deed were worth. The sale was confirmed and a conveyance to the purchaser directed by the final decree; and as the appeal brings up the whole of the decree and suspended its execution, the claim of the purchaser must fall with the reversal of the decree, unless there was some reason to affirm it so far as it confirmed the sale and directed a conveyance. Nothing of that kind appears. On the contrary, the purchaser is the representative of the trustee in the deed of trust, who was the creditor in one of the debts provided for, and one of three assignees of the other debt. He does not occupy the position of a stranger to the controversy, who purchased at a judicial sale, but is the party chiefly benefited by the proceedings complained of. And as the appeal suspended the order confirming the sale and arrested its execution, the whole decree should be reversed and the sale set aside, and a resale directed, and an application of the proceeds made upon proper principles. I think the decree should be reversed.

The other judges concurred in the opinion of Allen, J.

The decree was as follows:

The court is of opinion, that the complainants in the court below, who, with Isaac C. Grant, were parties to the single bill executed to James Cox on the 25th July 1839 for one thousand three hundred dollars, ought, as between themselves and said Isaac C. Grant, to be regarded as the securities of said Isaac C. Grant, who, as to them, had, for valuable consideration, assumed the relation of principal, and was primarily liable for said debt. That said Isaac C. Grant having failed to discharge his co-obligors from liability, and the creditor having sued and obtained judgment, the complainants or either of them who have been 181 *compelled to pay said judgment, are entitled to be substituted to the lien of said judgment on the real estate of said Isaac C. Grant. That as said judgment was prior in date to the deed of trust of the 19th day of September 1840 from said Isaac C. Grant to Francis Smith; and the parties

claiming under said deed of trust having failed to establish in themselves any equity to charge said lands prior to said deed of trust, or to show any reason why the equity of the complainants in the court below to be substituted to the lien of the judgment, should be postponed until the debts secured by the trust deed should be satisfied, the complainants are entitled to priority of satisfaction for the sums paid by them or either of them in discharge of said judgment, to the extent of a moiety of said land conveyed by the deed of trust, or the proceeds arising from the sale thereof, after applying to their satisfaction the proceeds arising from the sale of the other lands of said Grant not included in said deed of trust. That as according to the principles of the case of McClung v. Beirne, 10 Leigh 394, the lands retained by the debtor and not aliened should be first subjected to the relief of the subsequent bona fide alienees and incumbrancers, the whole proceeds of the land not embraced in the deed of trust should be first applied to the indemnity of the complainants and each of them, for the amount paid by them or either of them in satisfaction of said judgment; and if not sufficient to indemnify them, and if the proceeds arising from the sale of such lands not included in said deed of trust, should not be equal to a moiety of all the lands of the debtor, then so much of the proceeds arising from the sale of the lands embraced in the deed of trust as will, when added to the proceeds of the other lands not so embraced, amount to a moiety of all the lands owned by the debtor, should be applied to the indemnity of the complainants or
182 *either of them. That out of the other moiety of the proceeds arising from the sale of lands of the debtor, the debt of two hundred dollars recovered by James Cox against said Grant with interest and costs, should be satisfied, if, as it would seem from the recital in the decree, a judgment has been recovered prior to the date of the deed of trust. But as the record in that case is not before this court, although the cases were heard together, no decision as to the rights of the parties as involved in that case, can be pronounced. The residue of the fund arising from a sale of all the lands as aforesaid after applying a moiety as aforesaid if required, to the indemnity of the complainants, and the other moiety thereof or so much as is required, to the payment of the two hundred dollars and interest and costs as aforesaid, provided it should appear that said last claim is entitled to priority to the deed of trust, is to be applied to the benefit of the parties named in the deed of trust according to the terms thereof.

The court is further of opinion, that there was error in proceeding to decree a sale of the lands before the priorities of the parties had been ascertained, and without an enquiry as to what lands owned by the debtor as described in the deeds, copies of which were made exhibits with the bill, were included in the deed of trust.

The court is therefore of opinion, that said decree is erroneous, and it is adjudged and ordered that the same be reversed with costs to the appellant; and the cause is remanded with instructions to set aside the sale heretofore made, to direct an enquiry by a commissioner to ascertain what portion of the land of the said Isaac C. Grant was not conveyed by the deed of trust; also an enquiry to ascertain how much of said judgment for said debt of one thousand three hundred dollars has been paid by
183 the complainants, or either of *them, and to render a decree in favor of each of the complainants against said Isaac C. Grant for the amount so paid and interest. And if the same shall not be paid within a reasonable time, to be fixed by the court, then to decree said lands to be sold and the proceeds applied; and the cause proceeded in in order to a final decree, according to the principles of this opinion and decree.

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184. *Roberts v. King.*

July Term, 1858, Lewisburg.

Sale of Slaves—Property in Possession of Vendor—Case at Bar.—In 1817 K executed to his step son R a bill of sale for a female slave, purporting to be for a valuable consideration. At the time R was but a boy, and lived with K, and continued to live with him until 1836, when he married and settled near K on land given him by K. The slave had seven children, and all of them but one continued in the possession of K until the death of R in 1845; that one had been for some years previous to R's death in his possession. R had been heard to say that K had made him a bill of sale for the slaves and that they would be his at the death of K and his wife who was the mother of R. R died leaving a widow but no children, so that his widow and mother were his distributees. In a short time after the death of R his widow filed a bill against K and wife and R's administrator, claiming distribution of the slaves, alleging that the debts of R had been paid by the administrator out of other property, that he declined to sue for the slaves but consented to the suit. K and wife answered and insisted that the bill of sale was intended to give to R only the remainder of the slaves after their death, and was so understood by R, who never set up any claim to the slaves during his life; that the slave conveyed was a gift from K to R, without consideration, though the bill of sale purported to be for value. And they objected to the jurisdiction of the court; and relied upon the statute of limitations, and the lapse of time. R's administrator answered, admitting the facts stated in the bill as to his action. HELD:

1. **Same—Same—Equity Jurisdiction**—It is a proper case for the jurisdiction of the court.
2. **Same—Same—Statute of Limitations.**—The possession of K was subordinate to the deed, and not adversary; and therefore the claim was not barred by the statute of limitations.

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*In Erskine v. North, 14 Gratt. 69, the court said: "And I apprehend that it is a well-established principle, that a grant will never be presumed in favor of a party who by his answer expressly or impliedly admits that no grant has been made. Roberts v. King, 10 Gratt. 184."

3. **Same—Same—Laches.**—R having lived with K who stood in the place of a parent and guardian to him, until 1826, and the suit having been brought in 1845, the lapse of time does not bar the claim.

4. **Same—Presumption of Reconveyance—Case at Bar.**—The ground of defence set up in the answer precludes the presumption of a reconveyance of the slaves by R to K.

In July 1846 Jane Roberts, widow of Richard T. Roberts deceased, instituted a suit in equity in the Circuit court of Tazewell county, against Elijah
185 *King, and Polly his wife, and Alexander Ward administrator of Roberts, to recover her distributable share in certain slaves in the possession of King, which she alleged were a part of her late husband's estate. In her bill she charged, that on the 22d of July 1817 King executed to Roberts a bill of sale for a negro woman named Celia and her child, in consideration of the sum of three hundred dollars; which bill of sale was acknowledged in court by King and ordered to be recorded. That said slaves went into the possession of Roberts, and remained there, with the exception of some short intervals of time, until the death of Celia. That she left seven children, which also remained in the possession of Roberts, with occasional intermissions, until his death, which took place in the year 1845. That Roberts died intestate and childless, leaving the plaintiff and Mrs. King, who was his mother by a former husband, his heirs and distributees. That Roberts and King lived within less than half a mile of each other, on the most friendly terms. And King having no children, and being old and infirm, Roberts frequently permitted some of the said negroes to spend a considerable time at King's house to aid him in carrying on his plantation; but that this never lasted more than a year at a time; the slaves last loaned being then recalled and others sent in their places. That since the death of Roberts all the slaves aforesaid were claimed by King who took possession of and still retains them.

She stated further, that Alexander Ward had qualified as administrator of Roberts, and had paid all the debts without resorting to the slaves, and yielded his claim upon them, that they might be distributed according to law. She claimed that she was entitled to one moiety of the slaves for life, and asked for a decree accordingly, and for general relief.

King and wife answered the bill,
186 and objected to *the jurisdiction of the court, on the ground that as the bill charges that they hold the slaves adversely, the question of title should be tried at law in an action brought against them by the administrator of Roberts. They further say, that Roberts being the son of the female defendant, was brought up by them; they having married when he was very young. That having no children of his own, King considered and treated Roberts as his son, and having determined in 1817 to give him the slave Celia and her increase after the death of himself and wife, David Ward, a neighbor, was requested to draw an instrument to effect this object. The bill of sale mentioned by the plaintiff was accordingly prepared by Ward, who stated that the instrument must be recorded, and that it would then give the negroes to Roberts after their death. That having implicit confidence in Ward, and knowing nothing of the legal effect of such instruments, the defendant King executed the bill of sale and had it recorded; but his intention in so doing was only to bestow the slaves upon Roberts after the death of himself and wife; and this he supposed was the effect of the instrument. That no consideration whatever passed from Roberts to said King; but it was on the part of King a mere voluntary act of kindness to a boy whom he had raised. Indeed, Roberts at that time was worth nothing whatever except a few things which had been given him by King; and he was a youth living with King and wife, supported by them and under their control.

They aver that the only object of the bill of sale was to secure the slaves to Roberts after the death of King and wife, and that he so understood it, and never in his life claimed any interest in the slaves whilst King and wife should live. That it was wholly untrue that the slaves were taken possession of by Roberts, and retained until his death. That he never had
187 possession *under the bill of sale, and never claimed it. That he never exercised the slightest act of ownership over the slaves, and always asked the permission of King and wife when he needed the services of the slaves.

They further state, that after the execution of the bill of sale Roberts continued to live with them until 1826, when he married; and the defendant King gave him a part of his own plantation to live on; and he resided on the land so given him until his death. The slaves however remained with King and wife, and their right was never questioned. That Roberts frequently informed defendants that the health of his wife was delicate, and that she could not undergo hard labor; and he often requested as a favor that they would let some of the slaves stay with his wife and assist her. That such requests were never refused, and defendants permitted sometimes one and sometimes another of the slaves to go and assist Roberts' wife, so that there was generally one of the slaves there; but they were taken home whenever defendants chose, and their right to do so was never questioned. That in fact everything that Roberts owned had been given to him by the defendants, and they intended him to enjoy after their death all that they owned. That the defendant King had been in undisputed possession of the slaves from the date of the bill of sale until Roberts' death, a period of twenty-eight or twenty-nine

years; and he relied upon this lapse of time as a bar to the plaintiff's suit.

Ward the administrator of Roberts, answered, and said that he had paid all the debts of his intestate without its being necessary to use the slaves for that purpose. That he knew the slaves mentioned in the bill were subject to distribution between the plaintiff and Mrs. King alone; and as there was a dispute between them about the property, he thought it best 188 *for the interest of the estate he represented, not to waste it in controversies with the distributees, but to permit them to settle the matter among themselves. He therefore made no objection to the institution of a suit by the widow of his intestate for a distribution of the slaves.

The bill of sale of the slaves mentioned in the bill is there correctly described. It appears, however, that King always kept possession of all the slaves except one named Ann, which was in the possession of Roberts several years before his death. And one of the witnesses states, that he had heard Richard T. Roberts frequently say, that Elijah King had given him a bill of sale for the negroes in controversy, and at King's death he would own them all. That he never spoke of them as his property except at the death of King, and witness's impression was, at the death of his mother also.

Pending the cause, the defendant King died; and the case coming on to be heard in September 1848, the court dismissed the bill with costs. Whereupon, the plaintiff applied to this court for an appeal, which was allowed.

Floyd, for the appellant.
S. Logan, for the appellee.

LEE, J. I concur with Judge Daniel in the opinion that the objection to the jurisdiction of the court in this case cannot be sustained. The failure of Ward the administrator of Richard T. Roberts, to take any measures for the recovery of the slaves from King, and his surrender of the subject for discussion and settlement between the appellant and Mrs. King, admitted in his answer, and placed upon the ground that although he knew there was a dispute about the property, yet as it was not necessary to resort to the slaves 189 *for payment of debts, he thought it best for him not to engage in the controversy, but leave it to the distributees to settle the matter among themselves, constituted, as I think, a sufficient ground for the appellant to resort to a court of equity for a distribution of the slaves between herself and Mrs. King, if she could show herself entitled to such distribution. But I cannot concur in the conclusion at which he has arrived, upon the pleadings and proofs in the cause, that the appellant has shown herself so entitled. While I am of opinion that she will be entitled upon the death of Mrs. King to a moiety of the slaves for her life, I am equally of opinion that King and his wife had acquired a right to hold them during their joint lives, which it is too late now to disturb or call in question.

I think it is clear that all that the parties contemplated by the conveyance of the 22d of July 1817, was to secure the slaves to Roberts after the death of King and his wife. The acts and declarations of all the parties, including Roberts himself, show that it was fully intended to reserve an estate to King and his wife during their lives, and that after their deaths the slaves should become the property of Roberts. For notwithstanding the conveyance, King continued to hold possession of the slaves, (excepting the girl called Ann, whom it may be fairly inferred he permitted to stay in the family of Roberts as a favor under the circumstances stated in his answer,) from the time of the conveyance down to the institution of this suit, (within a few days of twenty-nine years), and after its commencement until his death in the spring or summer of 1847, claiming at the least an estate in the property for the joint lives of himself and his wife; and Roberts permitted this possession to continue until his death, which occurred in 1845, a period of about twenty-eight years, never making any 190 demand of possession *of the property or setting up any claim except to the remainder after the expiration of the life estate of King and his wife. It is true the deed executed by King conveyed the property to Roberts absolutely; and doubtless he might, by a proceeding taken within proper time, have recovered the possession of it from King; nor could the latter have successfully resisted such recovery by showing that the effect and operation of the deed was not according to the real intention of the parties. But if Roberts failed to resort to any measure to recover the slaves, and permitted King to hold possession of them for twenty-eight years after he had made an absolute conveyance of them to him, under a claim of whatever estate or interest in them, whether of the absolute property or of an estate for life, I cannot perceive how Roberts or his representatives can afterwards successfully controvert the right of King to hold them for the estate so claimed by him. If King, after making the deed, had been permitted by Roberts to retain possession of the slaves during his (Roberts') life, claiming to hold them absolutely as his own property, notwithstanding his deed and in defiance of Roberts, upon the ground that the deed was obtained by fraud or was not binding upon him for any cause which he might please to assign, certainly after the death of Roberts, his representatives could never recover the slaves of King at law or in equity; and there can be no conceivable reason, as it seems to me, why because King has claimed only an estate for the lives of himself and his wife during the long period for which he has been suffered to hold possession of them under such claim, instead of the absolute property, the representatives of Roberts can any more successfully controvert the life estate claimed by King than they could

the absolute property, if such had been the character of King's claim. Indeed, if to maintain the right of King and his 191 wife to hold the slaves during *their lives, it were necessary to presume a deed of retrocession of the slaves from Roberts to King for the lives of King and wife, I can perceive no reason why, under the well settled doctrine upon that subject, such presumption might not be made. But it is not necessary to presume such a deed, because a deed from Roberts was not required to vest a life estate in the property in King and his wife. A parol gift accompanied by the possession, and which remained with the donee, would, as between the parties, be sufficient for that purpose; and if it be now necessary to presume such a gift, or whatever it may be necessary to presume in order to sustain the right of Mrs. King to hold the possession of the slaves as against Roberts and his representatives during her life, I think such a presumption should be made.

I think, therefore, the complainant was premature with her bill, because her right to possession of any part of the slaves will not have become perfect until the death of Mrs. King; and that the court did not err in dismissing her bill. But the dismissal should have been without prejudice to her right to maintain any proper proceeding which she may be advised to institute for the recovery of her interest in the shares after the death of Mrs. King.

DANIEL, J. The objection, to the jurisdiction, taken in the answer of King and wife, is not tenable. It is stated in the bill that all the debts due by the estate of Roberts had been paid by the administrator Ward, without a resort to the negro property; and that he had yielded any further claim upon it. And, in his answer, Ward admits that the debts had been all paid, without the necessity of using the negroes for the purpose. And that knowing the slaves were subject to distribution between the plaintiff and his codefendant alone (no other person being interested in them), and that there was a dispute about 192 the property *between them, he had thought it best for the interest of the estate he represented, not to waste it in controversies between the distributees, but to permit them to settle the matter among themselves: And that he had therefore made no objection to the institution of a suit, by the widow of Roberts, for distribution. The debts of Roberts being all paid, and his mother Mrs. King, being, in any event, entitled to a moiety of the slaves, there could have been no utility or propriety in requiring the institution of a suit at law in the name of Ward against her for their recovery; for in the event of such recovery Mrs. King would have had a right immediately to bring her suit for a partition. Probable delay, expense and circuity of action were properly anticipated and avoided by resorting at once, as Mrs. Roberts did, to a court of equity, where all the questions arising, and all the rights involved, in the controversy, could be determined and adjusted in one proceeding.

Nor do I think that any bar to a recovery of her share of the property by Mrs. Roberts, is to be found in the statute of limitations. It is true, it is not shown that there was any change in the possession of the slaves following the execution of the deed, with the exception, that Witten a witness for the defendant, says one of the negro girls lived for some time with Roberts, at a period not long before his death, but how long he did not know; and that two of the witnesses, Barnes and Thompson, also say that Roberts had in his possession for several years before his death one of the girls, Ann: But whether she was the same girl referred to in the deposition of Witten, does not distinctly appear, though it seems most probable that she was. And the witness Thompson also states that some time after the death of Roberts the girl became sick and was carried back to King's for the purpose of being taken care of till she got well.

A change of possession, however, 193 was not at all *essential to the validity of the deed, as between the parties. The deed was effectual to pass the title of the slaves; and if King continued in the uninterrupted possession of them (with the exception before adverted to), he did so with the acknowledgment on his part, written and recorded, that the property was no longer his, but belonged to another to whom he had sold and conveyed it. Even if Roberts had been of age, and in no wise connected with King at the date of the sale, the legal relation between the parties, in respect to the property, established and shown by the deed, could not have been changed by King, except by some unequivocal act or declaration by him, known to Roberts, evincing a purpose to disregard the deed and to hold adversely to the title which it purported to convey. But, in fact, at the date of the deed Roberts was a mere boy living with King; and instead of being a stranger, was his step son. King stood to him in the place of parent and guardian. At what time Roberts came of age is not shown; but it is stated in the answer of King and wife, that he continued to live with them till 1826, when he married and went to live on a part of the same plantation on which King resided, then given him by the latter.

The near relationship between the parties and the kind feelings on the part of King towards Roberts still subsisting, as shown by the gift of the plantation, preclude all inference (if indeed any could otherwise legally arise), that the failure of Roberts to carry the slaves with him when he left King's for his new home, and the continued possession of King, unaccompanied by any other act on the part of either, originated in any purpose with King to hold the slaves thereafter adversely to Roberts. The proofs in the cause have, I think, thus wholly failed in furnishing any starting point

from which the running of the statute can be made to commence.

194 *The effort to base a defence on presumptions supposed to rise from the long continued possession of King has, I think, also failed. It is stated in the bill, and is not denied in the answer, that Roberts died in 1845. The subpœna was sued out in July 1846, and the bill filed at the August rules following. Allowing a reasonable time for the qualification of the administrator and the institution of the suit, the date of Roberts' death would appear to be correctly stated: and if we throw out of the computation (as I think we may properly do, for obvious reasons), the period between the date of the deed and the time when Roberts ceased to live with King in 1826, as stated in the answer, the possession of King on which it is sought to found the presumption, would fall short of twenty years; and looking at the relation in which the parties stood to each other, and the fact that one of the slaves was in the possession of Roberts for many years previous to his death, I should, without reference to the special averments in the answer of King and wife, be strongly disinclined to presume, from King's possession, an abandonment by Roberts of the deed, or a repurchase by King of the slaves. But when we come to examine the answer, all the grounds for such a presumption (if any otherwise existed), are removed by its statements, and the pretensions on which the defendants seek to rest their defence. The defence set up in the answer is not, that Roberts had resold or given back the slaves to King, or abandoned the right conferred by the contract of July 1817, and that the court ought so to presume from the long possession of King, but that the deed does not truly set forth the real contract and understanding of the parties to it. In their answer the defendants (King and wife) say, that Roberts, who is the son of Mrs. King by her first husband, was brought up by them. That King having no children, treated

195 and considered Roberts as a son; *and having in 1817 concluded to give him the slaves Celia and her increase, after the death of himself and his wife, applied to David Ward, a neighbor, to draw an instrument to effect this object. That the bill of sale of the 22d July 1817 was accordingly prepared by Ward, who stated that he must have it recorded, and it would then give the negroes to Roberts after his King's death. That knowing nothing of the legal effect of such instruments, and having implicit confidence in the advice of Ward, who was a magistrate, he executed the instrument and had it recorded; but that his intention in doing so was only to bestow the slaves on Roberts after the death of himself and wife, and that he thought such was the effect of the paper drawn by Ward. That no consideration whatever passed from Roberts to King (though three hundred dol- [illegible] ated in the instrument as the [illegible], but that the transaction [illegible] 's part, a mere voluntary act of kindness to a boy whom he had raised, and who was then in fact worth nothing whatever except a few things which he had previously given him. The answer proceeds to aver that Roberts understood the object of the instrument, and never claimed in his life time any interest in the slaves while the respondents should live. That he never had any possession under the deed, and claimed none. That he never exercised the slightest acts of ownership over them, and invariably asked the permission of the respondents when he needed the services of the slaves. In support of these averments, the only proof offered is the deposition of a single witness, who says that he had frequently heard Roberts say that King had given him a bill of sale of the negroes in controversy, and at his death he would own them all; and that he never spoke of them as his property, only at the death of King and (according to witness's impression), at the death of Mrs. King also.

196 *By this loose proof and continued possession, the appellee seeks to contradict and change the plain terms and manifest legal effect of the instrument under which Roberts claims; and in effect, to substitute, in the place of a recorded deed purporting to convey for value a present and absolute property in the slaves, a parol voluntary gift to be enjoyed only after the death of the donor.

Such a claim on the part of the appellee is in conflict with well established rules of evidence, and plainly at war with any defence in aid of which the law of presumption from long continued possession can be invoked.

I can perceive in the case no grounds for negativing the right of Mrs. Roberts to have her distributive share of the slaves in controversy with their increase; and think that the Circuit court ought, instead of dismissing her bill, to have entertained it and given the relief sought.

ALLEN and SAMUELS, Js., concurred with Judge Daniel.

MONCURE, J., concurred with Lee, J.

The decree was as follows:

The court is of opinion, that Mrs. Roberts is entitled to have distribution, as the wife of her deceased husband Richard T. Roberts, of the slaves with their increase, in the bill and proceedings mentioned; and that the decree of the 29th September 1848, dismissing her bill with costs, is therefore erroneous. The court is, however, also of opinion that the estate of King ought not to be subjected to the payment of any hire for said slaves for the time he held possession of them, before the date of Roberts' death; the court being satisfied, from

197 the circumstances of the case, *that the possession of the slaves by King during the life of Roberts was with the permission of the latter, without accountability for hire.

Therefore, it is adjudged, ordered and

decreed, that the said decree be reversed and annulled, and that the appellees pay to the appellant her costs by her about the prosecution of her appeal here expended. And the cause is remanded for proper accounts of the hires of said slaves, and all proper charges for their keeping to be taken, and for such other proceedings as may be necessary in order to a final decree.

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198 *Cecil v. Early & Others.

July Term, 1853, Lewisburg.

1. **Official Bonds—Sureties—Estoppel.***—The sureties of a deputy in his bond to the high sheriff for the faithful discharge of his duties, are estopped thereby from denying that their principal was deputy, unless the bond is invalid.

2. **Same—Failure of Officer to Comply with Law—Effect.**†—The bond of the deputy is not avoided by the fact that the County court did not enter of record that he was a man of honesty, probity and good demeanor; and that he did not take the several oaths required by law to be taken by deputy sheriffs.

3. **Pleading and Practice—Estoppel—Informal Conclusion.**—Upon a motion by a high sheriff against a deputy and his sureties, they file a special plea; and the plaintiff replies specially, and relies on the facts therein stated and especially on the bond as an estoppel; though the replication has not the peculiar commencement and conclusion of a pleading by way of estoppel. A demurrer to the replication should not be sustained.

This was a supersedeas to a judgment of the Circuit court of Pulaski, overruling the motion of John G. Cecil, sheriff of that county, against his deputy, Samuel Early, and his sureties, for judgment and award of execution for the amount of a judgment rendered against the sheriff for the default of the deputy. The notice was in due form, and was founded on 1 Rev. Code 1819, ch. 78, § 33. The defendants offered two pleas in bar, which were received; and which, in substance, were: 1st. That at the time of committing the default aforesaid, Early was not the legally qualified deputy of Cecil in this, that the court of Pulaski did not at the March term thereof in the year 1844, or at any time thereafter, enter of record that said Early was a man of honesty, probity and good demeanor; and he was not then, or at any time thereafter, permitted to take, and did not take, the several oaths required by law to be taken by a deputy sheriff: And 2dly. That
199 the sale of the slave, which *was the cause of action for which said judgment was obtained, was not made by said Early. To the first plea the plaintiff filed a special replication, to which the defendants demurred generally; and to the second plea the plaintiff replied generally. The special replication in substance stated that Cecil was duly commissioned, and qualified as sheriff for two successive years from March 1843. That Early was appointed by him and acted as his deputy for both years, and duly qualified for the first; and gave bond with the other defendants as sureties, dated the 7th of March 1844, conditioned, among other things, that Early would well and truly execute the office of deputy sheriff; and save the plaintiff harmless from all liabilities which might be incurred by the acts of Early during the second year: And it vouched the records referred to, and made profert of the bond. The demurrer was argued; and the court, after taking time to consider thereof, overruled the motion, without taking any notice of the second plea; it being unnecessary to try the issue made up on that plea after the demurrer had been sustained, as was in effect done by overruling the motion.

Floyd, for the appellant.

It is too late for the defendants to deny that Early was deputy to the plaintiff. They admit it under their hands and seals, and are estopped by the deed.

It is not incumbent upon the appellant to show that his deputy renewed his oath of office upon his continuing to hold it. It is admitted he took the necessary oaths when first appointed; and it would be difficult to define the period when it ceased to be obligatory whilst he continued to act as deputy. Lane v. Harrison, 6 Munf. 573; Royster v. Leake, 2 Munf. 280.

It is said for the defendants, this
200 case arises under *the provisions of the act of 1819; 1 Rev. Code 279, § 15; and, therefore, does not come within the principle settled by the case of Lane v. Harrison, which arose under the act of 1792. See 1 Rev. Code (ed. 1803), p. 121, § 12, which provided that deputies should not serve longer than "two years in any period of four," unless they proved to the satisfaction of the court that they had paid the public dues for the two years. By the same law, § 6, the appointment of sheriff was from year to year. Both were required to take an oath of office, the sheriff and his deputy. Id. p. 55. Yet it was decided in the case above referred to, that, in an action by the sheriff against his deputy, it was unnecessary to show that the deputy took the oath of office the second year.

The addition made to the statute of 1792, by the act of 1819, does not change the liability of the deputy to his principal: it only

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***Official Bonds—Sureties—Estoppel.**—McMillan v. Hickman, 35 W. Va. 715, 14 S. E. Rep. 230, says: "In the case of Hoke v. Hoke, 3 W. Va. 561, it is held, 'that there is no exception to the rule that the fair and voluntary execution of a sealed instrument is conclusive against all who seal it of everything admitted in it,' citing Shaw v. McCullough, 3 W. Va. 260; Cox v. Thomas, 9 Gratt. 312; Cordle v. Burch, 10 Gratt. 480; Cecil v. Early, 10 Gratt. 198."

See also, *foot-note* to Franklin v. Depriest, 13 Gratt. 257, monographic *notes* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801; "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124; "Estoppel" appended to Bower v. McCormick, 23 Gratt. 310.

†**Same—Failure of Officer to Comply with Law—Effect.**—See monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

subjects him to a penalty for acting without taking the oaths prescribed by law: it does not make his acts, as such, either void or voidable.

W. R. Staples and B. R. Johnston, for the appellees.

The case at bar arises under the provisions of the act of 1819, 1 Rev. Code of 1819, p. 279, § 15; and, in our view, is entirely unaffected by the cases of Royster v. Leake, 2 Munf. 280, and Lane v. Harrison, 6 Munf. 573, cited by appellant's counsel. Those cases were governed by the terms of the act of 1792. See old Rev. Code, p. 179, § 12; a wholly different statute. This latter act permitted a deputy sheriff to act two years upon one nomination and appointment; a provision first introduced in the act of 1772, which limited the service of any one in that office to two years, unless by permission of the court. As the law stood prior to the act of 1819, the deputy might qualify for the whole official
201 term of two years. It *was unnecessary for him to come into court and qualify anew upon the expiration of the first year.

The act of 1819 changed all this, and provided "that no person thereafter appointed should perform any of the duties of deputy sheriff, unless the court of the county were of opinion, and so entered of record at the time of his appointment, that he was a man of honesty, probity and good demeanor; nor shall he perform any of said duties until he shall have taken, in open court, the oath of office, and the other oaths prescribed for public officers." We regard this provision as conclusive in the cause. We apprehend that inasmuch as such entry of record of the good character of the person nominated to the court for its approval was an indispensable prerequisite to his taking the oaths of office; and as the record does not show that such entry was made or such oaths taken, things required by law to appear of record, that, therefore, the said Early was not and could not be the deputy sheriff of the appellant. Under this law, the mere nomination by the high sheriff does not constitute his nominee a deputy sheriff. He is only such when the requisitions of the statute have been fully complied with. These are matters of record, and can alone be properly proved by record. That is the best evidence, and nothing short of it is admissible. The idea that we are estopped (by the bond which we executed in contemplation of the appellant's complying with the terms of the law), from alleging, and from proving by yet higher evidence, that Early was not the deputy of the appellant after the expiration of the first year, we consider altogether unsound. But even if there were anything in the objection, it is too late to urge it here: The appellant should have replied, relying on the estoppel. It is clear, however, that the execution of the bond did not constitute Samuel Early a deputy sheriff. To do that, required
202 the concurring acts of *the high sheriff and the court, and that S. Early should take the oaths of office. These things were not done. Early did not become legally a deputy sheriff. Not being such his acts were done in his private capacity, and not as a public officer. It was only for acts done in the latter capacity that the appellees bound themselves to be responsible.

MONCURE, J., after stating the case, proceeded:

The question for our decision is, Did the Circuit court err in sustaining the demurrer?

I am of opinion that it did. The special replication neither traverses, nor confesses and avoids the matter of the first plea; but relies on the facts therein stated, and especially the bond, as an estoppel. It has all the substance, but not the peculiar commencement and conclusion of a pleading by way of estoppel. If the facts stated in a replication, although it may have an informal commencement or conclusion, constitute a legal bar to the matter of the plea, a general demurrer thereto ought to be overruled. This would be the case in a common law action; and is a fortiori the case in a summary motion, in which the pleadings may be ore tenus, and the court may pronounce judgment on the evidence. McKinster v. Garrett, 3 Rand. 554. The pleadings in a motion are sometimes in writing; but in such cases less strictness is required than in common law actions, and an objection that the issues on the pleadings are not formally joined will have no weight. Id. The court may itself try the issues, although of fact, or call in a jury for that purpose, at its discretion. Burke, adm'r, v. Levy's ex'or, 1 Rand. 1; 1 Rob. Pr. 600.

Then, do the facts stated in the replication constitute a good bar or estoppel to the matter of the plea? The bond bears date on the 7th of March 1844, the day on which the sheriff qualified; recites
203 that Early *had that day qualified as deputy; and is conditioned, among other things, for the faithful execution of the duties of the office of deputy sheriff, and for the indemnity of the sheriff against all liabilities incurred by the acts of the deputy. This is a solemn admission by deed of Early and his sureties, that he was the deputy from and after the 7th of March 1844; and clearly estops them from denying the fact unless the bond is void as being in contravention of the act of 1819, 1 Rev. Code 279, § 15, which declares that no person who shall be appointed to the office of deputy sheriff of a county, shall execute any of the duties of the office unless the court of such county shall be of opinion and enter of record at the time of his appointment, that he is a man of honesty, probity and good demeanor; nor until he shall have taken in open court, the oath of office and the several other oaths prescribed by law for public officers; and if he shall presume to do so he shall forfeit and pay to the commonwealth, for the use of the

literary fund, a fine of one thousand dollars.

I do not think that the validity of the bond is at all affected by this act, or the supposed failure of the deputy to comply with its requisitions. If the bond had been executed for the purpose of enabling the deputy to violate the act, and the sheriff had participated in or been apprised of that purpose when the bond was executed, the case might have been different. But it is not pretended that he did so participate, or was so apprised. Indeed it is not pretended that there was any purpose on the part of the deputy to violate the law; and if its requisitions were not in fact complied with, I presume, in the absence of averment and proof to the contrary, that the omission arose from mistake or inadvertence. However this may be, Is the sheriff who is innocent, to lose the benefit of the bond, because the deputy failed to comply 204 *with the law? Will the deputy be allowed to take advantage of his own wrong? To escape the consequences of a violation of his bond by showing that he violated also the requisitions of the law? The act, in its terms, imposes no duty upon the sheriff in this respect. Its requisitions are made of the deputy, and its penalty is laid alone on him.

The office of sheriff in Virginia for many years preceding the present constitution, was considered as a reward, and was the only reward of the justices for their public services. They seldom performed the duties of the office in person, but sold its deputation to others; and such sale, by a judicial construction of the proviso to the statute against selling offices, was decided to be legal; Salling v. McKinney, 1 Leigh 42; and in the new Code is expressly excepted from the prohibition therein contained. Code, p. 85, § 5 and 6. The general, and almost universal, practice was, that the person to whom the deputation of the office was sold, not only executed a private bond with surety to the sheriff, but furnished the sureties in the bonds of the sheriff, and attended to all the details of the qualification both of the sheriff and his deputies. The former rarely did more than sign the public bonds and take the oaths of office; trusting the rest to the person to whom he had deputed the office, and from whom he had received ample indemnity. If, from design or inadvertence on the part of the deputy, and without the knowledge of the sheriff, there was any irregularity in the qualification of the former, or a failure to comply with any of the requisitions of the law in regard thereto, would he be allowed to avoid the obligation of his bond by pleading such irregularity or failure on his part? I think not; and as the case under consideration is such a case, I therefore think the bond is a good estoppel of the matter of defence set up in the first plea.

On the subject of estoppels by bonds, 205 see *Cox and others v. Thomas' adm'x, 9 Gratt. 312, and cases therein cited.

I also think that the case of Lane v. Harrison, 6 Munf. 573, relied on by the counsel for the plaintiff, shows that such a defence cannot be made under such circumstances. It is true that that case occurred prior to the act of 1819; but the counsel for the defendants are mistaken in supposing that, as the law then was, a deputy might qualify for an official term of two years, and that it was unnecessary for him to qualify anew upon the expiration of the first year. In the case of The Commonwealth v. Fairfax, 4 Hen. & Munf. 208, it was decided that though a person might be continued in the office of sheriff for two successive years, an annual nomination, appointment and bond were necessary; and that the words, "during his continuance in office," inserted in the bond executed the first year, had reference to the actual duration of the office by virtue of the appointment under which the bond was taken. In the case of Munford v. Rice, 6 Munf. 81, the same words in the bond of the deputy executed the first year, received the same construction, and were limited to that year. The case was considered as falling within the principles of that of The Commonwealth v. Fairfax, and as not coming within the decision in Royster v. Leake, 2 Munf. 280, in which the condition of the bond stated that the deputy was to act as such until Goochland November court 1804: And that stipulation was considered as added to, and extending the expression "during his continuance in office," beyond the year for which his principal was first appointed; and which, in this private contract between the sheriff and his deputy, it was competent for them to do. See the opinion of the court, pronounced by Roane, J., in Munford v. Rice. The act of 1792, which governed the case of Lane v. Harrison, and the act of 1819, which governs this case, do not materially differ from each other so far as affects the 206 question *under consideration. Each required a yearly appointment and qualification of the sheriff and the deputy. Each contained the provision (and in the same words) that no person should be capable of executing the office of deputy sheriff of any county for any longer time than two years in any period of four years, unless he should produce to the court of the county satisfactory proof of his having collected and accounted for the taxes assigned to him by his former principal. Each prohibited him from executing the duties of his office without taking the oaths prescribed by law for public officers. And the only difference was that the act of 1819 superadded an additional prohibition to those contained in the act of 1792, and imposed a penalty of one thousand dollars on any person appointed to the office of deputy sheriff, who should presume to execute any of the duties of the office before such entry of record should have been made as required, or without having taken the oaths aforesaid. If under the act of 1792, a person who had been appointed, given bond, and acted as deputy sheriff, could not avoid his bond by pleading that he had not taken

any oath of office, and his appointment had not been approved by the court, as was decided in the case of Lane v. Harrison; no more, under the act of 1819, could such a person avoid his bond by pleading, as in this case, that he had not taken the several oaths required by law to be taken by a deputy sheriff, and that the court did not enter of record that he was a man of honesty, probity and good demeanor.

I think that the judgment of the Circuit court ought to be reversed, the demurrer overruled, and the case remanded to the Circuit court for further proceedings.

The other judges concurred in the opinion of Judge Moncure.

Judgment reversed.

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207 *Evans v. Bradshaw & als.

July Term, 1853, Lewisburg.

1. **Residence in Virginia—What Constitutes—Case at Bar.**—A plaintiff in equity whose house where his family lives is fifteen feet on the Virginia side of the line which separates the state from Tennessee, and who so far as known lives with his family, is *prima facie* a resident in Virginia; and this *prima facie* case is not removed by proof that a sheriff had gone to the house twice with process against him without finding him, and was told by the neighbors that the plaintiff would not let him see him.
2. **Chancery Practice—Bill of Exceptions.***—Upon a motion against a plaintiff in equity for security for costs, a bill of exceptions is taken to the opinion of the court, which states the evidence introduced on the motion. There is no objection to this mode of putting the evidence upon the record.

The case is stated in the opinion of Judge Lee.

B. R. Johnston, for the appellant.
S. Logan, for the appellee.

LEE, J. This is an appeal from an order in chancery of the Circuit court of Scott county, made upon the 12th of April 1850, by which a suit instituted by the appellant against the appellees and others was dismissed at the appellant's costs, by reason of his failure to comply with the requisition of a rule previously taken against him for security for costs and the fees that might be due the officers of the court. The rule was taken on the 11th of September 1849. On the 12th of April 1850, the appellees moved the court to dismiss the case because the appellant had failed to give the required security. The appellant thereupon introduced a witness, by whom he proved that his dwelling and the house in which his family resided was on the Virginia side of the state line, and that the 208 *appellant was, as the witness understood, still living with his family. He also proved by another witness that he (the appellant) was a citizen of Scott county, according to the marked state line, which ran fifteen or twenty feet from his house. The appellees to rebut this evidence, thereupon introduced one McIver, a former deputy sheriff of the county, who proved that he had had a process against the appellant, and on two occasions had gone to his house without finding him; and that he did not go again to the house because he was informed by the neighbors that the appellant would not let him see him. This appearing to be all the evidence offered on the subject, the court was of opinion that the appellees were entitled to have the suit dismissed, and an order was made accordingly, requiring also the appellant to pay the appellees' costs. The appellant excepted to the opinion of the court thus pronounced, and tendered to the court a bill of exceptions setting out the evidence above detailed, which was received by the court and signed and sealed, and ordered to be made a part of the record of the cause. And to this order of dismissal an appeal to this court has been allowed.

It may be true, as contended by the counsel for the appellees, that a bill of exceptions is a proceeding technically appropriate to courts of law, and is as such unknown in the court of chancery; yet where that mode is adopted of making a written memorial of oral testimony heard by the chancellor upon a collateral question arising before him, no reason is perceived why the appellate court should not consider the evidence thus embodied in passing upon the action of the court which appears to have been founded upon it. Although a judge sitting as a chancellor may not be required to receive or sign a bill of exceptions setting out the evidence upon which he may have decided, yet if he 209 shall have done so, and ordered it to *be made part of the record of the case, the evidence becomes as much a part of the case as if it had been taken in the most formal manner as a deposition, and filed as evidence in the cause; and as such, must be considered by this court in reviewing the action of the Circuit court. Nor would it seem to be an inconvenient mode of preserving on the record the facts involved in a question arising collaterally in a chancery cause, and disposed of by the court.

But it is objected that the court does not certify that the evidence set out was all the evidence heard by the court, nor what part of it, if any, was credited by the court. The memorial of the evidence made by the court is not to be regarded as a formal bill of exceptions, nor subject to the technical rules which prevail in the courts of law in the construction of the latter. It was manifestly intended by the court to be a certificate of all the evidence heard on the motion, and upon which its decision was based. If there was any other evidence before the court, it was the duty of the appellees to cause it to be embodied in the memorial, or to be preserved in some proper form and filed as part of the case. Nor was it necessary for the court to certify what part if any of the evidence was credited. There is

*See monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720; monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

no conflict in the testimony of the three witnesses examined, but the testimony of each may well consist with that of both the others, and in the absence of any reason to the contrary, the testimony of all the witnesses should receive equal credit.

The act of assembly under which this proceeding was had, provided that any suit at law or in equity, in the name of any person not residing in Virginia, should be dismissed if security were not given for costs and damages and officers' fees, within sixty days after notice that such security was required. And it contained a further provision, that where a question should arise as to the non-residence of the plaintiff, the burthen of 210 *proving such residence should be upon him. 1 Rev. Code 1819, p. 495, § 28. Thus the only question for the court to decide upon the rule was, Whether the presumption raised by the act that the appellant was not a resident of Virginia, was sufficiently met by proof on his part that he was in fact a resident of the state? The court decided that he had failed to prove his residence to be in Virginia, and dismissed his suit. In this the court erred. Proof that he was a man of family, that so far as known he lived with his family, and that the house in which they lived, though very near the marked line between the states of Virginia and Tennessee, was yet some fifteen or twenty feet within the line on the Virginia side, and that he was a citizen of Scott county, according to that line, was sufficient prima facie proof that he was a resident of Virginia, liable to perform the duties of a citizen of that state, and entitled to his privileges. That the deputy sheriff had failed on two occasions to find him at his house, and that it was thought he did not wish to see that functionary, proved nothing incompatible with his being a resident of the state.

The order dismissing the case should be annulled, with costs to the appellant, the rule for security for costs discharged, and the cause remanded to the circuit court for further proceedings therein to be had.

The other judges concurred in the opinion of Lee, J.

Decree reversed.

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211 *Jaynes & al. v. Brock.

July Term, 1858, Lewisburg.

1. **Bonds—Judgment—Injunction*—Case at Bar.**—B for himself and others sells part of a tract of land to J. who executes to B his bonds for the purchase money. The other parties refuse to confirm the contract, but sell their interest in the whole tract to J. B having recovered judgment upon the bonds, J is entitled to have the judgment enjoined, and to be relieved to the extent of the injury he has sustained by the failure of B to procure the others to execute the contract.

2. **Injunctions Refused by Judge—Right of Associate Judge to Award.†**—An injunction refused by a judge of a Circuit court, is presented to a judge of the Supreme court of appeals who also refuses it. The injunction may be awarded by another judge of the Court of appeals.

The case is fully stated in the opinion of Judge Samuels.

S. Logan and Patton, for the appellants.
There was no counsel for the appellee.

SAMUELS, J. Ansalom Brock, his four sisters and his two nieces (the children of a deceased brother), were the heirs at law of Joseph Brock deceased. They derived by descent from their ancestor a tract of land lying in Lee county, containing five thousand acres, which was never divided amongst the heirs. Ansalom Brock, by an agreement in writing, contracted to sell and convey to the appellants a portion of this tract of land, contained within certain boundaries specified in the agreement, for the price of sixteen hundred dollars. The agreement states that Brock had the authority of James Taliaferro and Susan his wife (she being one of the heirs of Joseph Brock), to make the sale. 212 He bound himself to procure for the *appellants a good and lawful title to the land embraced within the limits designated; seven hundred and thirty-four dollars and fifty-four cents of the price was paid down, and bonds taken for the residue, upon which bonds suits were subsequently brought and judgments obtained. Brock made a deed to the appellants, the legal operation of which is to convey to them Brock's undivided interest in the land embraced by the agreement; but does not convey his interest in the portion not embraced. Taliaferro and wife made a deed conveying their interest in the whole tract of five thousand acres. The holders of the other four shares refused to ratify the sale made by Brock; and afterwards by a separate contract sold and conveyed their interests in the whole five thousand acres for the sum of fourteen hundred dollars. They refused to sell less than their whole interest in the whole tract.

Not having obtained at the hands of Brock, or by his agency, the property bought, a bill was presented to a judge of the General court, stating in substance the facts herein detailed, and praying an injunction to the judgments above mentioned, and for specific and general relief. The injunction prayed for was denied by the judge of the General court; whereupon the bill was presented to a judge of the Court of appeals, by whom also the injunction was denied. It was then presented to another judge of the Court of appeals, by whom the injunction was awarded.

Ansalom Brock filed an answer, in which he insisted that it was not in the power of a judge of the Court of appeals to award the injunction after it had been denied by another judge of the court. The answer in substance acknowledged the facts alleged in the bill; but insisted on a legal construction thereof different from that of the appellants.

The court below at April term 1848 dissolved the injunction as improvidently 213 awarded. The order of *the court does

*See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

†See monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

not show explicitly whether this dissolution was because of a supposed want of power in the judge who awarded the injunction, so to award it, or whether the equity of the bill did not, in the opinion of the Circuit court, warrant the injunction.

Whether the injunction was dissolved for the one reason or the other, I am of opinion the court below erred. It cannot be supposed that the legislature intended by the statute, Supp. Rev. Code, p. 152-3, § 44, to withhold all relief by injunction in case a judge of the Circuit court shall deny it and one judge of the Court of appeals concurs therein. The whole scope and policy of the law seems to be, to give to parties the right to have the judgment of the court in matters of sufficient amount to give jurisdiction. It would be inconsistent with this policy, if a judge of the Circuit court and one judge of the Court of appeals should have power to deny definitively an injunction prayed for. Under some circumstances such denial would be equivalent to a final disposition of the whole subject, and a denial of all relief. We are not left however to speculate about the meaning of the statute; its terms are too plain to afford any cause of doubt. After the circuit judge refused the injunction, "the judges of the Court of appeals or any one of them," had authority to award it, in case he or they should be of opinion the circuit judge had erred in his refusal.

Upon the other question, it seems that as to two-thirds of the property sold by Brock to complainants, he failed to procure the title according to his contract; and although the title was obtained by another contract with the holders thereof, still complainants very probably sustained damage by Brock's breach of contract: The injunction should therefore not have been dissolved unless upon investigation it had appeared that no damage was sustained.

I am of opinion to reverse the decree and reinstate the injunction.

214 *The other judges concurred in the opinion of Samuels, J.

The decree was as follows:

It seems to the court here, that the judge who awarded the injunction herein had authority to act on the subject, and that the award thereof was a proper exercise of his authority. That inasmuch as the title to two-thirds of the land sold by Ansalom Brock to the appellants, were not conveyed to them by him or by his agency, although his contract bound him to procure a conveyance, and as the judgments enjoined were for a portion of the price of the property sold, it would have been proper to retain the injunction until it could be ascertained whether any, and if any, what abatement should be made from the price. It is therefore adjudged, ordered and decreed, that the decree of the court below, dissolving the injunction, be reversed and annulled, and the injunction reinstated; that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal here: And the cause is remanded for further proceedings to be had according to the principles of this decree, and for a final hearing.

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215 *Rhea v. Gibson's Ex'or.

July Term, 1853, Lewisburg.

1. **Common-Law Practice—Right of Court to Continue Motion from One Term until the Next—Case at Bar.**—The court grants the plaintiff a new trial of a cause, and the defendant takes an exception in which all the facts proved on the trial are stated. The defendant then moves the court to reconsider its opinion granting a new trial, and the court takes time until the next term to consider thereof; and at the next term refuses the new trial, and renders a judgment on the verdict for the defendant. The court had authority to continue the motion.
2. **Bonds—Blank for Amount—Filled in without Authority.***—A paper intended to be a bond is signed in blank as to the sum by a person as surety; and the blank is afterwards filled up in his absence, and without his knowledge and without authority from him. It is not his bond.

This was an action of debt in the Circuit court of Washington county, by Joseph Rhea against the executor of Charles C. Gibson, upon a bond for four hundred and eighty-nine dollars and seven and a half cents, signed by Peter Hickman, Jacob Merchant, Charles C. Gibson and Andrew Gibson. The defendant filed two pleas of payment in part by Hickman who was the principal in the note, and two other pleas of payment in part by his testator. He also filed a plea of non est factum. Upon the trial the jury found a verdict for the defendant on the plea of non est factum, which upon the motion of the plaintiff the court set aside as being contrary to the evidence. And thereupon the defendant filed a bill of exceptions to the opinion of the court, in which it is stated that all the facts on which the jury found their verdict is set out. At the same time the defendant moved the court to reconsider its opinion setting aside the verdict; and the court took time until the next term to consider thereof.

At the next term of the court, the order entered in the cause at the previous term, 216 granting a new trial, *was rescinded; and a judgment was entered in pursuance of the verdict. And thereupon the plaintiff filed a bill of exceptions which contains the facts as stated in the bill of exceptions filed at the previous term by the defendant, with the addition that it was admitted on the trial by the defendant's counsel, that the name of Charles C. Gibson subscribed to the bond sued on was in the proper hand writing of said Gibson.

It appears from the facts stated that the bond was written and signed by the parties, with a blank for the sum for which it was to

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*See principal case cited in Preston v. Hull, 23 Gratt. 615; Penn v. Hamlett, 27 Gratt. 337.

See also, Harrison v. Teirnans, 4 Rand. 177: *footnote* to Preston v. Hull, 23 Gratt. 600; monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

be given. That this blank was afterwards filled up by a third person, in the absence of Charles C. Gibson, and without any direction or authority from him to do it. That Hickman being indebted to Shafer, and Shafer being indebted to Rhea in a less amount, it was agreed between them that Hickman should execute the bond to Rhea for as much as Shafer owed him, and that Shafer's debt to Rhea and Hickman's debt to Shafer should be satisfied for that amount: But it did not appear that Gibson had any knowledge of this arrangement. This bond was some time afterwards presented to Gibson by the agent of Rhea, with a request that he would pay fifty or a hundred dollars on it, when Gibson stated that he did not recollect being bound for Hickman for a cent; though he said that the signature was his hand writing; and the agent might tell Mr. Rhea that he (Gibson) would be down in a few days to see him about it.

There was evidence upon the pleas of payment, that there had been paid to the plaintiff four hundred and sixty dollars, of moneys of Hickman, with the knowledge and concurrence of Gibson, but before the above mentioned application to him; and that these payments were applied by Rhea to another bond of Hickman held by Rhea.

Upon the application of the plaintiff this court granted a supersedeas to the judgment.

217 *J. W. Sheffey, for the appellant, insisted:

1st. That the court had no power at the subsequent term, to rescind the order made at the previous term granting the plaintiff a new trial. And as bearing on this question, he cited Brooke v. Young, 3 Rand. 106; Gordon v. Frazier, 2 Wash. 130; Halley's adm'r v. Baird, 1 Hen. & Munf. 25; Bent v. Patton, 1 Rand. 25; Cogbill v. Cogbill, 2 Hen. & Munf. 467; Field's ex'ors v. Freeland, in note to that case 477.

2d. That the paper was the bond of Gibson. That it is not in this case a question of a fraudulent alteration of a paper, which is the foundation of the doctrine that a bond is invalidated by alteration. 1 Greenleaf's Evi. § 568, 568 a: But the question is whether the filling up of this blank according to the intention of the parties, and the acquiescence in this afterwards by the obligor, binds him. And he referred to Texira v. Evans, cited in 1 Anstr. R. 228; Wiley v. Moor, 17 Serg. & Rawle 438; Knapp v. Maltby, 13 Wend. R. 587; Ex parte Kerwin, 8 Cow. R. 118; Woodley v. Constant, 4 John. R. 56; Commercial Bank Buffalo v. Kortright, 22 Wend. R. 348; Eagleton v. Gutteridge, 11 Mees. & Welsb. 465; Smith v. Crooker, 5 Mass. R. 538; Stahl v. Berger, 10 Serg. & Rawle 170; Speake v. United States, 9 Cranch. R. 28; 11 Mees. & Welsb. note, p. 801.

B. R. Johnson and Patton, for the appellee, upon the first point made by the counsel for the appellant, said, it was simply a question whether the court had power to continue a motion from one term to the next: And upon that question there could be no doubt.

2d. Upon the second question they referred to 1 Shepherd's Touchstone, title Deed, ch. 4, p. 50; 4 Comyn's Dig, title Fait, 261; Hibblewhite v. McMorine, 6 Mees. & Welsb. 200; Pigot's Case, 11 Coke R. 47; Davidson v. Cooper, 13 Mees. & Welsb. 343; Newell
218 v. *Mayberry, 3 Leigh 250; Marshall v. Gougler, 10 Serg. & Rawle 168; Hudson v. Revett, 15 Eng. C. L. R. 467; Cleaton v. Chambliss, 6 Rand. 86; Harrison v. Tiernans, 4 Rand. 177; Speake v. United States, 9 Cranch R. 28.

SAMUELS, J. This is an action of debt against the executor of Charles C. Gibson on a single bill purporting on its face to have been executed by Peter Hickman, Jacob Merchant, Charles C. Gibson and Andrew Gibson. Issues were made up on several pleas of payment, and on the plea of non est factum. On the trial at October term 1847, the jury found for the defendant on the plea of non est factum, but rendered no verdict on the other issues. The plaintiff moved the court to set aside the verdict as against evidence, and for a new trial; which motion, at that time, was sustained. At a subsequent day of the same term the defendant filed a bill of exceptions, and moved the court to reconsider its judgment setting aside the verdict. The court agreed to reconsider; taking time for that purpose, until the next term: and the cause was continued. At the next term, May 1848, the court rescinded the order of the previous term granting a new trial, and rendered a judgment on the verdict; and another bill of exceptions was taken.

It is made a question here, whether it was competent for the court at the May term 1848 to set aside the order granting the new trial at October term 1847. That order was suspended by the fact that the court agreed to reconsider the propriety of having entered it, and by taking time for such reconsideration. The order granting a new trial was merely interlocutory; the case itself was still under the control of the court; the bill of exceptions put upon the record the facts proven at the trial. If the record shows that the court at October term 1847 should have rendered a judgment for the defendant, and that the
219 order granting a new *trial was itself erroneous, the delay from October until May should not prevent the court from entering the proper judgment. I conceive that the question whether the new trial was properly refused is fully before this court.

The verdict of the jury should not be set aside as being against evidence, unless it be plainly so. In this case it was shown that the signature to the single bill, Charles C. Gibson, was in his hand writing; it was not directly shown, however when or for what purpose or under what circumstances that signature was made. The genuineness of the hand writing afforded prima facie evidence of the execution of the instrument; but such evidence may be rebutted by other evidence; and in this case it is clearly proven that about the time the bond bears date it was blank as to the amount; that this blank was filled with the amount therein by the direction of

Hickman and Merchant, in the absence of Gibson, and without his privity or consent; that before filling the blank Gibson had given no authority to do so. It did not appear that Gibson knew until nearly three years after the date of the bond that his name was written to such a paper; but it did appear that the bond was then shown to him and payment of fifty or a hundred dollars thereon requested. That Gibson professed to have no recollection of being bound for Hickman for one cent; that he acknowledged the signature to be his and promised to see Rhea in a short time; that Gibson took some pains to cause Hickman to make payments to Rhea, the application of which was a subject of controversy on the pleas of payment. On this evidence the jury found for the defendant on the plea of non est factum.

There are cases in which it has been decided that signing, sealing and delivering the form of a deed in blanks, with directions for 220 filling the blanks, and filling *them accordingly, make the deed valid and binding. In some cases the direction to fill the blank has been implied where it is apparent what must be inserted in the blank. Texira v. Evans, cited 1st Anst. R. 228; Stahl v. Berger, 10 Serg. & Rawle 170; Sigfried v. Levan, 6 Serg. & Rawle 308; Ex parte Kerwin, 8 Cow. R. 118; Smith v. Crooker, 5 Mass. R. 538; Speake v. The United States, 9 Cranch R. 28. There are other cases which decide that such filling of blanks will not give validity to the deed unless under circumstances which make a new execution thereof. Cleaton v. Chambliss, 6 Rand. 86; Hibblewhite v. McMorine, 6 Mees. & Welsb. 200; The United States v. Myers & Nelson, 2 Brock. R. 64; Harrison v. Tiernans, 4 Rand. 177.

It is not necessary for the disposition of this case to decide which of these conflicting authorities should be followed. The judgment must be sustained if the cases first cited above decide the law correctly, because of the absence of authority, express or implied, to fill the blank. If the second class of cases cited give the rule, the judgment must be sustained, because of the absence of proof of re-execution.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

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221 *Hope v. Smith, Sheriff.

July Term, 1853, Lewisburg.

Pleading—Suit on Bonds—Case at Bar.—G took the oath of insolvency at the suit of P and surrendered a bond on H. The sheriff brought a suit on this bond against H who pleaded as offsets two judgments which he had recovered against G, upon bonds which had been assigned to him. He had sued G upon these bonds before G took the oath of insolvency, but the judgments were not recovered until after the oath was taken, but before the suit brought against him by the sheriff. The plaintiff replied in the form of the statute, Sess. Acts 1844, p. 54, that the judgments were usurious; and the defendant demurred. HELD:

1. **Statute—As to Pleading Usury—To What Applicable.***—The statute though in terms applicable only to a plea, yet is properly applicable to a replication to a plea of setoff.†
2. **Bonds—Offsets—Usurious Judgments.**‡—Usury in the bonds upon which the judgments were recovered, cannot be set up to the judgments, and they are valid offsets; there being no fraud in the procurement of them.

This is a supersedeas to a judgment of the Circuit court of Washington county, rendered in a suit which was brought by Smith late sheriff of that county, for the benefit of Preston against Hope, on a bond to Grant who had taken the oath of insolvency under a ca. sa. in favor of Preston, and surrendered the bond in the schedule. Hope pleaded payment, to which there was a general replication, and issue was thereon joined. He also pleaded specially, that at and before 222 *the time of the institution of the suit, and before Grant took the oath of insolvency, the said Grant was indebted to him in a much larger sum than he owed Grant; that is to say, by two bonds which had been assigned to him, and are particularly described in the plea; that suits had been brought, and judgments recovered on the said bonds (which bonds and judgments were referred to as part of the plea); and that the sum of money so due and owing was wholly unpaid; and he offered to set off the same, or so much of it as should be sufficient, against the amount of his said bond to Grant. Copies of the records of the suits and judgments against Grant were filed with the special plea. To this plea Smith replied that the two bonds of Grant assigned to Hope, and mentioned in the plea, were executed for a usurious consideration, and in violation of the act of the general assembly entitled "An act to reduce into one the several acts against usury." Hope rejoined that after the bonds were assigned to him, and before Grant took the oath of insolvency, he Hope brought suits on the bonds, as alleged in his plea, and after the said oath of insolvency was taken, obtained judgments thereon, which judgments are in force, unreversed and unsatisfied. Smith demurred generally to the rejoinder, and Hope joined

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*See generally, monographic *note* on "Usury" appended to Coffman v. Miller, 26 Gratt. 698.

†Sessions Acts 1844, ch. 70, p. 54. 1. "That in any action of debt or covenant founded on any note, bond or other writing under seal, depending in any of the courts of this commonwealth, in which the defendant may desire to avail himself of the defence of usury, he shall be at liberty to do so by pleading the same in the following form. [And then a form is given.] To which plea the plaintiff may reply generally or specially."

2. "That under the plea aforesaid the defendant shall be allowed to give in evidence, any fact showing or tending to show that the note, bond or other writing, upon which the action was brought, was given for a usurious consideration."

‡See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

in the demurrer. The court sustained the demurrer and rendered judgment for the plaintiff Smith, without noticing the issue on the plea of payment.

S. Logan, for the appellant.
B. R. Johnston, for the appellee.

MONCURE, J., delivered the opinion of the court.

After stating the case, he proceeded:

The issue upon the plea of payment was not tried; and it would be necessary on 223 that ground, if no other, *to reverse the judgment. Wilson v. Davisson, 5 Munf. 178. But as, in that case, the cause would have to be remanded for further proceedings; and as a reversal of the judgment on the ground of error in sustaining the demurrer would put an end to the cause, it is proper to determine whether the judgment is erroneous in that respect.

The replication is in the general form prescribed by the act passed January 17th, 1844, entitled "An act simplifying the proceedings in cases of usury," Sess. Acts, p. 54. That act, in its terms, applies only to a plea; and a question was raised at the bar, whether it is also applicable to a replication to a plea of setoff. We are of opinion that it is; and that a plea of setoff, being in the nature of a cross action, a replication thereto is the same thing, in substance, with a plea to an action.

It was rightly conceded by the counsel for the appellee in this case, that the bond on which the suit was brought was subject in the hands of the sheriff Smith, to all the setoffs which the obligor had against it at the time the oath of insolvency was taken; and also that if Grant the obligee had sued on the bond, he would have been precluded by the judgments pleaded as setoffs, from replying usury in the bonds on which the judgments were obtained. But the counsel argued that the rights of the sheriff were fixed by the oath of insolvency, and could not be affected by anything done or suffered by the insolvent afterwards: and that as, at that time, judgments had not been obtained (though suits had been brought) on the assigned bonds, the judgments obtained afterwards (though obtained before the suit was brought by the sheriff on the bond of Hope), could not prevent the sheriff from replying that the bonds on which the judgments were obtained were usurious.

It is unnecessary to consider in this 224 case, whether *the doctrine, said to have been declared in De Wolf v. Johnson, 10 Wheat. R. 367, and denied in Lloyd v. Scott, 4 Peters' R. 205, that "the purchaser of an equity of redemption cannot set up usury as a defence to a bill brought by the mortgagee for a foreclosure, especially if the mortgagor has himself waived the defence," was recognized and confirmed in Crenshaw's adm'r v. Clark, 5 Leigh 65, and Spengler v. Snapp, Id. 478; nor whether or how far the plea of usury is a defence personal to the debtor, and may be waived by him. For, conceding that if no judgment had been obtained upon the assigned bonds, Smith might have replied usury to a plea of the bonds as setoffs, we are still of opinion that he is as much concluded by the judgments from going behind them, and replying usury in the bonds, as the insolvent himself would have been if the suit had been brought by him. If Hope had obtained his judgments by a fraudulent arrangement with Grant to prevent the sheriff from setting up the objection of usury to the bonds, the case would have been very different. But no fraud is imputed to Hope in obtaining the judgments, and he appears to have been guilty of none. He may have had good reason for instituting suits on the bonds, instead of holding them up to be used as setoffs in any suit that might be brought on his bond. They were assigned bonds, and due diligence might have required the institution of the suits in order to fix the liability of the assignors. They exceeded his bond in amount, and suits were necessary to recover the excess. He instituted the suits some time before the oath of insolvency was taken; which of itself would seem to repel any imputation of fraud. Considering it necessary or proper to bring the suits, which were pending when the oath was taken, What was he then to do? The same reasons which induced him to bring the suits, required him to prosecute them. He could not 225 sue *the sheriff, nor make him a party to the pending suits. He had a right, therefore, to prosecute them to judgment, and set off the judgments against his bond, whether in the hands of Grant or of his legal assignee the sheriff, who stands in his place. If Grant had pleaded usury and succeeded, or had made any other successful defence in the suits, the judgments in his favor would certainly have concluded Hope from setting up the bonds as setoffs in the suit brought on his bond by the sheriff. There would seem to be at least as much reason for holding that the judgments which were rendered against Grant, concluded the sheriff from going behind them and objecting that the bonds are usurious. That the judgments were rendered by non sum informatus, can make no difference. The defendant Grant set aside the office judgments and obtained continuances by putting in pleas of payment for that purpose: and at the succeeding term waived his pleas and suffered judgments to be rendered against him. This is a common course of proceeding where a defendant has no real defence, or bona fide intends to make none, and only wishes to obtain time. A judgment so rendered as much concludes a defendant in a suit or scire facias on the judgment, as does a judgment rendered in a case in which the matter was put directly in issue and passed upon by the jury. What the rights of Hope would have been, if, before he obtained his judgments against Grant, the sheriff had sued him on his bond, or summoned him as a garnishee under the statute, it is unnecessary to decide, as no such proceeding was instituted until more than three years after the judgments were obtained.

The views we have taken of this case are strongly sustained by the Supreme court of

Massachusetts in the case of Smith v. Stearns, 19 Pick. R. 20. That case arose under a statute of that state which authorizes an attachment by what is called the trustee 226 *process: The person being called "trustee" who, by our law, would be called a garnishee. The effect of the service of the process in giving the plaintiff a lien on the debt due by the trustee to the principal defendant, being the same, as it seems, with that of the service of an attachment on the garnishee with us. In that case the trustee obtained judgment after, on a note given to him before, he was summoned as trustee; and the question was, whether the judgment was conclusive, or its merits could be enquired into, in the suit of the attaching creditor. Shaw, C. J., in delivering the opinion of the court, among other things said, "It is clearly held as the construction of the trustee process, that where one is chargeable in consequence of being the debtor of the principal, the question will be, whether he holds any balance upon a liquidation of all demands. In striking such balance, he has a right to set off from the debt which he acknowledges he owes the principal, any demand which he might set off in any of the modes allowed either by statute or common law, or in any course of proceeding."—"The trustee ought not to be placed in a worse situation than he would be in if the principal had sued him for the debt."—"It has been argued that the trustee's liability must depend upon the state of facts as it existed when the trustee process was served. This is not strictly correct. Some liability must exist at that time in order to charge him; but that liability may be greatly modified and even discharged by subsequent events." The chief justice then states a variety of instances in which the liability would be so modified or discharged, and proceeds: "In the application of these principles to the case before us, we think that the trustee had a right to set off against the debt due by him to Smith, jr., the judgment which he had recovered against Smith, jr., on demands shown by the answers to have existed prior to the service of the 227 *trustee process. The judgment thus obtained did not create, but only ascertained and liquidated, the debt. The judgment was not conclusive, because it was competent for the plaintiff to show, if he could, by the answers of the trustee, that the judgment set forth in his answers, was collusive or fraudulent, or obtained on demands acquired subsequently to the attachment; and he had a right to put interrogatories to the trustee with a view to such answers. But if not collusive or fraudulent, the trustee had a right to set it off against the demands which he acknowledged that the principal had against him, and for this purpose to disclose it in his answers and insist upon it in his defence. This follows from the principle above stated, because he would have had a right to set it off in any suit of the principal against him." The court had some doubt as to whether the trustee had a right to set off the costs of his judgment, because they accrued after he was summoned as trustee; but was of opinion that they were to be considered as a component part of the judgment as one of its incidents; there being nothing to show that the suit was not brought in good faith, nor that the costs were incurred unnecessarily. We think these views are sound, and are at least as conclusive of this case as of that in which they were delivered. This is a stronger case than that; for there the suit was brought by the trustee after the attachment was served upon him.

We think the demurrer to the rejoinder ought to have been overruled; and we are, therefore, for reversing the judgment and rendering judgment for the plaintiff in error, who was the defendant in the court below.

Judgment reversed.

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228 *Morrison v. Speer.

July Term, 1853, Lewisburg.

Executions*—Equitable Relief—Adequate Remedy at Law.†—A party claiming that he has not been credited for all the money paid by him to the sheriff, on an execution, may have any injustice done to him in that respect corrected by the court from whence the execution issued: and it is not a case for an injunction and relief in equity.

This was a bill by Robert Speer filed in the Circuit court of Scott county, against George W. Hopkins, to enjoin a judgment recovered by Hopkins for the benefit of Nancy K. Grigsby and her children. The bill charged that Hopkins had recovered a judgment against the plaintiff and two others, one of whom was insolvent, and the other had moved away, for the sum of nine hundred and fifty dollars. That several executions had issued on the judgment, and plaintiff had made various payments upon the last of them to J. W. Morrison, the deputy sheriff in whose hands the execution was put, amounting to about four hundred dollars; but that only about one hundred and sixty-two dollars was credited on the execution. That he made another payment of thirty-four dollars to James Kane, another deputy, for which credit had not been allowed him; and that the execution had been placed in the hands of Kilgore another deputy sheriff, who was demanding a balance thereon much larger than was justly due. And making Hopkins alone defendant, he asked for an injunction to the

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***Executions.**—See monographic *note* on "Executions" appended to Paine v. Tutwiler, 27 Gratt. 440.

†Equitable Relief—Adequate Remedy at Law.—It is a well-settled rule that equity will not grant relief where there is a plain and adequate remedy at law. The principal case is cited as authorizing the proposition in Beckley v. Palmer, 11 Gratt. 634; Coleman v. Anderson, 29 Gratt. 427; Va. Min. Co. v. Wilkinson, 92 Va. 100, 22 S. E. Rep. 839; Lewis v. Spencer, 7 W. Va. 692; White v. Stender, 24 W. Va. 616; Miller v. Miller, 25 W. Va. 503. See, in accord, Haden v. Garden, 7 Leigh 157; Hudson v. Cline, 9 Gratt. 384; *foot-note* to Coleman v. Anderson, 29 Gratt. 425.

judgment, or at least to so much thereof as the credits to which he was justly entitled would amount to; that the said credits might be allowed to him, and for general relief. The injunction was granted as to four hundred dollars of the judgment.

229 *Hopkins answered the bill, admitting that he had recovered the judgment, expressing his ignorance as to the payments made as alleged in the bill, and not admitting that they had been made: And suggesting that Morrison and Kane should be made parties to the suit.

The plaintiff afterwards amended his bill and made Morrison a defendant, and called upon him to answer the original and amended bill. And he prayed that an account of the payments made by him to Morrison might be taken, and that he might have credit for said payments upon the judgment.

Morrison demurred to the bill and amended bill for want of equity. He also answered stating what moneys he had received from Speer; and alleging that he had other executions against him, and also fee bills and taxes, to which all the moneys he had so received had been applied, except the sum he had credited on the execution.

The court directed an account; and the commissioner made a report in which he credited the payments made by the plaintiff to Morrison upon Hopkins' judgment, leaving still a balance due thereon. This report was excepted to by both Morrison and Hopkins. But when the cause came on to be heard the court overruled the exceptions and directed the payments to be applied as credits on the judgment of Hopkins; and dissolved the injunction as to the residue, with costs against Morrison. From this decree Morrison applied to this court for an appeal, which was allowed.

S. Logan, for the appellant.
B. R. Johnston, for the appellee.

DANIEL, J. I can see nothing in this case on which to ground the jurisdiction of a court of chancery.

The original bill sets out a single 230 execution and *payments made to the sheriff in satisfaction of it, which had not been fully credited. No reason is alleged why the appellee had not applied, or might not still apply, to the court of law from which the execution issued to remedy the injustice of which he complained; and there is an entire absence from the case of those peculiar features which induced this court in the case of Crawford v. Thurmond, 3 Leigh 85, to sanction the interference of the chancellor.

The amended bill does not help out the jurisdiction. It merely makes Morrison the deputy sheriff to whom the payments are alleged to have been made, a party, and seeks to have an account with him. In neither bill, is there any allegation of a want or failure of evidence, arising from the loss of receipts or otherwise, rendering a discovery necessary. No statement is made of any such mutuality of cross demands or of complexity of account arising from a series of transactions on one side and payments on the other, as calls for the exercise of the jurisdiction of a court of equity. No obstacle whatever is suggested likely to defeat or embarrass the legal remedy. The case was a plain one for the demurrer, and I think the decree should be reversed; the injunction dissolved and the bill dismissed.

The other judges concurred in the opinion of Daniel, J.

Decree reversed, injunction dissolved and bill and amended bill dismissed, with costs.

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231 *Creigh's Heirs v. Henson.

(Absent ALLEN and DANIEL, Js.)

July Term, 1853, Lewisburg.

Deeds of Trust—Possession by Purchaser from Grantor—Case at Bar.—In May 1816 A conveys to S a tract of land in trust to secure a debt to C, which is duly recorded on the same day; and in October of the same year he executes to H a title bond for a part of the land; and H immediately enters into possession cultivating and farming, and claiming it under said bond, and continues thus to hold possession; A during his life time and his family since having resided on the residue of the tract. In 1827 the trustee S sells under the trust and conveys the land to C the purchaser. In 1848 the heirs of C bring ejectment against H for the land in his possession, and there is a special verdict which does not find an ouster or disclaimer by H. HELD:

1. **Same—Same—Nature of the Possession.***—That the possession of A after the deed, was as tenant by sufferance, and that the possession by H after his entry, was of the same character; and therefore the statute of limitations is no bar to the action.

2. **Writ of Right—Verdict—Construction of—Case at Bar**—The verdict finds that both parties claimed in fee from A; and this is a substantial finding of the seizin of the demandants; or at all events estops the tenant from denying it.

3. **Adversary Possession by Tenant—Quære—Must First Surrender Possession.†**—QUÆRE: If a tenant can disclaim holding under his landlord

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***Deeds of Trust—Possession by Purchaser from Grantor—Nature of the Possession**—See principal case cited in Pitzer v. Burns, 7 W. Va. 74. See also, principal case and Clarke v. McClure, 10 Gratt. 305, cited in Bowie v. Poor School, 75 Va. 304.

†**Adversary Possession by Tenant—Need Not Surrender Possession.**—In Creekmur v. Creekmur, 75 Va. 435, it was said: "There is a class of cases which hold that a party who enters into possession in acknowledged subserviency to the title of the true owner, cannot by any act of his impart to his possession an adversary character. Before asserting a title in himself, he must first surrender the premises, and place the owner in the same conditions in which he stood before the possession was taken under his title. A very strong leaning in favor of this doctrine was manifested in the case of Clarke v. McClure, 10 Gratt. 305. JUDGE ALLEN said: 'Where it is sought to make out a title by adverse possession, the possession, as a general rule, should be adverse in its inception.'

and set up an adverse title without first surrendering possession of the premises. If he may he cannot deny the title under which he entered, or augment the burden of proof on the other side by denying his tenancy.

This was a writ of right brought in June 1848, in the Circuit court of Greenbrier county, by the heirs of Thomas Creigh against William Henson, for six hundred and five acres of land. The tenant by his plea claimed two hundred acres of the land, and disclaimed title to the residue. There was a special verdict in the case, by which it was found that on the 27th of May 1816 Cutlip Airy executed a deed of trust to Lewis Stuart to secure a debt to said Thomas Creigh, conveying six hundred and five 232 acres of land embracing *the land in controversy, which deed was duly admitted to record on the day of its date: That thereafter, to wit, on the 16th of October 1816, the said Airy executed to the tenant Henson a title bond for the land in controversy: That on the 13th of May 1819 the said Airy executed another deed of trust to said Stuart to secure another debt to said Thomas Creigh, conveying the said six hundred and five acres of land, which deed was duly admitted to record the day after its date: That on the 23d of April 1827 the said Stuart conveyed the six hundred and five acres of land in fee simple to said Thomas Creigh, by deed which was duly recorded in the month in which it bears date. That the tenant Henson has been in actual possession of a part of the two hundred acres of land in controversy, by cultivation and farming, and claiming the whole of it under said title bond ever since its execution. That said Airy during his life time, and his family since, have resided on the residue of the said six hundred and five acres; and that the demandants are the heirs at law of said Thomas Creigh. The title bond and deeds are set out in hæc verba. The deed from the trustee Stuart to Creigh recites that on the 26th of March 1827, he sold the six hundred and five acres in pursuance of the two deeds of trust, and that Creigh became the purchaser. The court below gave judgment on the special verdict for the tenant, and this court awarded a supersedeas to the judgment.

Price and Reynolds, for the appellants.
Wm. Smith, for the appellees.

MONCURE, J., after stating the case, proceeded:

The possession of a grantor in a deed of trust after the execution of the deed, is not adverse to the title of the trustee, but only as his tenant at will or sufferance. The trustee may eject him without notice; or, without 233 *ejecting him, may convey the trust subject to a purchaser, whose tenant at will or sufferance the grantor will then become, and by whom he may in like manner, be ejected without notice. A person who purchases the trust subject, or any part of it, from the grantor, with notice of the deed of trust or after its due registration, stands in the place of the grantor, and bears the same relation that he does to the trustee and the purchaser from him. These propositions, as general rules of law, will not be denied; and they would seem to be decisive of this case. But it was contended by the counsel for the defendant that whenever a person in possession holds for himself to the exclusion of all others, the possession so held must be adverse to all others, whatever relation in point of interest or privity he may stand in to others; and that the tenant so held possession in this case for a period sufficiently long before the institution of the suit to give him a perfect title against the demandants. The principle is certainly sustained by recent American decisions which are entitled to great respect. But while it is maintained in these decisions, that a person whose possession, in its commencement, is subordinate to the title of another, may afterwards, without surrendering the pos-

A careful consideration of that case, and that of *Creigh's Heirs v. Henson, 10 Gratt. 231*, will show that neither of the judges who delivered the opinions of the court were disposed to commit himself unqualifiedly on the subject. The question may, therefore, be regarded as an open one in this state. Notwithstanding the doubt expressed in these cases, it is now settled, by a great weight of authority, that although a party may enter into the possession in privity with the true owner, he may, without first surrendering it, dissever such relation and claim by adverse title. The trustee may disavow his trust, the tenant the title of his landlord after the termination of his lease, and the tenant in common the title of his cotenant. The only distinction between this class of cases and those in which no privity existed, is in the degree of proof required to establish the adverse character of the possession. The rule now is that where possession is originally taken, or held under the true owner, a clear, positive and continued disclaimer and disavowal of title and the assertion of an adverse right, to be brought home to the knowledge of the party, are indispensable before any foundation can be laid for the operation of the statute of limitations. The statute does not begin to operate until the possession, before in privity with the title of the true owner, becomes tortious and wrongful by the disloyal acts of the occupying tenant, which must be open, continued and notorious, so as to preclude every doubt as to the character of the holding or the fact of knowledge on the part of the owner."

The rule as laid down in Creekmur v. Creekmur, has been substantially reiterated and approved in Whitlock v. Johnson, 87 Va. 323, 327, 12 S. E. Rep. 614; Reusens v. Lawson, 91 Va. 226, 21 S. E. Rep. 347; Chapman v. Chapman, 91 Va. 397, 21 S. E. Rep. 813; Hulvey v. Hulvey, 92 Va. 182, 23 S. E. Rep. 233; Va. Mid. R. Co. v. Barbour, 97 Va. 121, 33 S. E. Rep. 554.

See also, monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

Adversary Possession—Vendee Holding under Equitable Title.—See principal case cited in *foot-note* to Nowlin v. Reynolds, 25 Gratt. 137.

The principal case is also cited in Taylor v. Philippi, 35 W. Va. 560, 14 S. E. Rep. 132, as one of the many cases which discuss the doctrine of Adversary Possession.

session, disclaim that title, and hold adversely to it; yet this qualification is added to the principle, that knowledge of the disclaimer must be brought home to the party whose title is disclaimed. In the language of the Supreme Court of the United States, in one of the last of these recent decisions, the case of Zeller's lessee v. Eckert, &c., 4 How. S. C. R. 296, "As" the possession "was originally taken and held in subserviency to the title of the real owner, a clear, positive and continued disclaimer, and disavowal of the title, and assertion of an adverse right, and to be brought home to the party, are indispensable, before any foundation can be laid for the operation of the 234 *statute. Otherwise the grossest injustice may be practiced; for without such notice, he might well rely upon the fiduciary relations under which the possession was originally taken and held, and upon the subordinate character of the possession as the legal result of those relations. The statute therefore, does not begin to operate until the possession, before consistent with the title of the real owner, becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued and notorious, so as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the owner." "The operation of the principle (say the court in Hall v. Dewey, &c., 10 Verm. R. 599), is simply to impose upon the landlord the necessity of protecting his interest after learning the hostile claims of his tenant, by that measure of diligence which the statute of limitations has prescribed. For other purposes the original relation between the parties has its legal effect upon their respective rights. The tenant is still restrained from disputing the title under which he entered, nor can he augment the burden of proof upon the other side by denying his tenancy."—"The rights subsisting between the original parties to such a tenancy, continue to subsist between their grantees."

The principle, even with the qualification before stated, has never, I believe, been affirmed by this court: nor is it necessary to decide in this case whether it be the law of this state or not. The principle is certainly not law without the qualification; and conceding it to be so with it, this case does not come within its operation. The special verdict does not find that the demandants or their ancestor had any knowledge of any disclaimer of their title on the part of the tenant. Such knowledge cannot be inferred from the long possession of the tenant. The inference, if it had been proper, 235 should have been found *as a fact by the jury. But it would have been an improper inference even for the jury to make from the mere fact of continued possession by the tenant. His possession commenced as tenant by sufferance; it so continued after the sale by the trustee; and it should be referred to the same fiduciary relation until it was determined by the will of the legal owner, or at least until the title of the legal owner was disclaimed with his knowledge.

It is unnecessary to enquire whether the jury might have presumed a grant from the lapse of time in this case, as no such grant was found by the verdict. Instead of that, it is expressly found that the tenant claimed the land under the title bond.

It is objected by the counsel for the tenant that the fact of seizin of the demandants is not found by the verdict. But it is found that the demandants and tenant each claim an estate in fee simple in the land in controversy under Cutlip Airy; the former claiming under a deed executed by him with general warranty, shortly before the execution of the title bond under which the tenant claims. This is a substantial finding of seizin of the demandants, or at all events estops the tenant from denying it.

I think the judgment should be reversed, and judgment rendered for the demandants.

The other judges concurred in the opinion of Moncure, J.

Judgment reversed, and entered for the appellants.

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236 *Pasley v. English.

July Term, 1858, Lewisburg.

Ejectment—Evidence of Adversary Possession*—Case at Bar.—Upon an appeal from a judgment of a Circuit court refusing to grant a new trial in an action of ejectment, the appellate court looking alone to the documentary evidence and the parol evidence of the appellee, the plaintiff below, was of opinion that the appellee had failed to prove adversary possession of the land in controversy, which was not embraced in his deed but was embraced in the deed of the appellant; and reversed the judgment and remanded the cause for a new trial. On the second trial the plaintiff introduces the same parol evidence as to his adversary possession, not making his case other or stronger than it was before the appellate court. HELD:

1. **Same—Same†—Same.**—That the defendant is entitled to an instruction to the jury to disregard all the parol evidence introduced by the plaintiff to prove his right to the land in controversy not embraced within the boundaries of the deed under which he claimed.
2. **Same—Same—Same.**—That as the evidence of adversary possession is to be disregarded, it is error to instruct the jury that if such evidence proves an adversary possession of twenty years by the plaintiff under claim of title, they should find for him.
3. **Instructions—Abstract Questions.‡**—If an instruction is given on an abstract question which may

*See monographic *note* on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

†See principal case cited in Burke v. Lee, 76 Va. 390.

‡**Instructions—Abstract Questions.**—It seems settled that where the court gives an instruction on a mere abstract question under circumstances calculated to mislead the jury, such instruction will be error for which the judgment will be reversed. The principal case was cited as authorizing this proposition in Shen., etc., R. Co. v. Moose, 83 Va. 830, 3 S. E. Rep. 796; Sheppard v. Ins. Co., 21 W. Va. 394; Fisher v. W. Va., etc., R. Co., 39 W. Va. 371, 19 S. E. Rep. 580; Webb

mislead the jury, it is an error for which the judgment will be reversed.

This case was before this court in 1848, and is reported 5 Gratt. 141. The statement of the case in the opinion of Judge Lee renders any other statement unnecessary.

J. T. Anderson, for the appellant.
Michie, for the appellee.

LEE, J. This is an action of ejectment upon the demise of George, Elizabeth and Julia English, originally instituted in the Circuit court of Franklin county, and thence transferred to the Circuit court of 237 *Roanoke county. Upon a previous trial of the cause, there was a verdict in favor of the plaintiff for the land in controversy, and a motion was made by the defendant for a new trial, upon the ground that the verdict was contrary to the evidence. This motion having been overruled, the defendant excepted to the opinion, setting out in his bill of exceptions, all the evidence on both sides, instead of stating the facts proved on the trial; and the court having rendered judgment upon the verdict in favor of the plaintiff, the case was brought to this court by a supersedeas. This court was of opinion that the Circuit court had erred in refusing the new trial, and accordingly the judgment was reversed, the verdict set aside and the case remanded to the Circuit court for a new trial to be had. The case will be found reported in the 5th volume of Grattan's Reports, commencing at page 141.

In the judgment of this court certified to the Circuit court, it was declared that the parol testimony of the plaintiff in error ought to be excluded from consideration; but that notwithstanding such exclusion the defendants in error had failed to show that Gwin Dudley under whom they claimed, acquired title to the land in controversy from William Mead under whom the plaintiff in error claimed; and that they had also failed to show that they and those under whom they claimed, had at any time a sufficient adversary possession thereof to sustain their action; and therefore that the Circuit court had erred in refusing to grant to the plaintiff in error a new trial of the cause.

After the case went back to the Circuit court a new trial took place, upon which the defendants in error gave in evidence the deed from William Mead to Gwin Dudley, the will of Gwin Dudley and the deed from Gwin Dudley and wife and Lewis Dudley to the defendants in error; all of which 238 had been read on the *former trial. They also gave the plat and certificate of survey of the premises in controversy made by Surveyor Bernard under an order of the court, in evidence, together with the parol testimony of witnesses substantially the same as that given upon the former trial. No material difference whatever, is perceived between the parol testimony introduced upon this occasion and that upon the former trial. A reason is assigned why Dudley bought the same land of Ryan which had been assigned him in the partition with Mead, which was not alluded to on the former trial; and there was some proof that the line between the white oak at F and the pine had been marked several times; and one of the witnesses spoke of having seen a man, who said he was processioning, go along part of said line; but there was no proof of any notice of such processioning either to Mead or to the public. The defendants in error also gave some proof as to the course of the line of the deed from Mead to Dudley from the red oak at G and as to the growths of the timber over the marks upon that and other lines on the plat. But there was no other or additional testimony offered by them in support of the adversary possession claimed to have been taken and held by them of the land in controversy. Upon this material question the evidence given on the first trial on the part of the defendants in error, was fully as strong, and in substance just the same as that given on this occasion. The plaintiff in error on his part deduced his title regularly from William Mead the common source, and gave evidence tending to prove that while the conveyances from Mead under which he claimed did embrace the land in controversy, that of the defendants in error derived from the common source, did not. He also gave evidence that Gwin Dudley the elder acknowledged the blazed line from the black oak at H to the red oak at I to be the division 239 line between *himself and Mead, and that after the death of Gwin Dudley the elder, between the years 1830 and 1834, Gwin Dudley the younger, who then claimed the land under the will of Gwin Dudley senior, only claimed to the old blazed line HI, and did not claim any part of the land in controversy. And he gave other testimony strongly conflicting in some respects with that offered by the defendants in error, and tending to overthrow their pretensions. But in the view that I take of this case it is unnecessary to go into the details of the testimony on the part of the plaintiff in error, or to notice it further than to say that its tendency certainly was directly to impugn the title set up by the defendants in error, and to weaken the case of claim of title and adversary possession upon which they had necessarily to found themselves to recover in this action.

After the evidence had been closed the plaintiff in error moved the court to instruct the jury:

1st. That they must disregard all the parol evidence introduced by the defendants in error to prove their right to land not embraced within the boundaries of the deed from William Mead to Gwin Dudley for the

v. Big Kanawha, etc., Co., 43 W. Va. 810, 29 S. E. Rep. 523; State v. Allen, 45 W. Va. 75, 30 S. E. Rep. 213; *foot-note* to Bartley v. McKinney, 28 Gratt. 750.

But, though abstract, if it be not calculated to mislead, the case will not be reversed on that account. Hunter v. Jones, 6 Rand. 541; Sheppard v. Peabody Ins. Co., 21 W. Va. 394. But see *foot-note* to Colvin v. Menefee, 11 Gratt. 87.

See generally, monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

two hundred acres of land, which they had given in evidence in support of their title.

2dly. That if they believed from the evidence that the boundaries of the deed from William Mead to Gwin Dudley did not include the land in controversy, and that the boundaries of the deed from Carper and wife to the plaintiff in error did include the land in controversy, they must find for the latter.

These instructions the court gave, but with the following modification, moved by the counsel for the defendants in error:

Unless the jury should be satisfied from the evidence that a division line was marked and agreed upon as the boundary between their lands by William Mead
240 *and Gwin Dudley, under whom the parties claimed, respectively, and that the said Gwin Dudley had taken possession and held up to said line, and that he and these claiming under him had so held peaceable and uninterrupted possession up to said line, exercising open and notorious acts of ownership over the land on their side, including the land in controversy, for a period of twenty years and upwards before the bringing of this suit, and that the said William Mead and those claiming under him, had acquiesced in such their possession: in which event they ought to find for the plaintiff, (the defendant in error,) although they might be satisfied from the evidence that the deed under which Gwin Dudley and those claiming title under him asserted title, did not in fact cover or embrace the land in controversy: But at the same time instructed the jury merely constructing saw pits would not amount to an adversary possession against William Mead and those claiming under him, sufficient to entitle the plaintiff to recover by force of an adversary possession.

To this modification of the instructions moved by him the plaintiff in error excepted; and a verdict and judgment having been rendered against him, he applied for and obtained a supersedeas from this court.

Passing by the criticism to which the modification appended by the court to the instructions might perhaps be justly obnoxious, that it does not expressly declare that the taking and holding possession of the land in controversy by Gwin Dudley and those claiming under him, must have been accompanied with claim of title to the same in order to give it the character of such an adversary possession as by its own force would enable the plaintiff in ejectment to recover upon it, let us examine it as if that idea had been distinctly embraced and presented by the terms employed. Of course the instructions and the modification
241 appended *by the court are to be taken together and considered as a whole. Else the contradiction would be involved of telling the jury that they were to disregard all the parol evidence introduced by the plaintiffs in ejectment to prove their right to land not embraced in the deed from Mead to Gwin Dudley, and yet in the next breath telling them that if they believed certain things were established by that same testimony, they ought to find for the plaintiffs, notwithstanding they might be satisfied the deed under which they claimed title did not embrace the land in controversy. But considered as a whole, the necessary construction to be placed upon the instructions with the modification appended, is that the jury were to disregard all the parol testimony of right to land not embraced in the deed from Mead to Gwin Dudley, unless they should be satisfied from that same evidence that a division line had been run between Mead and Dudley, and that the latter and those claiming under him had taken and held possession accordingly for twenty years and upwards; in which latter event, if they should be so satisfied, then they were not to disregard the testimony, but ought to give it full weight and effect, and to find a verdict in favor of the plaintiffs upon it. But the court does not stop here; for it goes on to instruct the jury further that merely constructing saw pits on the land (which form of expression, I take it for granted, was intended to include the cutting and sawing of timber at those pits, proven by the witnesses upon both trials; for the court could not have intended to discriminate between those different supposed acts of ownership over the property, the same having been always proven in connection, and evidently considered by this court all together when it held that the defendants in error had failed to show a sufficient adversary possession upon the former trial to maintain their action,) would not amount to an adversary possession against
242 William *Mead and those claiming under him, sufficient to entitle the plaintiffs in ejectment to recover by force of their adversary possession. Transposing the disjecta membra of the instructions and modification appended taken as a whole, and placing them in their simplest and most natural order, the sum and substance of the whole would seem to be this: That as this court had expressly decided that the evidence given on the former trial did not establish a sufficient adversary possession to sustain the action, so the same evidence given upon the second trial without further and additional proofs, could not and did not establish such adversary possession upon this; and therefore the jury were to disregard all the parol testimony introduced by the plaintiffs in ejectment to prove their right to the land not embraced by the deed from Mead to Dudley, which was the very matter in controversy. But that notwithstanding the supposed evidence of adversary possession on the part of Gwin Dudley was thus stricken out of the case and to be disregarded, yet still, if the jury should believe that Dudley and those claiming under him had taken and held adversary possession of the land in controversy for twenty years and upwards before the bringing of the suit, and that Mead and those claiming under him had acquiesced in such possession, then they ought to find for the plaintiffs in ejectment. Now I can perceive no

ground whatever on which such an instruction can be sustained. If it can by any mode of interpretation be relieved of the obvious objection of repugnancy upon its face, yet viewed in the most favorable light, it must be regarded as an instruction upon a supposed state of facts which nowhere exists in the case; the only evidence tending to prove such a state of facts having been expressly repudiated by the court in its instruction in conformity to the opinion of this court upon the very question certified to the former in its judgment granting the new trial. And although
243 *it may be true, a court will not look with very extreme nicety into the evidence to determine whether there be any evidence tending to prove the hypothetical case supposed in the instruction, nor will examine any such evidence that may be found with a view to ascertain its weight or sufficiency, yet where, as in the present case, it is apparent there is no evidence tending to prove the case supposed, the instruction asked for ought not to be given. Wiley v. Givens, 6 Gratt. 277.

The counsel for the defendants in error, however, insists that although in such a case the instruction asked for being upon an abstract proposition not arising on the evidence, may well be refused by the court, yet if the court shall waive this objection and give the instruction, it would not be such error as would occasion a reversal of the judgment. And in the case of Preston v. Harvey, 2 Hen. & Munf. 55, it is said that this court does not sit to reverse judgments for erroneous opinions on mere abstract or immaterial questions; and that judgment should not be reversed for an erroneous decision unless some injury could possibly have resulted therefrom to the party appealing. But where an instruction is given which may serve to mislead the jury upon a question material to the cause, the reason for reversing the judgment is as strong as it can be in the case of any erroneous decision whatever. In Lee v. Tapscott, 2 Wash. 276, it is held that improper testimony, however unimportant it may be to the cause, ought never to be confided to the jury; for if it should have an influence on their minds, it will mislead them; and if it should have none, it is useless and may at least produce perplexity. And in Poindexter v. Davis, 6 Gratt. 481, it is held that if improper testimony be suffered to go to the jury, the judgment must be reversed, although there might be other and unexceptionable evidence as to the same fact before the jury. And certainly the objection to an ir-
244 relevant and *improper instruction by the court to the jury cannot be less strong than that to the admission of irrelevant and improper testimony.

In this case I think there is little doubt that the modification appended by the court to the instructions asked by the plaintiff in error might and did mislead the jury upon a question vital in the cause, and that without it they would certainly not have rendered such a verdict. It will be observed that when the case was before this court upon the supersedeas to the former judgment, the Circuit court having in the bill of exceptions certified the evidence given on the former trial, and not the facts which it proved, this court, according to its settled rule, in passing on the question of a new trial, could only consider the documentary testimony read to the jury and the parol testimony on the part of the defendants in error, rejecting entirely the parol testimony on the part of the plaintiff in error. But notwithstanding this exclusion of all the parol testimony on the part of the latter, this court was of opinion that the evidence of the defendants in error had failed to make out a sufficient adversary possession of the land in controversy to enable them to sustain their action. And all this was certified in its judgment to the Circuit court. Yet when the case went back to that court, at the second trial, upon the same testimony on the part of the defendants in error, not in any respect strengthened or improved, but on the contrary certainly to some extent impaired and weakened by the conflicting testimony on the part of the plaintiff, which was fully before the jury for their consideration, the court, by the modification appended to the instructions, tells the jury that if they were satisfied from the evidence that there had been such adversary possession as that claimed on the part of the defendants in error, then they ought to find a verdict in their favor; thus in effect giving them to understand
245 *that although this court, looking to the evidence of the defendants in error exclusively, had held that it did not make out a case of adversary possession, yet that they upon the second trial, considering the same testimony, impaired and weakened as it was to some extent by the countervailing testimony on the part of the plaintiff in error, might disregard the opinion of the Court of appeals; and if they thought the testimony sufficient to make out a case of adversary possession, they might so find, and render their verdict for the plaintiffs in ejectment accordingly.

I think it is plain that under the opinion of this court upon the former hearing and upon the state of the evidence given at the second trial, the plaintiff in error was entitled to the instructions asked for by him without any such modification as that appended by the court; and that the Circuit court clearly erred in so much of its instruction as was embraced in that modification. I am therefore of opinion to reverse the judgment, set aside the verdict, and remand the cause to the Circuit court, that a new trial may be had, upon which, if the evidence shall be substantially the same as before, and the plaintiff in error shall ask for the same instructions as upon the last trial, they are to be given without any such modification as that appended to them upon the former trial.

The other judges concurred in the opinion of Lee, J.

Judgment reversed.

246 *Purcell v. McCleary & al.

July Term, 1853, Lewisburg.

1. **Joint Decree against Two Parties—Appeal by One Party—Effect.***—Upon a bill against two joint owners of land, for the specific execution, or for the rescission of, a joint contract made by them for the sale of the land, one of them answers the bill and sets up a defence equally applicable to both; and the bill is taken for confessed against the other. There being a decree against both for a rescission of the contract and a repayment of the purchase money, the party as to whom the bill has been taken for confessed, may appeal; and if the decree is erroneous, it will be reversed as to both.

2. **Vendor and Vendee—Conveyance of Property—Case at Bar.**—The quantity of land sold is to be laid off in one, two or three tracts, as the vendee may choose. Therefore he vendors are not in default for failing to convey until the vendee has made his selection, and has caused the land to be surveyed.

3. **Rescission of Contract—Latent Ambiguity—Case at Bar.**—There being a latent ambiguity in the contract, which can only be cleared up by a survey, it is error to decree a rescission of the contract until a survey is made, and it is thus ascertained whether the vendors can comply with their contract.

A bond bearing date the 23d day of December 1834, was executed by Joseph Hagan and Sarah Purcell, the latter by said Hagan as her attorney in fact, by which they bound themselves in a penalty of three hundred and eighty dollars to Thomas C. McCleary, that they would make to him a good title to two or three certain tracts of land in Russell county, on both sides of the Louisa fork of Sandy river, containing two hundred acres, beginning at the narrows above Yates' improvement, then down the river on both sides, including the good land, and running up Slate creek as far as said McCleary wishes; and down the river, including the good land adjoining the improvement, and the improvement that Willis Deal lives on; to be laid off in one, two or three surveys, as the said McCleary chooses. And that the said Hagan and Purcell 247 *should make a title to the land within six months from the date of the bond, with general warranty. The purchase money was paid to Hagan at the time, in horses; and a few days afterwards McCleary, by an endorsement on the bond, assigned one-half of the interest in the contract to H. D. Smith.

In 1846 McCleary and Smith instituted a suit in equity in the Circuit court of Tazewell county, against Hagan and Mrs. Purcell, in which they set out the bond and the assignment; and alleged that the price of the land was one hundred and ninety dollars, which they alleged had been received by Hagan. They state that when they went to see the land they found it in the possession of other persons who refused to surrender it. That they had been induced to wait by the promises of Hagan to turn out the parties in possession. That he filed a number of caveats against persons on the Louisa fork; that these caveats were pending from 1836 to 1844, when they were dismissed without any decision on the merits. And as they cannot maintain a suit against the parties in possession, they ask either for a specific performance of the contract by Hagan and Mrs. Purcell, or for a rescission of the contract, and the return of the purchase money with interest; and for general relief.

Hagan answered the bill; and alleged that McCleary was to have the land run out and furnish the courses before the defendant was to convey it to him; which he had not done. He insisted that the title to the land was good; and he was ready, whenever the land should be run out and the courses furnished, to convey the said lands pursuant to the title bond. He alleged that at the time of the purchase McCleary had possession of said lands at the mouth of Slate, and was well acquainted with them, and knew all about their condition and who was in possession; and he denied that he was to put him in possession of the lands. 248 Though *the process was served on Mrs. Purcell she did not answer; and the bill was taken for confessed as to her.

Evidence was introduced to prove that the place called Yates' improvement had been occupied for many years, under a title adverse to that of the defendants. And it was also proved that though one hundred and ninety dollars was the nominal price of the horses given for the land, that was in fact one-third more than their value.

The cause came on to be heard in September 1848, when the court held that the plaintiffs were entitled under the contract, to be put into possession of the land, as well as to a conveyance of a good title. And reciting, that it appeared that the land or a part of it had been in the adverse possession of others, and that a conveyance alone would be unavailing, it was decreed that the defendants do, on or before the 1st of April 1849, either obtain possession of

*Appeal—Parties Standing on Same Rights—Effect on Parties Not Appealing.—In Walker v. Page, 21 Gratt. 636, it was said: "The rule established by the practice and decisions of this court may be stated to be this: Where the parties stand upon distinct and unconnected grounds, where their rights are separate, and not equally affected by the same decree or judgment, then the appeal of one will not bring up for adjudication the rights or claims of the other. Tate v. Liggat & Matthews, and Liggat & Matthews v. Morgan, 2 Leigh 84, 107. But where the parties appealing, and the parties not appealing, stand upon the same ground, and their rights are involved in the same question, and equally affected by the same decree or judgment, this court will consider the whole case, and settle the rights of the parties not appealing as well as those who bring their case up by appeal. Lewis v. Thornton, 6 Munf. 87, 97; Lenows v. Lenow, 8 Gratt. 349; Liggat & Matthews v. Morgan, 2 Leigh 84; *Purcell v. McCleary, 10 Gratt. 246.*"

See the principal case cited for the same proposition in Saunders v. Griggs, 81 Va. 517; Morgan v. The Ohio, etc., R. R. Co., 39 W. Va. 25, 19 S. E. Rep. 591; Vance Shoe Co. v. Haught, 41 W. Va. 282, 23 S. E. Rep. 556. See also, *foot-note* to Walker v. Page, 21 Gratt. 636.

the land by them sold to McCleary, and deliver possession thereof to the plaintiffs; or institute proceedings for the purpose of dispossessing the present occupant: And on their failure or neglect so to do, the court would proceed to rescind the contract and to decree to the plaintiff the value of the horses paid defendants, with interest.

In April 1849 the cause came on again, and it appearing that the defendants had failed to comply with the former decree, the court decreed a rescission of the contract, and that the defendants should pay to the plaintiffs the sum of one hundred and twenty-six dollars and sixty-six cents, with interest from the 23d of December 1834, until paid, that being the true value of the horses, and the costs. And thereupon Mrs. Purcell applied to this court for an appeal, which was allowed.

Price, for the appellant.
B. R. Johnston, for the appellee.

249 *ALLEN, J., delivered the opinion of the court.

The court is of opinion, that as by the contract disclosed by the title bond filed as an exhibit with the bill, it appears that Joseph Hagan and Sarah Purcell agreed to sell, and bound themselves to convey to Thomas C. McCleary two hundred acres of land on both sides of the Louisa fork of Sandy river and on Slate creek, in one, two or three surveys, as the said Thomas C. McCleary might choose; it was the duty of said Thomas to make his selection, and cause the land to be surveyed at the place described. And until such selection and survey the said Hagan and Sarah Purcell were in no default for failing to convey the same.

The court is further of opinion, that as no such selection has been made, a survey should have been directed before any final decree was pronounced, to ascertain the precise situation of the Yates' improvement with reference to the land claimed by said Hagan and Purcell at the place described in the title bond, so as to enable the court to decide whether the two hundred acres could be laid off by beginning at the narrows above said improvement, and then down the river on both sides thereof, so as to adjoin and not to include said improvement, there being a latent ambiguity in the description of the land sold, which can only be cleared up by an actual survey.

The court is therefore of opinion, that said decree is erroneous; and the same is reversed with costs. And the cause is remanded to said Circuit court, with instructions to cause said two hundred acres to be surveyed in one, two or three surveys, as either party may direct; and for further proceedings in order to a final decree.

Decree reversed.

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250 *Rowans v. Givens.

July Term, 1853, Lewisburg.

Writ of Right—No Plea Filed—Effect of Verdict.*—In a writ of right, the failure to file a plea is error not cured by a verdict in favor of the tenant.

This was a writ of right in the Circuit court of Monroe county by William and Charles Rowan against David G. Givens. The demandants filed a count in the form prescribed by the act of assembly; but there was no plea, or joinder of issue in the cause. In this condition of the pleadings the cause was tried, and there was a verdict and judgment for the tenant. The demandants having taken exceptions to rulings of the court in the progress of the trial, obtained a supersedeas to the judgment, from this court. This court did not notice the questions involved in the exceptions, and it is therefore unnecessary to state them.

N. Harrison, for the appellants.
Caperton, for the appellee.

SAMUELS, J. The "act reforming the method of proceeding in writs of right," 1 Rev. Code 463, directs that the count, plea and replication, respectively, shall be in the form prescribed by that act, or in a form of the same effect. This court in Beverly v. Fogg, 1 Call 421, (Tate's edition,) decided that it was error not cured by verdict, to omit from the count the boundaries of the land demanded, which the statute required to be inserted. In Taylor v. Huston, 2 Hen. & Munf. 161, it was decided that the omission to file a plea in the form, or to the effect of that prescribed by the act of 251 *assembly, was likewise error, not cured by verdict; and that the mere entry "usual plea and time to reply," and the entry of the word "joinder" at a subsequent day, would not sustain a judgment for

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*Pleading and Practice—Nonjoinder of Issue—Effect.—No verdict can properly be rendered, or judgment entered thereon, unless issue shall have first been joined; and, if it be done, such verdict or judgment will, for this reason alone, be set aside, for the statute of jeofails does not cure the nonjoinder or want of issue altogether.

The principal case was cited for this proposition in Preston v. The Salem Imp. Co., 91 Va. 585, 22 S. E. Rep. 486; Gallatin v. Haywood, 4 W. Va. 2 (writ of right); High v. Peerce, 9 W. Va. 294; State v. Douglass, 20 W. Va. 776; Ruffner v. Hill, 21 W. Va. 159; Brown v. Cunningham, 23 W. Va. 111; Hickman v. Baltimore & Ohio R. R. Co., 30 W. Va. 305, 4 S. E. Rep. 659; Baltimore & Ohio R. R. Co. v. Hickman, 30 W. Va. 315, 7 S. E. Rep. 460 (dissenting opinion of WOOD, J.).

See also, in accord, Stevens v. Taliaferro, 1 Wash. 155; Kerr v. Dixon, 2 Call 379; Grymes v. Pendleton, 4 Call 130; Taylors v. Huston, 2 H. & M. 161 (writ of right); Wilkinson v. Bennett, 3 Munf. 314; Totty v. Donald, 4 Munf. 430; Sydnor v. Burke, 4 Rand. 162; M'Million v. Dobbins, 9 Leigh 422; Petty v. Frick Co., 86 Va. 501, 10 S. E. Rep. 886; Johnson v. Fry, 88 Va. 695, 12 S. E. Rep. 973; Baltimore & Ohio R. R. Co. v. Gettle, 3 W. Va. 376, 384; Baltimore & Ohio R. R. Co. v. Christie, 5 W. Va. 325; Baltimore & Ohio R. R. Co. v. Faulkner, 4 W. Va. 180; State v. Conkle, 16 W. Va. 726.

As to the misjoinder of issue, see *foot-note* to Southside R. R. Co. v. Daniel, 20 Gratt. 344, where the subject is dealt with at some length.

See principal case distinguished in Bartley v. McKinney, 28 Gratt. 750.

the tenant. Apart from the rules of practice specifically provided for the writ of right, the general rules applying to all actions will not sustain a judgment given upon a verdict rendered as upon the trial of an issue, when no issue had been joined. McMillion v. Dobbins, 9 Leigh 422; Sydnor v. Burke et ux., 4 Rand. 161.

In the case before us no plea whatever was entered, nor any mention made of a plea; yet the jury was impaneled as for the trial of the mise joined upon the mere right, and rendered a verdict for the tenant, on which a judgment was given accordingly. Adhering to the cases cited, I am of opinion to reverse the judgment; to set aside all proceedings had subsequently to filing the count; and to remand the cause to be proceeded in from that point.

The other judges concurred in the opinion of Samuels, J.

Judgment reversed.

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252 *Devers v. Ross.

July Term, 1858, Lewisburg.

[60 Am. Dec. 331.]

(Absent LEE, J.*)

Bonds—Time of Payment Extended—Effect on Surety.†—A covenant by the holder of a bond with the principal obligor, to give a specific time for payment, does not release the surety at law. His only remedy is in equity.

This was a supersedeas to a judgment of the Circuit court of Harrison county. The case is sufficiently stated in the opinion of Judge Samuels.

Price, for the appellant.
There was no counsel for the appellee.

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*JUDGE LEE had been counsel in the cause.

†**Bonds—Time of Payment Extended—Effect on Surety.**—In Glenn v. Morgan, 23 W. Va. 470, it was said: "According to the settled law of Virginia and this state an agreement by the holder of a bond with the principal obligor, to extend the time of payment, does not release the surety at law, and his remedy is only in equity. *Devers v. Ross. 10 Gratt. 252;* Steptoe v. Harvey, 7 Leigh 501; Ward v. Johnson, 6 Munf. 6; Sayre v. King. 17 W. Va. 562."

Again in Harnsbarger v. Kinney, 13 Gratt. 521, the court, citing the same cases that are cited above, said: "An agreement between creditor and debtor for forbearance is no bar to an action at law, unless it be a covenant never to sue, which is equivalent to a release to the party with whom the covenant is made. Regarding the subject as the courts of law regard it, a contract for indulgence would not delay a suit for the debt, and the surety might avail himself of his remedies to enforce the collection thereof, and thus obtain exoneration from liability." See also, Tremper v. Hemphill, 8 Leigh 626, 31 Am. Dec. 673.

Mr. Barton claims that it is at least an open question in Virginia whether the surety may not now—under § 3299, Va. Code 1887—set up at law the agreement by the holder of the bond to extend the time for payment. 2 Barton's Law Pr. 1080 (note); 1 Barton's Ch. Pr. 490.

SAMUELS, J. This was an action of debt brought on a single bill in the name of Cyrus Ross the obligee, for the use of Jesse Flowers, against James P. Wilson a principal debtor, and James Devers his surety. A joint plea of payment was filed by the defendants, and issue made up thereon. A separate plea was filed by Devers the surety, alleging in substance, that this party executed the single bill as surety; that it had been assigned and delivered by the obligee Ross to one William Martin; that Martin for the use of Jesse Flowers, had instituted an action thereon against the obligors. That during the pendency of this action, an agreement under seal was made between Martin and Wilson the principal debtor, whereby Wilson agreed to pay all costs that had accrued upon the suit; and that Martin, without the knowledge, privity or consent of Devers the surety, agreed to forbear and
253 *give day of payment of said debt until a day certain; that the costs were paid and the suit dismissed, and the forbearance accorded and day of payment given according to the terms of the contract between Martin and Wilson; but without the knowledge, privity or assent of Devers the surety. A special replication to this plea was filed, and a rejoinder to the replication without bringing the parties to issue. The court, without noticing the plea of payment, gave judgment for the plaintiff as upon a demurrer to the rejoinder, although no demurrer thereto appears in the record.

It was decided by this court in the case of Ward v. Johnson, 6 Munf. 6, that a confession of judgment by the principal, with stay of execution for a definite time without the assent of the surety, did not, at law, discharge the surety from his liability.

In the case before us, the assurance of indulgence, it is alleged, was given in the covenant of Martin who had been the holder of the bond, but who had brought suit thereon in the name of Ross the obligee for the use of Flowers. It is by no means clear, that Martin had any authority under the facts alleged in the plea to control the debt at all. Giving to the plea, however, the construction most favorable to the defendant, and holding that Martin had control of the debt, and might enter into such a covenant for indulgence, yet the case falls within the principle declared in the case of Ward v. Johnson: a covenant not to sue for a limited time, does not release the debt. It is equally well settled that if a creditor shall make a contract with his principal debtor for an extension of the time of payment, he does not thereby afford the surety for the debt, a plea in bar in a suit at common law; the surety must seek relief, if entitled to any, in a court of equity. Ward v. Johnson, 6 Munf. 6; Steptoe's adm'rs v. Harvey's ex'ors, 7 Leigh 501.

I am therefore of opinion the court
254 below might *have refused to receive the plea, or having received it, might

have stricken it out; or if a verdict had found the truth of the plea, might have rendered a judgment "non obstante veredicto." The court fell into no error in overruling the plea.

The court, however, should not have rendered a judgment against the defendants without disposing of the issue on the plea of payment; the plaintiff can have no judgment until this issue shall be found in his favor.

I am of opinion to reverse the judgment, and to remand the cause for the purpose of trying the issue on the plea of payment.

The other judges concurred in the opinion of Samuels, J.

Judgment reversed.

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255 *Cunningham v. Smith & al.

July Term, 1858, Lewisburg.

[60 Am. Dec. 333.]

1. **Action on Bond—Plea of Failure of Consideration—Averments.***—In an action of debt upon a bond, defendant pleads that the bond was given for the price of goods which he bought of plaintiff, who represented that they were sound and marketable, when in fact they were unsound and damaged, and by means thereof unsaleable; but the plea does not aver a warranty of the quality of the goods; or that the plaintiff knew that the said representations made by him were untrue; or that he used any fraud or art to disguise or conceal their true condition or quality. The plea is defective; and properly rejected when tendered.

2. **Same—Same—Same.**—But in such case the plea avers that the representations were untrue, and that the plaintiff at the time of making them knew them to be untrue, and knowingly made them with the intent to defraud the defendant; and proceeds to set out the unsoundness of numerous articles purchased, and to detail particulars in which the representations had turned out to be untrue: This is a good plea.

3. **Pleading—Duplicity—Special Demurrer.**†—Duplicity in a plea can only be objected to by a special demurrer.

This was an action of debt on a bond for four hundred and four dollars, instituted by Smith and Sinclair against H. B. Cunningham, in the Circuit court of Ritchie county. The defendant filed a special plea in the nature of a setoff, for two hundred dollars, to which the plaintiff demurred. He also tendered another special plea in the nature of setoff, which was objected to by the plaintiff and rejected by the court: To which opinion of the court rejecting the plea the defendant excepted. Both of these are set out in their substance in the opinion of Judge Daniel. On the hearing of the cause the court below sustained the plaintiff's demurrer to the defendant's plea, and rendered a judgment in favor of the
256 plaintiff for their *whole debt. Whereupon the defendant applied to this court for a supersedeas, which was awarded.

Fry, for the appellants.
There was no counsel for the appellees.

DANIEL, J. The plea rejected by the court was, I think, defective. It does not aver a warranty of the quality of the goods for the price of which the single bill in the declaration mentioned is alleged to have been given; nor does it aver that the defendants in error knew that the representations alleged to have been made by them

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***Action on Bond—Statute of Equitable Defences—Want of Consideration.**—In Harris v. Harris, 23 Gratt. 751, it was said: "It has been repeatedly held by this court that the words 'failure in the consideration' as used in the statute (Va. Code 1849, ch. 172, § 5; Va. Code 1860, ch. 172, § 5; Va. Code 1887, § 3299), refer to contracts originally founded on a valuable consideration, and not to contracts without consideration. *Cunningham v. Smith, 10 Gratt. 256;* Watkins v. Hopkins, 13 Gratt. 743."

See principal case also cited as authority for this proposition in Williamson v. Cline, 40 W. Va. 206, 20 S. E. Rep. 921. See also, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801; monographic *note* on "Consideration" appended to Jones v. Obenchain, 10 Gratt. 259.

In accord with the inference to be drawn from the first and second headnotes, that the vendor is not liable for defects in goods sold, where there is no warranty, unless he makes a false representation which he knew at the time to be untrue or uses fraud to disguise the true condition of the goods, see Mason v. Chappell, 15 Gratt. 572, and *foot-note.*

†**Pleading—Duplicity—Special Demurrer.**—See Norfolk & W. R. Co. v. Ampey, 93 Va. 122, 25 S. E. Rep. 226, where JUDGE RIELY delivering the opinion of the court said: "But even if this count was obnoxious to the charge of duplicity, the fault could not be taken advantage of on a general demurrer. The objection for duplicity relates to matter of form only, and does not go to the substance of the pleading. Being an objection to the form and not to the substance of the declaration, it could only be availed of, even at common law, with all of its rigid rules of pleading, by special demurrer. The party demurring was required to lay his finger upon the very point. Chitty on Pl. 655, 662; 4 Minor's Institutes, Pt. 2, 939; 5 Rob. Pr. 305; Smith v. Clench, 2 Ad. & Ellis, N. S., 836; Fairfax v. Lewis's Adm'r, 11 Leigh 243; Kennaird v. Jones, 9 Gratt. 189; *Cunningham v. Smith, 10 Gratt. 257;* Smith's Adm'r v. Lloyd's Ex., 16 Gratt. 310, 313; Grayson v. Buchanan, 88 Va. 251, 13 S. E. Rep. 457; and King v. Howard, 1 Cush. 141. Where special demurrers have been abolished, duplicity in pleading cannot now be reached by a demurrer. 5 Rob. Pr. 305; 3 *Id.* 509; King v. Howard, 1 Cush. 141; Coyle v. B. & O. R. R. Co., 11 W. Va. 107; and Sweeney v. Baker, 13 W. Va. 200." See also, in accord, Smith v. Lloyd, 16 Gratt. 296, and *foot-note.* By Va. Code 1849, ch. 171, sec. 31 (Code 1887, sec. 3271), special demurrers were abolished in Virginia.

In some cases, it has been held that in those jurisdictions, where special demurrers have been abolished, objection for duplicity in pleading cannot be maintained; and there seems to be some authority for this view both in Virginia and West Virginia. In Grayson v. Buchanan, 88 Va. 257, 13 S. E. Rep. 457, it was said that an objection to a plea on the ground

with respect to the soundness and marketable quality of said goods were untrue, or that they used any fraud or art to disguise or conceal their true condition or quality. The plea is, I think, liable also to a further objection. After setting out that the defendants in error had represented the goods to be sound and marketable, when in fact they were unsound and damaged, and by reason thereof unsalable, the plea proceeds to state further that the plaintiff in error was a merchant doing business, &c., and that he had endeavored to the best of his skill to keep for sale articles of merchandise of a sound and marketable character, and had usually done so until he was induced, by the false representations of the defendants in error, to purchase the goods in question, and that the mixing of them with the merchandise on hand in his store injured the sale of the others, depriving the said plaintiff in error of custom, and seriously damaging him in his business. And the plea concludes by averring his right to have the damages sustained by reason of the several matters in the plea set forth allowed as a setoff to the bond.

If the special damage to the business of the plaintiff in error as a merchant, 257 just above mentioned, could *avail him as a defence in any form of plea, (about which it is not necessary to express an opinion,) I think it very obvious that a plea relying on such remote consequences would have to be characterized by a particularity of averment, in which the one under consideration is plainly wanting. The plea was, I think, properly rejected. I have been unable, however, to discover any valid ground of objection to the plea demurred to. It distinctly avers that the defendants in error represented the articles bought to be sound and of a good and marketable quality; and that the plaintiff in error, relying upon and believing the said representations, purchased the bill of goods: And that said representations were untrue, and that the defendants in error, at the time of making them, knew them to be untrue, and knowingly made them with the intent to defraud the said plaintiff in error. And the plea then proceeds to set out the unsoundness of numerous articles purchased, and to detail, otherwise, particulars in which the representations had turned out to be untrue. The plea substantially sets out a false warranty and avers damage from its breach.

It is true that this plea labors under the formal defect of duplicity, in as much as it also avers that by the agreement the defendants in error were to forward and deliver all of the articles purchased, and that some of them had never been forwarded and delivered; and damage is claimed for this breach of the agreement. Two distinct grounds of defence, breach of warranty and partial failure of consideration, are thus relied on in one plea. This defect might have been remedied if it had been pointed out by a special demurrer, but it is not of a character so essential to the defence as to be reached by a general demurrer. I think therefore that the court erred in sustaining instead of overruling the demurrer; and that for this cause the judgment should be reversed as to 258 the amount of two hundred *dollars, the damages claimed as a setoff by the plea, and affirmed as to the residue; and the cause remanded for further proceedings, with liberty to the defendants in error to withdraw their demurrer and reply to said plea.

The other judges concurred in the opinion of Daniel, J.

Judgment reversed.

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259 *Jones & Wife v. Obenchain & als.*

July Term, 1853, Lewisburg.

Chancery Practice—Deed from Husband to Wife—Meritorious Consideration †—A deed from a husband to his wife, conveying to her all his property, real and personal, under circumstances showing a strong meritorious consideration, set up in equity against a nephew, the heir at law of the grantor.

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of duplicity can be taken, at common law, only by special demurrer, which is not now available in Virginia except as to dilatory pleas, citing 4 Min. Inst. (3d Ed.) 939. See, in accord, Coyle v. B. & O. R. Co., 11 W. Va. 106; and Sweeney v. Baker, 13 W. Va. 201.

But in Harris v. Harris, 23 Gratt. 750, and Little Kanawha, etc., Co. v. Rice, 9 W. Va. 636, 640, it was decided that pleas were properly rejected because of duplicity. See also, O'Bannon v. Saunders, 24 Gratt. 138, 147, and Virginia, etc., Ins. Co. v. Saunders, 86 Va. 969, 11 S. E. Rep. 794. In this last case, it was intimated that if there had been duplicity in the replication objected to, the objection on that ground would have been sustained.

Prof. Graves, in an editorial (which we have followed in the above short discussion of this question), 1 Va. Law Reg. p. 385, says: "As the authorities now stand, it is impossible to say whether duplicity in a declaration or plea can be made a ground of objection in Virginia. It seems settled that it cannot be done by *demurrer* (the case of *Cunningham v. Smith*, *10 Gratt. 255*, was no doubt decided under the law as it existed prior to July 1, 1850); but it does not follow that the objection is in no way available. It is probable that in Virginia a plea bad for duplicity might, on motion, be rejected; or, if already received, be ordered to be stricken out—a procedure common in Virginia with reference to defective pleas. And, perhaps, the same course would be pursued as to a count in a declaration bad for duplicity. See 5 Rob. Prac. 305."

Same—Same.—In Guarantee Co. v. Nat. Bank, 95 Va. 488, 28 S. E. Rep. 909, the principal case is cited as authority for the proposition, that, where a plea presents two or more distinct and sufficient defences, either of which, if true, would necessitate a finding on the issue in favor of the defendant, the plea is bad for duplicity.

*For monographic note on Consideration, see end of case.

†**Chancery Practice—Deed from Husband to Wife—Meritorious Consideration.**—See principal case cited

This was a suit in equity in the Circuit court of Botetourt county, by Thomas J. Obenchain and others, children of Mary Alverson, to set up a deed executed by John Alverson, by which he conveyed to his wife Mary Alverson his whole estate, consisting of a tract of land then worth about one thousand five hundred dollars, and the stock, farming utensils and house and kitchen furniture upon the farm. The defendants were John Jones, the heir at law of Alverson, the wife of Jones, who was a sister of the plaintiffs, and other children of Mrs. Alverson. The case as made by the pleadings and proofs, is as follows:

In 1817 John Alverson then being about sixty years of age or upwards, married Mrs. Mary Obenchain, a widow with seven sons and a daughter. At the time of the marriage Alverson owned the tract of land before mentioned, with some stock upon it, upon which he was living with five unmarried sisters; one or two of them older than himself: Mrs. Obenchain had a small amount of personal property. After the marriage Alverson continued to live on his farm with his wife and her children and his sisters; and the farm was cultivated by the sons of Mrs. Alverson, and the whole family was supported by their labor; Alverson not doing any work or hiring any labor except occasionally in harvest 260 time. In March 1835 Alverson *executed the deed before mentioned, being then upwards of eighty years old; "for a good consideration, together with the good will and affection" he bore to his wife. He died within a month or two after its execution, and after his death the deed was recorded. One of Alverson's sisters had died some years before him; one died a very few days after him. The others lived until about the death of Mrs. Alverson, which occurred about seven years after the death of Alverson: And the sisters, who had become very helpless, and had been unable to do any work for a number of years, continued to live with Mrs. Alverson, and were supported by the labor of the sons who lived with their mother.

After the death of Mrs. Alverson and the sisters of her husband, John Jones, the nephew and heir at law of John Alverson and his sisters, instituted an action of ejectment in the Circuit court of Botetourt against John Obenchain and another person who were then in the possession of the land conveyed to Mrs. Alverson as aforesaid: And on the trial, the deed to her having been excluded from the jury as evidence, on the ground that being a conveyance from a husband to his wife, it was void at law, there was a verdict and judgment for the plaintiffs: And thereupon the present plaintiffs filed this bill to enjoin said judgment, and to set up said deed.

The circumstances attending the execution of the deed was proved by the only survivor of the subscribing witnesses, which showed his competency to make it. It appeared too from his statements that he had previously made a will giving his property to his wife and her children, but being told that there might be an effort to set it aside after his death, he determined to make a deed. One witness who was examined on the subject stated that the property would not have supported Alverson and his sisters, and that the old man 261 *had frequently told him so. And the witness was of opinion that looking to the condition of Alverson and his sisters, and the necessity of nursing and attending upon them, the whole property was not more than a fair equivalent for the services which were rendered to them by the Obenchains. This witness stated further, that Alverson frequently talked to him about the disposition of his property. He said he intended it to go to his wife for her life time and then to his step sons the Obenchains, for the reason that they had worked to support him in his old age; and that he had executed a paper which was

in Henry v. Graves, 16 Gratt. 258; Sayers v. Wall, 26 Gratt. 373; Stokes v. Oliver, 76 Va. 83; Keffer v. Grayson, 76 Va. 523; Riggan v. Riggan, 93 Va. 90, 24 S. E. Rep. 920; Marling v. Marling, 9 W. Va. 91, 94; Robinson v. Woodford, 37 W. Va. 394, 16 S. E. Rep. 604.

In Sayers v. Wall, 26 Gratt. 354, it was held that a deed from a husband to his wife founded on a meritorious consideration would be supported in equity against subsequent creditors who had constructive notice of the conveyance. The court, at page 372, said: "The question now arises as to the validity of the deed to vest the real estate in Eleanor A. Sayers. It is a conveyance directly from a husband to his wife. It seems to be well settled that at law it has no validity, because of the legal unity between husband and wife, the latter having no legal existence separate from her husband. As a consequence of this old common-law doctrine, it is held by courts of law, that a deed directly from a husband to his wife must be inoperative and void; whilst if it had been made to a third person, for the benefit and separate use of the wife, the same courts hold that it is valid, and vests the beneficial estate in the wife Equity, which looks more to the substance than the form, holds that the conveyance directly from the husband to the wife, if fair and free from the taint of fraud, is just as valid as if the conveyance had been made to a trustee for the benefit of the wife. Equity will interpose a trustee to hold the estate for the benefit of the wife, or will treat the husband as a trustee for the wife, and will give the same effect to the conveyance, as if it had been made to a third person, for the sole and separate use of the wife. Huber v. Huber, 10 Ohio R. 371; Wallingsford v. Allen, 10 Peters R. 583, 24 Verm. R. 375; Deming v. Williams, 26 Conn. R. 226; Putnam v. Bickwell, 18 Wis. R. 333; Sims v. Rickets, 9 Amer. Rep. 681; Shepard v. Shepard, 7 John. C. R. 57; *Jones & Wife v. Obenchain & als., 10 Gratt. 259.*" See, in accord, Fox v. Jones, 1 W. Va. 205.

In Keffer v. Grayson, 76 Va. 523, it was held that the consideration of "love and affection" is not of itself sufficient to justify a decree for specific performance. See monographic *note* on "Consideration" at end of case; monographic *note* on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

written by Robert Sterrit, (the deed) which he thought would secure the property to them. And whilst he was on his death bed he wished witness to recollect what he had often said about the disposition of his property, and desired him to see that his desire was complied with.

Upon the hearing of the cause the Circuit court perpetuated the injunction and set up the deed; holding that it was upon a valuable as well as a meritorious consideration. And from this decree Jones and wife applied to this court for an appeal, which was allowed.

Mays, for the appellants.
Boyd, for the appellees.

ALLEN, J. This case presents the question whether a voluntary deed made by a husband to his wife, whereby he conveyed to her the whole of his estate, real and personal, though void at law, can, under the circumstances, be set up in equity as against the heir of the husband, who was his nephew. The evidence as it seems to me does not make out a case of valuable consideration. There is not to my mind any satisfactory proof of an express contract between the husband and wife and her sons by a former marriage, whereby the former, in consideration of the labor of his 262 step *sons for his benefit or the future support of himself and his aged sisters, agreed to make the conveyance. These circumstances may, and I think do, show a strong moral obligation on the part of the husband to make some provision for his wife and step children; and therefore are proper to be looked to, as showing the intent of the conveyance and the motives which induced it; but do not constitute such a valuable consideration as would protect the property against the creditors of the husband.

It is a maxim of equity that the court will not interfere in favor of a mere volunteer. The mere intention to bestow a bounty, however clearly proved, is not of itself sufficient to create a binding engagement: Some consideration is essential to the validity of the act.

In consequence of the unity of person between the husband and wife, neither can grant to the other an estate to take effect in possession during the coverture. Lit. § 168. But although such conveyance be void at law, a court of equity is not precluded under certain circumstances, from giving effect to it. Shepard v. Shepard, 7 John. Ch. R. 57.

A controversy has existed in the English Chancery court as to the extent to which a mere voluntary assignment of an equitable interest or chose in action will be enforced in equity. The cases on the subject are reviewed in the note to Ellison v. Ellison, in White's Leading Cases in Equity 167, 65 Law Lib. 192. That authorities are to some extent conflicting, but the result deduced from them is, that where a trust is actually created, and the relation of trustee and cestui que trust established, a court of equity will in favor of a volunteer, enforce the execution of the trust against the person creating it and all subsequent volunteers; although it will not create a trust or establish the relationship of trustee and cestui que trust by giving effect to an imperfect conveyance in favor of a vol- 263 unteer. A *later case of Kekewitch v. Manning, 12 Eng. L. and E. R. 120, of which however I have only seen an abstract, is said to have decided that a mere voluntary settlement of an equitable reversionary interest is binding and may be enforced as against the settler. But the principles involved in those decisions are applicable only to cases where there was no consideration of any kind for the assignment or conveyance. They do not touch the question how far a court of equity will lend its aid in giving effect to an imperfect conveyance founded on a mere meritorious consideration, meaning thereby a provision for a wife or children after marriage. In the case of Colman v. Sarrel, 1 Ves. jr. R. 50, a voluntary deed had been executed purporting to be an assignment of stock to trustees for the benefit of a stranger: Lord Thurlow refused to sustain the assignment, remarking, whenever you come into equity to raise an interest by way of trust, you must have a valuable or at least a meritorious consideration.

In the leading case of Ellison v. Ellison, Lord Eldon remarked, that where an actual transfer was made, that constituted the relation of trustee and cestui que trust, though voluntary and without good or meritorious consideration: And in another part of his opinion he adverts to the difference between a deed for pure volunteers and one making a provision for a wife and children. These expressions show that both Lord Thurlow and Eldon recognized the distinction between a deed making provision for a wife or children, and a stranger; and that the meritorious consideration in the first case would authorize a court of equity to give effect to an imperfect deed. In Ellis v. Nimmo, Lloyd & Goold 333, 10 Cond. Eng. Ch. R. 534, the direct question came up for decision in the High court of chancery in Ireland, before Sugden, lord chancellor. In that case a postnuptial agreement in writing, by which a father undertook to 264 make a provision for a *child, being a contract founded on a meritorious consideration, was specifically executed against the settler. That distinguished jurist took time to consider the question, remarking that it was a singular fact that it had never been decided; and after a review of all the cases bearing on the question, he held that the meritorious consideration was a sufficient consideration to sustain the agreement. He rests his decision mainly upon the cases in which equity interposes in aid of a defective execution of a power or surrender of a copyhold, which do not arise out of contract, but depend upon an intention to settle. In all those cases a sufficient consideration was necessary to call into exercise the powers of a court of

equity; and a provision for a wife or child being a meritorious consideration, had always been held as sufficient to enable a court to remedy a defective settlement, where there is no contract.

The cases of Dillon v. Coppin, 4 Mylne & Craig, 647, 18 Eng. Ch. R. 646, and Jefferys v. Jefferys, 1 Craig & Phil. 138, 18 Eng. Ch. R. 137, are referred to in the note in White's Leading Cases in Equity as having overruled Ellis v. Nimmo. But as is shown by a review of these cases by the American editor, they were decided on different grounds. In the case of Dillon v. Coppin, it was an imperfect transfer, and the circumstances did not indicate an absolute intention of the parent to make it. The father retained the deed in his possession during his life, and had endorsed on an envelope on the deed that it was to be given to his daughter at his death: And the case was between children of the same testator, so that the meritorious consideration was balanced. The case of Jefferys v. Jefferys was the case of a child to whose use the father had covenanted to surrender a copyhold, against the wife to whom he had devised it; and who after his death had been admitted. The two classes were 265 *equally meritorious, the children and the widow. From this review of the English cases the American editor states the result of the English authorities to be, that equity will aid a defective transfer which was intended and meant to be a complete present transfer upon a meritorious consideration, against one not standing in the relation of wife or child, as a brother or other collateral relation; but that it will not interfere between those standing upon the same meritorious consideration, being children, or children and widow of the person whose estate is in question. If such was the fair result of the English cases adverted to, the rule would hold a fortiori since the case of Kekewitch v. Manning, ubi supra; for according to the abstract of that case, a merely voluntary settlement of an equitable reversionary interest was enforced in favor of a niece against the settler herself, after a total change of circumstances, and after an express revocation by the settler, before it had ever been acted on.

The question has never been decided in this court. In Darlington v. McCoole, 1 Leigh 36, the bill was filed to set up an alleged agreement by which the father in law after marriage gave to the son in law the land in question, so far as he could give it by parol and putting him in possession. The bill was filed after the death of his wife and her father, against the son and devisee of the father. Brooke, judge, in giving the opinion of the court, remarked that in such a case, when the donor had received and the donee lost nothing, when the chief motive for the gift, a provision for the daughter, was annihilated by her death, and the father had discharged the moral obligation to provide for her issue, there was nothing to call into action the powers of a court of equity. There was neither a valuable or a meritorious consideration, without one of which a court of equity will not aid a defective 266 *conveyance; much less enforce a bare agreement, even if it were in writing. The case is no authority on the question involved in the one now under consideration; but it serves to show the impression on the minds of the judges of this court, that where there was a meritorious consideration, meaning thereby a provision for a wife or child, equity would enforce a defective conveyance.

In McIntyre v. Hughes, 4 Bibb. R. 186, the Court of appeals of Kentucky enforced specifically an obligation by the father to his son for the conveyance of land, against the other children of the obligor, the father being dead, although founded on the consideration of blood only. The judge, in giving the opinion of the court, remarked, that under the statute of uses, the proximity of blood between the father and son is sufficient to support a covenant by the father to stand seized to the use of the son; and if so, it must have been prior to the statute, a sufficient consideration to have created the use; that prior to the statute transferring the possession to the use, it was the common practice to resort to equity to enforce the execution of a use, and that proximity of blood had always been a sufficient consideration for the interposition of equity, where there was no other circumstance in the case to forbid such interposition. In the case of Ellis v. Nimmo, Lord Chancellor Sugden refers to the practice under the statute of uses, and rests his decision in some measure upon the same reason which had previously operated on the Court of appeals of Kentucky.

In Dennison v. Goehring, 7 Barr. Pa. R. 175, Gibson, chief justice, remarked, that natural affection, though not a valuable is a meritorious consideration, on the foot of which an agreement by a father to secure a provision for his child has been enforced in equity. In the case of Buford's heirs v. McKee, 1 Dana R. 107, it was decided that this principle of a meritorious 267 *consideration would not be extended to collateral relations. And in other cases it is held that although such voluntary agreements are executed when made in favor of a wife or child, it is only done where the agreement is under seal, which imports a consideration at law.

The case before us steers clear of all the difficulties suggested by any of the cases referred to. The provision was for a wife, not by a parol agreement or an agreement not under seal, but by regular conveyance under seal. No creditor was injured, and the party claiming against the deed, is not the grantor himself or a subsequent purchaser for value without notice, or one standing in the relation of a wife or child; but a collateral relation, the nephew of the grantor. The proof shows that the consideration was not only meritorious in conse-

quence of the relation between the husband and wife, but that the grantor regarded it as highly meritorious; and that his object was not only to make provision for his wife, but through her to acquit himself in part of the obligation which he admitted he owed to her and her sons for their labor on his farm, and the support thereby afforded to himself and his aged and infirm sisters. He told his friend on his death bed, that he intended his property to go to his wife during her life time and then to his step sons, for the reason that they had worked to support him in his old age; and that he had executed a paper which he thought would secure his property to his wife and his step sons.

He further stated that one of the considerations on which he had given his property to the young Obenchains was, that they should take care of his sisters and support them decently during their lives: and he frequently told the witness he could not have supported himself and his sisters without the aid of his step sons. This proof may not amount to evidence of 268 *a direct contract for a valuable consideration. But it proves the grantor's own sense of the obligation resting upon him, and obviates any objection to the deed in consequence of its embracing all his small estate. He had confidence in his wife and her children, that they would continue as they had done to provide for the wants of himself and his sisters. In this he was not mistaken. Three of his sisters survived him, and were maintained by his widow and children as long as they lived: though the evidence shows the charge was a heavy one. These sisters with their nephew, were the heirs of the grantor, and as such entitled to three-fourths of his estate: and it does not appear that either of them preferred any claim to the property after the death of their brother.

The claim of the appellees to the aid of a court of equity to aid and enforce the deed from the husband to his wife, is in all its respects stronger than the case of Shepard v. Shepard, 7 John. Ch. R. 63; which was a case of a deed from husband to wife, void at law, but aided and enforced in equity; it is as in that case, the safest and most effectual relief; and it is that which the grantor intended. One of the witnesses proves that he said he had made a will making the same disposition of his property that was made by the deed. But being apprehensive his will might not stand, and being informed he could convey his property to whom he pleased, he made the conveyance in question. I think it was intended to be an operative instrument from the time of its execution; and that as it was defective at law, it presents a proper case for the interposition of a court of equity to aid the defect.

The other judges concurred in the opinion of Allen, J.

Decree affirmed.

CONSIDERATION.

I. Consideration Defined.
II. Necessity for Consideration.
III. Sufficiency and Nature.
IV. Adequacy of Consideration.
V. Meritorious Consideration.
VI. Valuable Consideration.
A. Subject in General.
B. Compromise of Conflicting Claims.
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D. Postnuptial Settlements—Consideration for.
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VIII. Illegality of Consideration.
IX. Failure of Consideration.
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XI. Bona Fide Purchaser—Rights of.
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A. The Declaration.
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XIV. Evidence.
A. In General.
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C. Presumption—Burden of Proof.
XV. Relief in Equity.

Cross References to Monographic Notes.

Assignments, appended to Ragsdale v. Hagy, 9 Gratt. 409.
Assumpsit, appended to Kennaird v. Jones, 9 Gratt. 183.
Bills, Notes and Checks, appended to Archer v. Ward, 9 Gratt. 622.
Bonds, appended to Ward v. Churn, 18 Gratt. 801.
Debt, The Action of, appended to Davis v. Mead, 13 Gratt. 118.
Deeds, appended to Flott v. Com., 12 Gratt. 564.
Fraudulent and Voluntary Conveyances, appended to Cochran v. Paris, 11 Gratt. 348.
Gaming, appended to Neal v. Com., 22 Gratt. 917.
Judicial Sales, appended to Walker v. Page, 21 Gratt. 686.

I. CONSIDERATION DEFINED.

Anything that may be detrimental to the promisee or beneficial to the promisor in legal estimation, will constitute a good consideration for a promise. Halsey v. Peters, 79 Va. 68; Colgin v. Henley, 6 Leigh 104; Sturm v. Parish, 1 W. Va. 144; Jackson v. Hough, 38 W. Va. 236, 18 S. E. Rep. 575; 3 Min. Inst. (2d Ed.) 17.

Loss or disadvantage to the person to whom the promise is made, is as good a consideration as benefit or advantage to the person making it. Thus, a forbearance to sue, or the surceasing of an action, is a good consideration, although that may operate exclusively for the benefit of the original debtor. Colgin v. Henley, 6 Leigh 104.

II. NECESSITY FOR CONSIDERATION.

In General.—It is said in Stephens v. White, 2 Wash. 206, that a promise without a consideration of some sort imposes no legal obligation upon the party who makes it.

Same—Collateral Promise—Time of Rendering.—A promise in writing, not under seal, by a son to pay a debt for his father must be considered a *nudum pactum*, unless some consideration moving from the creditor to the son, or some agreement binding the creditor to forbearance, or the like, in the event of the assumption by the son, be proved. Parker v. Carter, 4 Munf. 273; Beverleys v. Holmes, 4 Munf. 95.

Collateral Promise—Legal Rights.—A promise of one person to pay the debt of another, though in writing, must be founded on consideration to make it binding, but under the statute of frauds in Virginia the consideration need not be set forth in the writing. Colgin v. Henley, 6 Leigh 85. An agreement without consideration is no bar to legal rights. Mosby v. Leeds, 3 Call 439.

Same—Voluntary Statement—Estoppel.—The mere statement of an appellant to an appellee that he did not intend to or would not appeal does not prevent an appeal, unless there was a consideration for the statement, or the appellee has acted on it to his prejudice. Southern Ry. Co. v. Glenn, 98 Va. 309, 36 S. E. Rep. 395, 6 Va. Law Reg. 222.

Same—Promise of Executor.—A, executor of B, writes to C, a creditor of B, that as soon as he is able to dispose of his crops, he will pay the claim, or will let him have any property in his possession at moderate valuation. This will not bind A in his own right without an averment of assets, or a forbearance to sue, or of some other consideration. Taliaferro v. Robb, 2 Call 258.

Mercantile Securities—Instruments under Seal.—A consideration need not be shown in mercantile securities; here there arises a presumption of consideration, *prima facie* between the parties and conclusive as to subsequent holders for value without notice. McNiel v. Baird, 6 Munf. 316. So in case of instruments under seal a valuable consideration is conclusively presumed. Harris v. Harris, 23 Gratt. 751; Goodall v. Stuart, 2 H. & M. 111. See *infra*, "Presumption—Burden of Proof."

III. SUFFICIENCY AND NATURE.

Promise to Pay the Debt of Another—Need Not Be at Creditor's Request.—A promise founded on sufficient consideration will be binding, though not made at the request or even with the knowledge of the person whose debt the promisor assumes, nor at the request of the creditor. Colgin v. Henley, 6 Leigh 104.

Partnership Agreements—Individual Debts.—Partnership effects may be applied, by the concurrence of the partners, to pay an individual debt of one of them, if the other receives a sufficient consideration therefor, though they may be unable to pay all their partnership debts. Marks v. Hill, 15 Gratt. 400. See Millhiser v. McKinley, 98 Va. 207, 35 S. E. Rep. 446.

Purchase—Conditional Promise—Father and Son—Mutual Obligation.—A father-in-law having promised his son-in-law that, if he would purchase a certain tract of land, he would assist him in paying for it by letting him have the amount of a particular bond, when collected; and the son-in-law having thereupon made the purchase, this promise was held to be upon sufficient consideration, and obligatory in law. Scott v. Osborne, 2 Munf. 413. There can be no contract without mutual obligation. Innis v. Roane, 4 Call 379.

Delivery of Note—Condition.—Where an agreement to build a house stipulated that a note for part of the price should be delivered when a certain amount of the work had been completed, and a note was delivered before such time, but after the payee had expended in labor and material more than the amount of the note, it was held that there was a valid and sufficient consideration to support the note, the delivery before the time, when, according to the agreement, it could be demanded, not making the note an accommodation note. Ould v. Myers, 23 Gratt. 383.

Contracts—Railroad Crossings—Gates.—Although a street-railway company may have the right to cross a railroad at grade without the consent of the railroad company, yet the benefits derived from the increased safety to its passengers furnished a sufficient consideration for its contract with the railroad company to pay one-half the costs of the erection and maintenance of such gates and the salary of a watchman. Richmond, etc., Ry. Co. v. Richmond, etc., R. Co., 96 Va. 670, 32 S. E. Rep. 787. See Ocheltree v. McClung, 7 W. Va. 232; also, Knott v. Seamands, 25 W. Va. 99.

Auctioneer—Promise of Indemnity.—The plaintiff being employed by A and B to sell land at public auction, cries it out to C as the highest bidder. A considering the sale as unfair, directs the plaintiff to cry it again. B promises to indemnify the plaintiff if he will not comply with the request, to which he accedes; in consequence of which he is sued by A and B, and damages are recovered against him. The consideration of the promise made by B is both legal and sufficient to support an action against him upon his promise of indemnity. Carr v. Gooch, 1 Wash. 260; Field v. Spotswood, 1 Wash. 280. See Long v. Israel, 9 Leigh 556; Chichester v. Vass, 1 Call 83; Price v. Winston, 4 Munf. 63. See also, Walker v. Henry, 36 W. Va. 100, 14 S. E. Rep. 440; Jackson v. Hough, 38 W. Va. 236, 18 S. E. Rep. 575.

Extension of Time—Release of Surety.—An agreement between the creditor and the principal debtor to extend the time of payment of the debt for a definite period, if founded on a sufficient consideration and made without the surety's consent, will discharge the surety. Glenn v. Morgan, 23 W. Va. 467; Shields v. Reynolds, 9 W. Va. 483; Knight v. Charter, 22 W. Va. 423; Hill v. Bull, Gilmer 149; Norris v. Crummey, 2 Rand. 323, 2 Rob. Pr. 133; Harnsbarger v. Kinney, 13 Gratt. 511. Payment of interest in advance is a sufficient consideration, even if it be at a usurious rate. Armistead v. Ward, 2 Pat. & H. 504. See also, Hunter v. Jett, 4 Rand. 104; Alcock v. Hill, 4 Leigh 622; Ward v. Vass, 7 Leigh 135; Chichester v. Mason, 7 Leigh 244.

Agreement to Release a Debt—Insufficient Consideration.—A creditor does not lose his right to collect a debt by simply declaring his intention not to collect it. If the agreement to release is not based upon sufficient consideration he may still collect. Triplett v. Woodward, 98 Va. 187, 35 S. E. Rep. 455; Southern Ry. Co. v. Glenn, 98 Va. 309, 36 S. E. Rep. 395.

Statement of Assignor of Bond—Validity—Insolvency of Obligor.—R assigns the bond of G to K without consideration, and K transfers it to H as collateral security for goods purchased of H on credit, upon the understanding that if R does not acknowledge his liability as assignor of said bond, H may return it and look out for other security. R being called on by H to know if he was responsible as assignor of the bond, assured H in writing that he was aware of no offset or objection to said bond, nor of anything to affect his liability as assignor thereof. H, therefore, did not return the bond and apply for other security. When the time for payment for the goods arrived G was insolvent. This was not a sufficient consideration to support an action of *assumpsit* by H against R. Hopkins v. Richardson, 9 Gratt. 485. See also, Hale v. Crow, 9 Gratt. 263.

IV. ADEQUACY OF CONSIDERATION.

In General—Executed Contract.—An executed contract will not be set aside for mere inadequacy of consideration. It is only in those cases where the inadequacy of price is so gross as to lead to the

irresistible inference of fraud that a sale made without imposition, between parties standing on equal ground will be rescinded by a court of equity. Matthews v. Crockett, 82 Va. 394; Jones v. Degge, 84 Va. 685, 5 S. E. Rep. 799; Greer v. Greers, 9 Gratt. 330; Tebbs v. Lee, 76 Va. 744; Hale v. Wilkinson, 21 Gratt. 82; Southerlin v. March, 75 Va. 223; Lowe v. Trundle, 78 Va. 69.

Inadequacy of Price—Unconscionable Bargains.—Inadequacy of price, whether it be so gross as to be *per se* proof of fraud or not, if attended by circumstances evincing unconscientious advantage taken by the vendee of improvidence and distress of the vendor, will avoid the contract in equity, though it be a contract executed. M'Kinney v. Pinckard, 2 Leigh 149, 21 Am. Dec. 601; Samuel v. Marshall, 3 Leigh 567.

Presumption of Fraud—Estimated Value.—Inadequacy that will justify the presumption of fraud must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense. Half the estimated value of property is not always inadequacy. Bradford v. McConihay, 15 W. Va. 732; White v. McGannon, 29 Gratt. 511; Wood v. Harmison, 41 W. Va. 376, 23 S. E. Rep. 560; Lallance v. Fisher, 29 W. Va. 512, 2 S. E. Rep. 775.

Sheriff and Execution Debts—Oppression.—A sheriff on the day appointed for the sale of a debtor's goods undertook to pay the amount of the execution in consideration of the debtor assigning to him a well-secured bond of a third person for over double the amount of the debt, and agreed to return the bond if the debtor should pay the debt within a month. Upon the debtor's failure to pay within the prescribed time a dispute arose between the parties as to the debtor's right to subsequently redeem the bond and upon receipt of $10 from the sheriff the debtor surrendered the written evidence held by him of his claim to redeem the bond. It was held that whether the original transaction was a pledge or a conditional sale the debtor is entitled to relief on the ground of fraud and oppression practiced upon him by the sheriff and on account of the inadequacy of price paid. Hyde v. Nick, 5 Leigh 386.

Same—Condition Attached to Legacy.—A party accepting a legacy coupled with a condition, may bind herself to the performance of the condition, although the burden may exceed the benefit. Hill v. Huston, 15 Gratt. 350; Taliaferro v. Day, 82 Va. 95. See McCandlish v. Keen, 13 Gratt. 615.

Unequal Conditions—Rescission—Evidence of Parties.—A release by an old woman to her agent of a large indebtedness, in consideration of small services, will not be upheld in the absence of all evidence of the circumstances under which the release was executed. The agent, after the death of the principal, is not a competent witness to show such circumstances. Triplett v. Woodward, 98 Va. 187, 35 S. E. Rep. 445.

Confidential Relations—Grounds of Rescission.—A sale by a young man, who had just arrived at the age of twenty-one years, of a reversion in real estate, there having been no fraud or imposition on the part of the purchaser, and no confidential relation between the parties, will not be set aside for mere inadequacy of price. Mere inadequacy of consideration is not sufficient to avoid a sale, unless it is so gross as to shock the moral sense. Cribbins v. Markwood, 13 Gratt. 495; Mayor v. Carrington, 19 Gratt. 74. See discussion of subject in M'Kinney v. Pinckard, 2 Leigh 149. See also, Millhiser v. McKinley, 98 Va. 207, 35 S. E. Rep. 446; Forde v. Herron, 4 Munf. 316; Whittaker v. S. W. Va. Imp. Co., 34 W. Va. 223, 12 S. E. Rep. 509; Pennybacker v. Laidley, 33 W. Va. 639, 11 S. E. Rep. 44; Brachan v. Griffin, 3 Call 433; Committee v. Ralston, 98 Va. 625, 37 S. E. Rep. 288; Lowe v. Trundle, 78 Va. 65.

Deed of Separation—Invalid—Children.—A deed of separation being invalid as to husband and wife, on the ground of gross inadequacy of consideration is invalid as to the children. Switzer v. Switzer, 26 Gratt. 574.

Unequal Conditions—Gross Inadequacy.—A contract will be set aside in equity for gross inadequacy of consideration where there is inequality in the position of the parties and their relation is such as to warrant the presumption that the defendant took advantage of the plaintiff's illiteracy and ignorance. George v. Richardson, Gilmer 230; Switzer v. Switzer, 26 Gratt. 574; Pennington v. Hanby, 4 Munf. 140.

Trustee—Creditor—Sale of Property.—A trustee having sold property for one-fourth of its value, without getting the legal title, and the principal creditor secured by the deed having become the purchaser, the grantor being absent at the time, and the money to pay the debts having been forwarded to his agent at the place of sale, and being at the time in the postoffice at the place and not delivered to the agent, though in the expectation of receiving it he had several times applied at the office for the letter, a court of equity will set aside the sale. Rossett v. Fisher, 11 Gratt. 492. See Gibson v. Jones, 5 Leigh 370; Breckenridge v. Auld, 1 Rob. 148; Dabney v. Green, 4 H. & M 101.

Mental Weakness—Rescission.—Mere inadequacy of consideration is no ground for rescinding contracts. But great weakness of mind, coupled with gross inadequacy of consideration, will induce courts of equity to rescind contracts, where from these facts, undue influence is inferable. Crebs v. Jones, 79 Va. 381.

Inadequacy—Judicial Sale—Rejection of Bid.—Where sale of land is decreed to pay specific legacies, and the residue to four residuary legatees, and the land is bid in by one of those legatees, and the other legatees oppose the acceptance of the bid and the confirmation of the sale, and show by numerous witnesses well acquainted with the land, that though the sale was open and fair, yet the price bid was grossly inadequate, and that the land if divided and sold in parcels would, on the usual terms of payment in such cases, bring two or three times the price bid: *held*, there was no error in the court rejecting the bid, and refusing to confirm the sale and directing a resale. Terry v. Coles, 80 Va. 695; Taylor v. Cooper, 10 Leigh 317; Brock v. Rice, 27 Gratt. 812. The general rule is that great inadequacy of price is, when clearly shown, sufficient cause to set aside such sale. Sinnett v. Cralle, 4 W. Va. 600; Hartley v. Roffe, 12 W. Va. 401; Kable v. Mitchell, 9 W. Va. 492; Teel v. Yancey, 23 Gratt. 691; Talley v. Starke, 6 Gratt. 339; Roberts v. Roberts, 13 Gratt. 639; Heywood v. Covington, 4 Leigh 373. See Evans v. Spurgin, 6 Gratt. 107.

See generally, monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

V. MERITORIOUS CONSIDERATION.

Conveyance from Husband to Wife.—Though the conveyance in favor of a wife and children is not founded on a valuable, but only on a meritorious

consideration, a court of equity will give effect to it against subsequent creditors of the husband. Sayer v. Wall, 26 Gratt. 354. See Riggan v. Riggan, 98 Va. 78, 24 S. E. Rep. 920; Keffer v. Grayson, 76 Va. 523; Fox v. Jones, 1 W. Va. 205; 2 Min. Inst. (2d Ed.) 883. In Wood v. Harmison, 41 W. Va. 376, 23 S. E. Rep. 560, an important distinction is made between the effect of a meritorious, and an inadequate consideration.

Same—Upheld in Equity.—A deed from a husband to his wife, conveying to her all his property real and personal, under circumstances showing a strong meritorious consideration, will be upheld in equity against a nephew, the heir at law of the grantor. Jones v. Obenchain, 10 Gratt. 259; Stokes v. Oliver, 76 Va. 72.

Personal Property Acquired by Marriage—Subsequent Deed.—Although personal property, acquired by marriage, cannot be considered a valuable consideration, to support a subsequent deed for the benefit of the wife, yet it is a meritorious consideration and will be supported or set aside according to circumstances. Harvey v. Alexander, 1 Rand. 219.

Same—Parol Gifts of Land—Statute of Frauds.—The statute of frauds has no bearing on parol gifts of land, which are founded on meritorious considerations. If the promise reduced to writing, could, under the circumstances, be enforced in equity, it may be, although by parol. Halsey v. Peters, 79 Va. 68.

VI. VALUABLE CONSIDERATION.

A. SUBJECT IN GENERAL.

Agreement to Support.—An agreement to maintain and support another is a valuable consideration sufficient to support a transfer of property. Keener v. Keener, 34 W. Va. 421, 12 S. E. Rep. 729; Hisle v. Rudasill, 89 Va. 519, 16 S. E. Rep. 673; Henderson v. Hunton, 26 Gratt. 926; Dickeschied v. Bank, 28 W. Va. 340. See also, on this subject, Williams v. Lewis, 5 Leigh 686; Baird v. Rice, 1 Call 18, 1 Am. Dec. 497.

Same—Father and Son.—A parol contract between a father and his son, whereby the father agreed to give to the son a certain tract of land, on the consideration that the son would support the father and his wife for their lives, is a valid contract, and will be enforced at the suit of the children of the son after his death against other children of the father, who had fraudulently procured a deed for the land from the father, with the knowledge of the said contract. Lester v. Lester, 28 Gratt. 737. See also, Terry v. Clark, 84 Va. 221, 4 S. E. Rep. 372.

For Whose Benefit the Consideration Must Inure—The consideration, which will support an action for the debts of a married woman or her contracts, so as to make her separate estate liable, need not inure to her own benefit, or that of her separate estate, but it may inure to the benefit of her husband, or any third party, or may be a mere prejudice to the other contracting party; in short it may be any consideration which would support the contract, if she were a feme sole. Radford v. Carwile, 13 W. Va. 572; Hughes v. Hamilton, 19 W. Va. 366; Patton v. Bank, 12 W. Va. 587; Camden v. Hiteshew, 23 W. Va. 236.

Compensation for Services—Promise of Legacy—Though services performed with a view to a legacy, and not in expectation of a reward in the nature of a debt, will not generally be the ground of an action, yet if performed at the request of the testator, or if he has promised to pay for the services either before or after they were performed, an action is maintainable. Jincey v. Winfield, 9 Gratt. 708.

Foregoing Intention to Remove.—J being wealthy and childless, verbally agrees with his brother C who is poor and has a large family of children, that if C will forego his intention to move to the West, and move to and settle on a tract of land of J near his residence, J will convey the land to him in fee; C induced by this promise, executes the agreement on his part. *Held*, there was no consideration either meritorious or valuable to support the agreement, the plaintiff not having shown that he suffered any inconvenience or damage on account of the other party's promise, and equity cannot decree specific execution against J's heirs. Reed v. Vannorsdale, 2 Leigh 569.

Indorsement—Parting with Goods on Faith of.—In the case of Hopkins v. Richardson, 9 Gratt. 494, it was held that the plaintiffs' parting with their goods to A, upon the faith of the defendant's indorsement made for that purpose was ample consideration for his liability.

Debt Barred—New Promise—Binding.—If a debt is discharged under bankruptcy or insolvency laws, the debtor by a promise to pay it, waives the benefit of those laws, and payment may be compelled. The old consideration sustains the debt. Walker v. Henry, 36 W. Va. 100, 14 S. E. Rep. 440; Mackie v. Davis, 2 Wash. 219. See also, Stephens v. White, 2 Wash. 206.

Statute of Limitations—New Promise.—The original consideration is likewise sufficient to support a new promise to pay a debt barred by the statute of limitations. Rowe v. Marchant, 86 Va. 177, 9 S. E. Rep. 995; Aylett v. Robinson, 9 Leigh 45. A simple written contract can be taken out of the statute of limitations, not by part payment or by promise to settle, but only, by a promise in writing, or acknowledgment from which a promise to pay must be inferred. Gover v. Chamberlain, 88 Va. 286, 5 S. E. Rep. 174.

Partnership Debt—Novation.—Where there is an express agreement between the creditor and his partnership or joint debtor, whereby the creditor agrees to take and accept the individual note or obligation, of the partner or joint debtor, in discharge of the partnership or joint debt, such agreement is founded upon a valid consideration, and will have the effect to discharge the joint or partnership debt. Bantz v. Basnett, 12 W. Va. 772; Bowyer v. Knapp, 15 W. Va. 296.

Arrears of Interest—Voluntary Bond.—Arrears of interest which have accrued on a voluntary bond were held to form a valuable consideration to sustain any other bond or conveyance, or to warrant the payment of arrears, even as against creditors in Welles v. Cole, 6 Gratt. 645. See also, Fones v. Rice, 9 Gratt. 569. See 3 Min. Inst. (Part 1, 2d Ed.) 108.

Refraining from Suit—Judgments.—Refraining from instituting proceedings to subject land to the payment of a judgment which is a lien thereon, on a written promise by the owner of the land to pay the judgment, constitutes a valuable consideration for the promise to pay it, although the landowner was not previously liable therefor. Bradshaw v. Bratton, 96 Va. 577, 32 S. E. Rep. 56.

Bond—Conditioned on Slave Service—Certainty of Contract.—Emancipated slaves (mother and daughter) remained in the service of their former master until a short time before he gave them a bond conditioned that he would devise to them certain real and personal property, definitely described, "provided they would return and live and remain with" him and his wife during their natural lives. *Held*,

in an action brought after his death to compel his personal representatives to convey and deliver the property, that the contract was on valuable consideration and sufficiently definite, both as to the property to be devised and the services to be performed. Burdine v. Burdine, 98 Va. 515, 36 S. E. Rep. 992. 6 Va. Law Reg. 389.

Conditional Agreement—Enforced in Equity.—An agreement of a creditor to remit damages recovered upon the affirmance of a judgment, upon condition that the debtor pay the balance, with interest, by a certain time, is binding upon him, and will be enforced in equity. Robertson v. Campbell, 2 Call 421.

Part Payment—Accepted in Full.—Where a father or other relative pays one-half of a joint note on behalf of the promisor in consideration of an agreement that the promisee will release such promisor from payment of the other half, and the contract is executed, the money received, and the release indorsed on the note, such a transaction constitutes a valid contract, of which said promisor can avail himself when sued for the remaining half of said note. Maslin v. Hiett, 37 W. Va. 15, 16 S. E. Rep. 437. See "Want of Consideration," *infra*.

Part Payment for Whole Debt—New Elements—Accord and Satisfaction.—An unsealed agreement to accept a smaller sum than the entire debt, does not bind the creditor. "But this rule being highly technical and often unjust, has been gradually falling into disfavor; and the courts have not only confirmed its operation strictly within its own narrow limits, but have seized upon every possible opportunity to evade its application." Hence, wherever a new element enters into the agreement to take a part for the whole, the entire debt is satisfied; *e. g.*, a promise to pay at an earlier date, or at a different place, a promise by a new party, or the like. Seymour v. Goodrich, 80 Va. 303; Smith v. Chilton, 84 Va. 840, 6 S. E. Rep. 142. Thoroughly discussed and so held in Lee v. Harlow, 75 Va. 22, 9 Va. Law J. 264 *et seq.* But see Va. Code 1887, § 2858.

Execution of New Note by Express Agreement.—Where before a note is due, a part of the debt is paid, and a new note executed for the residue, by the debtor, and an express agreement made between the parties that the old note shall be surrendered, such agreement is founded upon valuable consideration, and extinguishes the old note, and no suit can be maintained thereon. Bantz v. Basnett, 12 W. Va. 772. The question, as to the effect of giving a new note for an old one, without any express agreement, is discussed in this case and numerous authorities cited. See, in accord, Jarrett v. Ludington, 9 W. Va. 383; McLaughlin v. Beard, 5 W. Va. 588.

B. COMPROMISE OF CONFLICTING CLAIMS.

In General.—It is said, in Braxton v. Harrison, 11 Gratt. 60, that, "There can be no doubt that the resignation of a colorable claim, conflicting with that of another person, and the settlement of the dispute between the parties without suit, constitute a good consideration." And "in these cases, inequality of consideration does not, of itself, form any objection."

Same—Favored in Law.—The consideration of compromising doubtful rights, and settling boundaries, are not only good but favored in law. Zane v. Zane, 6 Munf. 406; Jarrett v. Nickell, 4 W. Va. 278.

Dispute—Compromise—Conveyance of Land.—Where two parties claim title to lands, and they compromise the dispute by one party paying a sum of money, and the other conveying the land with warranty, such agreement will be binding, if not brought about by fraud. Moore v. Fitzwater, 2 Rand. 442; Davisson v. Ford, 23 W. Va. 617. If, however, there is no foundation for such claim of liability, then the promise made to settle this liability assumed in the compromise has not sufficient consideration to sustain it and no suit can be based on such promise, but the mere proof that the liability is doubtful will not render the consideration insufficient. Davisson v. Ford, 23 W. Va. 627.

Compromise of Bastardy Proceedings—Public Policy—Defence.—A note given to a woman in compromise of bastardy proceedings is binding and valid, and on sufficient consideration, and the payment thereof cannot be avoided on the ground that the compromise of such proceedings is contrary to public policy or public morals, nor can the innocence of the putative father be set up as a defence against the recovery, in the absence of fraud on the part of the obligee in the procurement thereof. Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. Rep. 812.

C. RELEASE OF DOWER.—Relinquishment of dower to the extent of its value, is sufficient consideration for a postnuptial settlement as against the husband's creditors. Strayer v. Long, 86 Va. 559, 10 S. E. Rep. 574; Cronie v. Hart, 18 Gratt. 789; William & Mary College v. Powell, 12 Gratt. 373, 385; Taylor v. Moore, 2 Rand. 563; Lee v. Bank, 9 Leigh 200; Harrison v. Carroll, 11 Leigh 476, 484; Burwell v. Lumsden, 24 Gratt. 446; Davis v. Davis, 25 Gratt. 590; Quarles v. Lacy, 4 Munf. 251; Blanton v. Taylor, Gilmer 209; Blow v. Maynard, 2 Leigh 29; Harvey v. Alexander, 1 Rand. 219. The settlement will be set aside as to the excess. Davis v. Davis, 25 Gratt. 590.

Same—Examples.—Release of dower right in large farm by the wife is sufficient consideration for much smaller farm purchased by the husband and conveyed to a trustee for the benefit of the wife and children. Payne v. Hutcheson, 32 Gratt. 812. See also, Harvey v. Alexander, 1 Rand. 219; Quarles v. Lacy, 4 Munf. 251; Gatewood v. Gatewood, 75 Va. 412; Lewis v. Caperton, 8 Gratt. 150.

By an agreement in contemplation of marriage, the intended husband bound his estate to pay the intended wife certain sums of money, if she survived him; which were to be in bar of and in full compensation for her dower. *Held*, this agreement barred her of her dower in her husband's real estate; but did not deprive her of her distributable share of his personal estate. Findley v. Findley, 11 Gratt. 434. See Faulkner v. Faulkner, 3 Leigh 255; Charles v. Charles, 8 Gratt. 486.

Powers of Wife over Property.—A wife has full power to dispose of the whole estate conveyed to her under a deed of settlement. A mortgage of such estate afterwards executed by husband and wife joining, to secure a just debt due from the husband is for valuable consideration and binding. Lee v. Bank, 9 Leigh 200; Finch v. Marks, 76 Va. 207; Bailey v. Hill, 77 Va. 492; Frank v. Lilienfeld, 33 Gratt. 377; Bain v. Buff, 76 Va. 374, and cases cited; Penn v. Whitehead, 17 Gratt. 503, 94 Am. Dec. 478; Darnall v. Smith, 26 Gratt. 378. See also, Bank v. Chambers, 30 Gratt. 202, 32 Am. Rep. 661; Justis v. English, 30 Gratt. 565; Burnett v. Hawpe, 25 Gratt. 481; Garland v. Pamplin, 32 Gratt. 305.

D. POSTNUPTIAL SETTLEMENTS—CONSIDERATION FOR.—Although a postnuptial settlement may have been made under such circumstances as to be void as to creditors of the husband, yet if the wife relinquishes her interest in property, or assumes the payment of debts of her husband so as to

make them charges on her separate estate, upon the faith of such settlement, it will be held good to the extent of a just compensation for the interest which she may have parted with, or of the debts which she has assumed to pay. Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep. 1; William & Mary College v. Powell, 12 Gratt. 372, 385; Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615; Strayer v. Long, 86 Va. 559, 10 S. E. Rep. 574; Quarles v. Lacy, 4 Munf. 251; Blanton v. Taylor, Gilmer 209; Taylor v. Moore, 2 Rand. 563; Harrison v. Carroll, 11 Leigh 476; Wood v. Harmison, 41 W. Va. 376, 23 S. E. Rep. 560; Goshorn v. Snodgrass, 17 W. Va. 717; Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780; Ficklin v. Rixey, 89 Va. 832, 17 S. E. Rep. 325. But a mere parol agreement, whereby the husband agrees to settle certain property on the wife in consideration of her relinquishing her contingent right of dower in certain lands of the husband, which he proposes to convey for the benefit of creditors is not binding on the wife and furnishes no valuable consideration for the property settled upon her as against attaching creditors, before she has in fact relinquished her dower right. Harrison v. Carroll, 11 Leigh 477.

Postnuptial Settlement—Wife's Equity.—"The wife's equity is so substantial an interest that it will constitute a valuable consideration for a postnuptial settlement by the husband upon her (made while the equity exists) which will be sustained against his creditors to the extent of the equity, by a court of 'chancery.'" Poindexter v. Jeffries, 15 Gratt. 373; Walden v. Walden, 33 Gratt. 88. See 2 Min. Inst. (4th Ed.) 688; 1 Min. Inst. (4th Ed.) 332; 6 Am. & Eng. Enc. Law 711.

Release of Dower—Promise of Settlement.—Even if the wife relinquish her dower on the mere promise that other property shall be settled on her, as a compensation for the interest so relinquished, in the absence of fraud, such settlement will not be disturbed unless it manifestly appears to be grossly excessive. Burwell v. Lumsden, 24 Gratt. 443; DeFarges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805; Taylor v. Moore, 2 Rand. 563. Though the settlement on the wife is made fraudulent as to her husband's existing creditors, the fraud will not be imputed to her. Strayer v. Long, 86 Va. 557, 10 S. E. Rep. 574; William & Mary College v. Powell, 12 Gratt. 387; Blanton v. Taylor, Gilmer 209; Taylor v. Moore, 2 Rand. 563, 580; Quarles v. Lacy, 4 Munf. 251.

Proof of Consideration—Postnuptial Settlements.—Where the settlement is made before the relinquishment no distinct proof of a previous agreement is required. Strayer v. Long, 86 Va. 557, 10 S. E. Rep. 574; William & Mary College v. Powell, 12 Gratt. 386. See also, Taylor v. Moore, 2 Rand. 563.

VII. COLLATERAL PROMISES.

Promise to Pay Debt of Another—Writing Required.—Where the consideration of a defendant's undertaking or promise is money or property to be furnished to or received by a third person, if the transaction be such that the third person remains responsible to the person who furnishes him with such money or property, or from whom the consideration proceeds, such promise or undertaking is collateral, and under the statute of frauds will not bind the defendant, unless it be in writing. Radcliff v. Poundstone, 23 W. Va. 724; Waggoner v. Gray, 2 H. & M. 603; Cutler v. Hinton, 6 Rand. 509; Ware v. Stephenson, 10 Leigh 155; Noyes v. Humphreys, 11 Gratt. 636; William & Mary College v. Powell, 12 Gratt. 387. See W. Va. Code, 1899, ch. 98, § 1.

Parol Contract—Debt of Another.—Where the promise to pay the debt of another arises out of some new and original consideration, it is not within the statute of frauds, and is binding, though not in writing. Wright v. Smith, 81 Va. 777; Hopkins v. Richardson, 9 Gratt. 494.

Same—Wife Surety for Husband.—A married woman as surety for her husband or any one else can bind her separate estate by a writing without any consideration moving to her or her estate, the benefit to the principal being sufficient. Williamson v. Cline, 40 W. Va. 195, 20 S. E. Rep. 921; Radford v. Carwile, 13 W. Va. 572; Dages v. Lee, 20 W. Va. 584; Hughes & Co. v. Hamilton, 19 W. Va. 366. See *ante*, "Valuable Consideration. A. Subject in General."

New Note—Extension of Time—Surety.—Forbearance to sue being valuable consideration, if a creditor takes from his debtor and a surety a note giving further time for payment, that is sufficient consideration to bind the surety. Williamson v. Cline, 40 W. Va. 194, 20 S. E. Rep. 917; Bank v. Good, 21 W. Va. 455; Hopkins v. Detwiler, 25 W. Va. 734.

Forbearance to Sue—Promise of Second Mortgagee.—The forbearance of a first mortgagee to foreclose his mortgage is a valuable consideration sufficient to support a promise of a second mortgagee to pay a certain sum upon the first mortgage within a given time. Colgin v. Henley, 6 Leigh 85.

VIII. ILLEGALITY OF CONSIDERATION.

Restraint of Marriage.—A bequest given on condition, in restraint of marriage is upon an illegal consideration and not binding. Selden v. Keen, 27 Gratt. 576.

Illegal Promise of Marriage.—A promise of marriage made in consideration of sexual intercourse is illegal and void. Burke v. Shaver, 92 Va. 345, 23 S. E. Rep. 749.

Contract for Conveyance of Land Not Yet in Possession.—It seems that a contract, under seal, between two brothers by which one of them, for a fair and valuable consideration, agrees that, when he shall obtain possession of a certain tract of land expected to be devised to him by their father, he will convey it to the other, is not *contra bonos mores* and may support an action of covenant at law, or be enforced specifically in a court of equity. Lewis v. Madisons, 1 Munf. 303. See M'Cann v. Janes, 1 Rob. 256; Clarke v. Reins, 12 Gratt. 98.

Good and Bad Consideration—Effect When Separable.—Where the transaction is of such a nature that the good consideration can be separated from the bad, the court will separate them and consider the deed valid so far as it is entirely distinct from and unaffected by the illegal consideration. Kemper v. Kemper, 3 Rand. 8; Skipwith v. Strother, 3 Rand. 214; Skipwith v. Cunningham, 8 Leigh 294. See the Ohio case of King v. King, stated in 6 Va. Law Reg. 795; Gordon v. Cannon, 18 Gratt. 424; Garland v. Rives, 4 Rand. 309; Dade v. Madison, 5 Leigh 401. See monographic *note* on "Gaming" appended to Neal v. Com., 22 Gratt. 917.

IX. FAILURE OF CONSIDERATION.

Sale of Goods.—In the sale of an article, in the absence of fraud or express or implied warranty, the common-law maxim of *caveat emptor* applies and the purchaser cannot defeat his promise to pay the price for the thing bought because it turns out to be worthless. Mason v. Chappell, 15 Gratt. 572; Wilson v. Shackleford, 4 Rand. 5.

Failure of—What Constitutes.—When the consideration of a note is the payee's engagement to perform

some service or do some act, his nonperformance of such service or act constitutes a failure of consideration. Riffe v. Gerow, 29 W. Va. 462, 2 S. E. Rep. 104.

Same—Conditional Grant.—An agreement to grant a right of way for a railroad was shown by parol evidence to have been delivered to the president of the road, on condition that it should not take effect unless it was necessary to the building of the road, or unless the board of directors should make compensation therefor. After the road was completed, though no necessity had occurred for using the right of way, and though no compensation had been made therefor, the president turned the agreement over to the right-of-way agent, who was aware of said conditions. *Held*, the agreement was void, and plaintiff entitled to an issue of *quantum damnificatus* to ascertain the damages to his land. Humphreys v. R. & M. R. R. Co., 88 Va. 431, 13 S. E. Rep. 985; Harris v. Harris, 23 Gratt. 778; Hicks v. Goode, 12 Leigh 490. See Isbell v. Norvell, 4 Gratt. 176.

Assignment of Forfeited Lease—Waiver.—In an action on a note given for an amount due on an assignment of a mining lease, which defendants contend had been forfeited before the attempted assignment, where it appears that the lessors apparently acquiesced in the assignment, and waived a forfeiture by plaintiff for nonpayment of rents and royalties, and did not declare the lease forfeited until long after defendants had been in possession and had violated the terms of the lease, a judgment for plaintiff will be affirmed. Deaton v. Taylor, 90 Va. 219, 17 S. E. Rep. 944.

Acceptance of an Order.—A general acceptance of an order binds the acceptor to the payee, by whom the same was taken *bona fide*, for valuable consideration paid by him, notwithstanding the consideration, which induced the acceptance, afterwards fails without any fault on the part of the payee. Corbin v. Southgate, 3 H. & M. 319; Findlay v. Hickman, 10 Leigh 354.

Failure of Confederate Currency.—A contract made in August 1863, for the sale of land to be paid for in confederate currency, is a valid contract. Hale v. Wilkinson, 21 Gratt. 75; Ambrouse v. Keller, 22 Gratt. 769; Dixon v. McCue, 21 Gratt. 373; Jarrett v. Nickell, 9 W. Va. 353; Bierne v. Brown, 10 W. Va. 749; Harrison v. Farmers' Bank, 6 W. Va. 1; Fleming v. Ervin's Committee, 6 W. Va. 215.

It is said, in Mead v. Jones, 24 Gratt. 359, the court citing Ambrouse v. Keller, 22 Gratt. 769, to sustain the statement: "Whatever doubts and perplexities as to the character of Confederate States treasury notes and the validity of the proper payments therein, may have attended the administration of justice at an early period after the close of the late war with the United States, there cannot, at this day, be a doubt that they constituted a valid consideration; and that transactions therein closed in good faith during the war by parties understanding them and competent to contract, will not be reopened by this court, because they were based on Confederate States treasury notes." Staples v. Staples, 24 Gratt. 225; Talley v. Robinson, 22 Gratt. 888; Myers v. Whitfield, 22 Gratt. 780. See Davis v. Harman, 21 Gratt. 194; Walker v. Page, 21 Gratt. 636.

Failure—Equitable Defence—Option.—When failure of consideration is a defence relied upon against a bond, for the payment of money, such defence is an equitable one, and the party entitled to make it is not bound to make it, in a court of law—it is at his option, whether he will make such defence in a court of law or equity, and if judgment has been obtained on the bond in a court of law, it is not necessary to entitle him to make his defence in equity against the judgment, that he should aver in his bill any excuse, for not making such defence in the action at law. Ludington v. Tiffany, 6 W. Va. 11; Jarrett v. Goodnow, 39 W. Va. 602, 20 S. E. Rep. 575; Bias v. Vickers, 27 W. Va. 456.

Scaling of Confederate Currency.—See Moss v. Moorman, 24 Gratt. 97; Moon v. Richardson, 24 Gratt. 219; Smyth v. Sutton, 24 Gratt. 191; Effinger v. Kenney, 24 Gratt. 116; Jarrett v. Nickell, 9 W. Va. 353; Gilkeson v. Smith, 15 W. Va. 44; Bailey v. Stroud, 26 W. Va. 614.

Defence—Failure—Collateral Attacks.—Valid judgments of a court of record cannot be attacked collaterally; and defence of failure of consideration must be set up either in a suit wherein judgment is rendered, or by a chancery suit brought by defendant for that purpose. Spotts v. Commonwealth, 85 Va. 531, 8 S. E. Rep. 375.

Same—Example—Set-Off—Damages.—A and B execute a joint bond to C, part of the consideration of which is the price of a parcel of corn sold by C to A deliverable at a day subsequent to the date of the bond; the corn is not delivered according to contract; in debt on the bond by C against A and B the defendants cannot set off the value or price of the corn. Where one purchases goods deliverable at a future day, and presently binds himself by deed to pay the purchase money, or pays it in cash, the purchaser, in case the goods be not delivered, cannot disaffirm the contract for failure of consideration and claim the stipulated price paid, or contracted to be paid, but can only recover damages against the vendor for breach of his contract. Christian v. Miller, 3 Leigh 84.

Same—Failure of—No Defence to Action on Bond.—A father, for a consideration payable *in futuro*, granted to a son all his estate, including bonds of another son, which were afterwards collected in good money by grantee's attorneys, who, after retaining the same for several years, paid it over in confederate money. The loss was held to be no defence to an action by grantor's heirs against grantee to recover the consideration. Kerlin v. Kerlin, 85 Va. 475, 7 S. E. Rep. 849.

Negotiable Notes—Based on Slave Services.—During the year of 1861 slavery was recognized as existing both by the United States and Missouri, and slaves owed no allegiance to either; and there could be no demand for their services by the United States or the state, which could occasion a failure in part of the consideration of the notes given for their price. Booker v. Kirkpatrick, 26 Gratt. 145.

Bond for Price of Slaves Valid—Enforceable after the War.—A bond given in 1863 for the price of slaves purchased at a judicial sale, is valid and binding. The slaves were not freed by proclamation of the president, and there was no failure of consideration. Such bond may be enforced after the war, and after the adoption of the the 13th amendment to the constitution. Henderlite v. Thurman, 23 Gratt. 466; Rives v. Farish, 24 Gratt. 125. See Effinger v. Kenney, 24 Gratt. 116. See further, Moss v. Moorman, 24 Gratt. 97, on the subject of payments of debts in confederate currency, and cases cited.

Purchaser for Value—Emancipated Slaves—Recovery.—The purchasers of the emancipated slaves under executions, being *bona fide* purchasers, are entitled to recover back from the estate of the testatrix the amount paid by them, with interest,

and the expense of keeping the chargeable negroes; they accounting for the profits of the negroes purchased by them. Jincey v. Winfield, 9 Gratt. 708.

Sale of Free Negro—Relief in Equity Refused.—A negro man being conveyed by deed of trust to secure debts amounting to more than his value, his grantor sells him, and the purchaser pays to one of the *cestuis que trust* part of the purchase money, and executes to the other his obligation for the residue, payable some months afterwards. The grantor makes to the purchaser a bill of sale of the negro as a slave, and therein warrants and defends the title to him against the claims of all persons whatsoever. The *cestuis que trust* do not join in the bill of sale of warranty, but, by the arrangement, their liens on the negro are relinquished to the purchaser, and the payment made by him to one of the *cestuis que trust*, and the obligation executed by him to the other, discharge the grantor's debt to them *pro tanto*. It turns out that the negro so purchased is a free man; and judgment being obtained at law against the purchaser upon his obligation, an injunction is awarded him. *Held*, the purchaser can have no relief against the *cestuis que trust*, and the injunction is therefore dissolved, and the bill dismissed. Findlay v. Hickman, 10 Leigh 354.

Failure of Condition—Recovery.—Where vendor sells land of his wife without conveyance, and part of price is paid, with understanding expressed in receipt for sum so paid, that if a third person's heirs (who were likewise the heirs of wife), got a redivision of their ancestor's lands (whereof the land sold is part), vendor is to pay vendee his money back; and wife dies intestate without having had issue, and the heirs get the land from vendee by legal proceedings, the latter is entitled to have his money, so paid upon a consideration that failed, refunded by vendor. Ferguson v. Teel, 82 Va. 690.

Contract for Work—Payable in Notes—Conditions—Failure of—Recovery.—M employs S to build a house, and he is to pay for it in ten notes of $5,000 each, payable at different periods, to be delivered by M to S when R shall say he is entitled to them. One note to be first delivered, then two at the same time, when the work has advanced to a certain stage, etc. If S should fail to carry on the work to completion, any notes not delivered should be forfeited to M. The first note is properly issued. Before S is entitled to receive the next two, M, at the request of S, delivered him one of them; S having done more work than the amount of that note; and S soon after receiving the last note, abandons the work. *Held*, though the note was given by M to S for his accommodation, before he was bound to deliver it, yet it is not an accommodation note in the legal sense, but is upon a valuable consideration; and M has no equity on this ground, either against S or the holder of the note for value, to have the note delivered up to him. Ould v. Myers, 23 Gratt. 383.

Rescission—Nature of Transaction—Averments—Total Failure.—To entitle a party to recover back money which he has paid upon a contract which has been wholly rescinded, or the consideration of which has wholly failed, he must not have been guilty of any fraud or illegal conduct in the transaction. In such case, the usual and better mode of counting is the common count for money had and received. But if the plaintiff declares specially, it must appear with sufficient certainty from the facts so set out, or from apt averments, made in the count, that the consideration has wholly failed, and that such failure did not proceed from any fraud or illegal conduct on the part of the plaintiff. Johnson v. Jennings, 10 Gratt. 1, 60 Am. Dec. 323.

Latent Equity—Mortgage—Relief Granted.—The grantee in a deed for land, which is absolute on its face, but in truth a mortgage, having conveyed the land to a purchaser from him for valuable consideration, without notice of any equity; and the purchaser, upon obtaining knowledge of it, having filed a bill against his vendor for a rescission of the contract, in which suit the mortgagor is a party, and unites in the prayer for rescission, *held*, such rescission will be decreed, unless there be some other party who has a right to object. Breckenridge v. Auld, 1 Rob. 148.

"Failure in Consideration"—Meaning of.—It is said, in Harris v. Harris, 23 Gratt. 751, that it has been repeatedly held by the Virginia court that the words "failure in consideration" as used in the statute, refer to contracts originally founded on valuable consideration and not to contracts without consideration. Va. Code 1887, § 3299; Cunningham v. Smith, 10 Gratt. 255; Watkins v. Hopkins, 13 Gratt. 743.

X. WANT OF CONSIDERATION.

Promise to Pay Another's Debt—Nudum Pactum.—A promise in writing by a son to pay a debt of his father, founded on no consideration, is a mere *nudum pactum* and will not be enforced, even in equity. Chandler v. Hill, 2 Hen. & M. 124; Parker v. Carter, 4 Munf. 273.

Promise to Do What One Is Legally Bound to Do.—A promise to pay a debt for which the promisor is already bound, is mere *nudum pactum*, and, adds nought to the original obligation. Keffer v. Grayson, 76 Va. 517.

Promise to Do What One Is Legally Bound to Do.—Nudum Pactum—Specific Performance.—In Keffer v. Grayson, 76 Va. 517, the court said, "a debt barred by limitation * * * * may be revived by a new promise, and the new promise may constitute a valid consideration; but a promise to pay a debt for which the promisor is already legally bound, is a mere *nudum pactum*, and adds nothing to the force of the previous obligation. * * * * It is, therefore, clear that a promise to pay a subsisting indebtedness, or *even its actual payment*, is not a consideration upon which a court of equity can decree the specific execution of an agreement for the conveyance of real estate. It is impossible to say there is a valuable consideration where the debtor does no more than the law compels him to do, and the creditor receives no more than he is entitled to receive." Smith v. Phillips, 77 Va. 551.

Assignment—Subsequent Promise—No Value.—A promise by the maker of a common-law instrument made to the assignee after the assignment is a *nudum pactum* and not binding. Hopkins v. Richardson, 9 Gratt. 485.

Agreement to Accept Part of Debt in Full Payment.—An agreement to accept a part of a debt for the whole is *nudum pactum* and not enforceable in equity. Smith v. Phillips, 77 Va. 548. But see Maslin v. Hiett, 37 W. Va. 15, 16 S. E. Rep. 437, where such agreement was between the creditor and a third person and was held binding. See "Valuable Consideration," *ante*.

Trustee and Cestui Que Trust.—Trustees charged with the support of the testator's imbecile son invested his property in confederate bonds, which be-

came worthless, and refused to furnish any further support for the son, whereupon the son, who was then of age, agreed to abate one-third of the principal which the trustees were ordered by the will to pay to him at the age of twenty-five. This agreement was held to be unenforceable, for want of consideration. Knight v. Watts, 26 W. Va. 175.

No Privy Examination of Wife—Void Deed.—A deed from husband and wife without her privy examination and relinquishment, is utterly void as to her, and furnishes no consideration to support a subsequent conveyance. Harvey v. Pecks, 1 Munf. 518. The case of Lucketts v. Lucketts, 10 Leigh 56, furnishes a good example of want of consideration, but the decision was based on other grounds.

Bond or Covenant—Married Woman's Liability.—The debts of a married woman, for which her separate estate is liable, are such as arise out of any transaction, out of which a debt would have arisen, if she had been a feme sole, except that her separate estate is not bound by a bond or covenant based on no consideration, such bond or covenant being void at law, and she is not estopped in a court of equity from showing that it was based on no consideration. Camden v. Hiteshew, 23 W. Va. 239; Radford v. Carwile, 13 W. Va. 572.

Mistake of Law or Fact—Recovery.—Money paid under mistake or ignorance of fact, may be recovered back; otherwise, if paid under a mistake or ignorance of law; and the principle applies as well in the case of money paid as city taxes to a corporation, as in the case of money paid as a debt to an individual. Mayor of Richmond v. Judah, 5 Leigh 305. See also, Burton v. Burton, 10 Leigh 597; Beard v. Beard, 25 W. Va. 486.

Same—Over-Payment.—A party to a compromise entered into, in ignorance of important facts connected therewith, binds himself to pay, and does pay, more than he was originally bound to pay. He is entitled to recover back the amount he has overpaid, with interest thereon from the time of payment. Ross v. McLauchlan, 7 Gratt. 86.

Defence—Want of Consideration—Specialty—Statute.—The defence of "want of consideration" cannot be made to a specialty either at common law or under the statute, Va. Code 1849, ch. 172, § 5. The seal imports a consideration, and a party cannot avoid it on the ground of a want of consideration. See Va. Code, 1887, § 3299; Harris v. Harris, 23 Gratt. 751; Shiflett v. Orange Humane Society, 7 Gratt. 297; Sterling Organ Co. v. House, 25 W. Va. 64; W. Va. Code, ch. 126, § 5; Fisher v. Burdett, 21 W. Va. 626; Wyche v. Macklin, 2 Rand. 426; Chew v. Moffett, 6 Munf. 120; Taylor v. King, 6 Munf. 358.

XI. BONA FIDE PURCHASER—RIGHTS OF.

Failing Debtor—Preference of Creditors—Statute.—The statute to prevent fraudulent conveyances applies to no conveyance made *bona fide* for valuable consideration, and does not prevent a debtor in failing circumstances from preferring one class of creditors to another. Skipwith v. Cunningham, 8 Leigh 272; Garland v. Rives, 4 Rand. 282; Phippen v. Durham, 8 Gratt. 457; Paul v. Baugh, 85 Va. 958, 9 S. E. Rep. 329. But if such conveyance to pay one debt is proved to be with fraudulent intent to delay, hinder and defraud other creditors it comes within the statute and is void. Garland v. Rives, 4 Rand. 282.

Fraud—Purchaser for Value—Notice—Effect.—A defrauds B of certain slaves, and afterwards makes a deed conveying them to a trustee to secure a debt. The trustee sells the property, and C becomes the purchaser for valuable consideration, without notice of the fraud. C then conveys the property to D. *Held*, that D is entitled to hold the slaves against B, whether he had notice of the fraud or not. In the former case, he holds a valid title under C; in the latter, he is himself a *bona fide* purchaser without notice of the fraud. Montgomery v. Rose, 1 Patt. & H. 5. Had there been fraud on the part of the grantor, such fraud could not affect the rights of the trustee and the creditors secured by the deed, without notice of the fraud. Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615. See also, Paul v. Baugh, 85 Va. 958, 9 S. E. Rep. 329.

Transfer by Insolvent Merchant—An insolvent merchant purchases goods not intending to pay for them, and after getting possession of them he conveys them and all his other estate in trust for the payment of his debts. The trustee having no notice of the fraud is a purchaser for value without notice. Wickham v. Martin, 13 Gratt. 427; Williams v. Given, 6 Gratt. 268. Otherwise, if the purchaser has notice of the fraud at the time of his purchase. Tate v. Liggat, 2 Leigh 84.

Who Are Purchasers for Valuable Consideration.—The trustee and beneficiaries in a deed to secure *bona fide* debts, without notice, are purchasers for valuable consideration, within the meaning of the exception in the statute, Va. Code 1849, ch. 188, § 3, p. 717, and will be preferred to an execution creditor of the grantor in the deed, as to chose in action thereby conveyed. Evans v. Greenhow, 15 Gratt. 153. See also, Shurtz v. Johnson, 28 Gratt. 657; Exchange Bank v. Knox, 19 Gratt. 747; Wickham v. Martin, 13 Gratt. 427; Freeman v. Eacho, 79 Va. 47; Witz v. Osburn, 83 Va. 230, 2 S. E. Rep. 33. And see further Davis v. Beazley, 75 Va. 491, citing Williams v. Lord, 75 Va. 390, where the same statute is referred to; Va. Code 1873, ch. 114, § 5. See Va. Code 1887, § 3601; Chapman v. Chapman, 91 Va. 400, 21 S. E. Rep. 813; Sipe v. Earman, 26 Gratt. 563; Gordon v. Cannon, 18 Gratt. 387.

Holder with Lien—Purchaser for Value.—Where the payee of a note, being indebted to the plaintiff, indorsed and delivered it to him in part payment on such indebtedness, plaintiff was a holder for value. So in a like case where the payee assigned the note as collateral, plaintiff was holder for value for the amount due him under Acts 1897-98, pp. 896, 918, § 27, declaring that where a holder has a lien on an instrument he is a holder for value to the extent of his lien. Payne v. Zell, 98 Va. 294, 36 S. E. Rep. 379.

Implied Lien—Rights of Bona Fide Assignee.—The owner of land who sells and conveys without reserving a lien on the face of the deed, cannot set up his secret implied lien against a subsequent *bona fide* assignee of bonds, who paid valuable consideration for the same. Gordon v. Rixey, 76 Va. 704; Moore v. Holcombe, 3 Leigh 597.

Creditors in Deed of Trust.—In the case of Wickham v. Martin, 13 Gratt. 427, JUDGE DANIEL said (the other judges concurring): "I think it has been the constant course of the courts in this state to regard the creditors in a deed of trust, made by their debtor *bona fide* for their indemnity, in the light of purchasers for value." Garland v. Rives, 4 Rand. 282. See, supporting this statement of the law: Skipwith v. Cunningham, 8 Leigh 271; M'Cullough v. Sommerville, 8 Leigh 415; Lewis v. Caperton, 8 Gratt. 148; Phippen v. Durham, 8 Gratt. 457; Dance v. Seaman, 11 Gratt. 778.

Who Are Purchasers for Value—Application of Statute.—A widow having received her distributable share of the personal estate of her husband, is not a purchaser for value, so as to be entitled to set up the defence of purchaser for value without notice. Snoddy v. Haskins, 12 Gratt. 368. The act, Code 1849, ch. 149, § 13, p. 593, limiting the period in which suits may be brought to set aside conveyances or transfers of property, on considerations not deemed valuable in law, does not apply to cases of actual fraud. Va. Code 1887, § 2929; Williams v. Blakey, 76 Va. 254.

Conveyance of Land—Consideration—Pre-existing Debt—Liens—Attachments—Failure to Docket.—The consideration for the sale and conveyance of land is a debt due at the time by the vendor to the purchaser. The purchaser is a purchaser for valuable consideration within the meaning of the recording acts. And such a purchaser having purchased and received a conveyance of the land without notice of an attachment which had been previously levied upon it, but which had not been docketed, is entitled to hold the land free from the lien of the attachment. Cammack v. Soran, 30 Gratt. 292. See Abney v. Lumber, etc., Co., 45 W. Va. 446, 32 S. E. Rep. 256.

In Chapman v. Chapman, 91 Va. 400, 21 S. E. Rep. 813, the court, on this subject, sustains the ruling in Cammack v. Soran, *supra*, 30 Gratt. 292, and cites Evans v. Greenhow, 15 Gratt. 153; Wickham v. Martin, 13 Gratt. 427; Exchange Bank v. Knox, 19 Gratt. 739; Shurtz v. Johnson, 28 Gratt. 657, 667; Williams v. Lord, 75 Va. 404; Witz v. Osburn, 83 Va. 230, 2 S. E. Rep. 33. For general discussion of the subject, see 14 Am. & Eng. Enc. Law (2d Ed.) 226, and 2 Min. Inst. (4th Ed.) 696.

Liens—Judgment Creditors—Purchasers for Value—Priorities.—In 1867, on bond of M and B to P, assigned by P to R, the latter obtained judgment, which was docketed in 1869. In 1866 M granted his land to B, reserving lien for purchase money, and in 1870 assigned the purchase money bonds to G for value without notice of the judgment. In contest for priority between R, as judgment creditor, and G, as assignee of the vendor's lien and of the bonds thereby secured, *held*, the lien of the judgment has priority. "The reservation of the vendor's lien in the deed of conveyance," says MR. JUSTICE BRADLEY, in King v. Young Men's Association, 1 Wood's R. 386, "is equal to a mortgage taken for the purchase money contemporaneously with the deed, and nothing more. The legal title passes to the purchaser, subject to the lien, and the land is liable to attachment and execution as his property, as an equity of redemption." Gordon v. Rixey, 76 Va. 700. See Skipwith v. Cunningham, 8 Leigh 271; Shurtz v. Johnson, 28 Gratt. 657.

Rights of Judgment Creditors—Record—Statutes.—Sections 4 and 5 of the W. Va. Code 1868, ch. 74, were construed in Anderson v. Nagle, 12 W. Va. 98, the first of which sections is as follows: "Any contract in writing made, in respect to real estate or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein for more than five years, shall, from the time it is duly admitted to record, be as against creditors and purchasers as valid as if the contract was a deed conveying the estate or interest, embraced in the contract." W. Va. Code 1899, p. 697, ch. 74, sec. 4 and 5, construing sec. 5, ch. 74. See Rauch v. Oil Co., 8 W. Va. 36; Renick v. Ludington, 20 W. Va. 567. A deed of trust creditor is held to be entitled as a purchaser for value within the meaning and purview of the above section and so of a mortgagee. But a deed of trust unrecorded is void against subsequent purchasers without notice. Weinberg v. Rempe, 15 W. Va. 829.

Latent Equities—Parties Affected by.—The purchaser for value without notice is not affected by latent equities, and it is immaterial of what the equity consists, whether it be a lien, trust, or any other claim. Snyder v. Grandstaff, 96 Va. 473, 31 S. E. Rep. 647.

Position of Assignee—Statute—Purchaser Defined.—Assignee of a purchase money bond, secured by vendor's lien, is assignee of a chose in action only and not such purchaser of the land for value as will be protected by Code 1873, ch. 182, § 8, he is entitled to the rights of his assignor and no more. Purchasers are understood to be all persons who, by contract, have acquired a direct interest in the subject, whether by way of lien, or by mortgage or by deed of trust, or by absolute conveyance, in contradistinction to creditors whose liens arise by act of law. 2 Min. Inst. (2d Ed.) 876; Gordon v. Rixey, 76 Va. 698.

Assignment—Assignee's Position.—The assignee of a bond, though for valuable consideration and without notice, takes the same, subject to all the equities of the obligor against the obligee. Norton v. Rose, 2 Wash. 233; Feazle v. Dillard, 5 Leigh 31; Goodall v. Stuart, 2 H. & M. 105; Mayo v. Giles, 1 Munf. 533; Stockton v. Cook, 3 Munf. 68; Etheridge v. Parker, 76 Va. 247; Gordon v. Rixey, 76 Va. 704; Stebbins v. Bruce, 80 Va. 389; Stoner v. Harris, 81 Va. 451. For full treatment of this subject, see monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

The lien of a judgment is a legal lien and the question of notice has no influence upon it; the purchaser takes legal title, subject to the legal lien, whether a purchaser with or without notice. Leake v. Ferguson, 2 Gratt. 420. See also, Taylor v. Spindle, 2 Gratt. 44; Rodgers v. McCluer, 4 Gratt. 81. See Borst v. Nalle, 28 Gratt. 430; Price v. Thrash, 30 Gratt. 515. It is said further in Gordon v. Rixey, 76 Va. 698: It has been repeatedly held by this court that creditors secured by deeds of trust are regarded in the light of purchasers for value, and it is well settled that a mortgagee is also a purchaser to the extent of his interest, citing Wickham v. Martin, 13 Gratt. 436; Tate v. Liggat, 2 Leigh 84. In Bird v. Wilkinson, 4 Leigh 266, the mortgage was not recorded and the *bona fide* purchaser got a good title to the property.

Trustee—Cestui Que Trust—Purchaser.—A purchaser or grantee, who has notice of the trust, at the time of his purchase, becomes himself a trustee, notwithstanding the consideration he has paid. The vested interest of a *cestui que trust* cannot be impaired or destroyed by the voluntary act of trustees. Hobson v. Whitlow, 80 Va. 788; Willard v. Worsham, 76 Va. 392.

Fraud—Innocent Purchaser—Rights of.—Where a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation as to the consideration, the property vests in the vendee until the vendor has done some act to disaffirm the transaction. And the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor.

Old Dom. Steamship Co. v. Burckhardt, 31 Gratt. 664; 15 Am. & Eng. Enc. Law (3d Ed.) 163; Jones v. Christian, 86 Va. 1017, 11 S. E. Rep. 984; monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

Same—Burden of Proof.—The grantee in a deed for land, which is absolute on its face, but in truth a mortgage, having sold the land, and taken from the purchaser a bond for the purchase money, and a deed of trust to secure the same, and having then transferred the bonds to one who claims to be the assignee thereof for valuable consideration, but appears to have taken the assignment under circumstances calculated to throw strong suspicion on the transaction, *held*, it is incumbent on the assignee to prove that the assignment was for value. Breckenridge v. Auld, 1 Rob. 148. The burden of proving notice to a purchaser for value is on him who alleges it, and it will not be implied from confidential relations existing between the grantor and grantee. Snyder v. Grandstaff, 96 Va. 473, 31 S. E. Rep. 647.

Must Be Complete Purchaser.—To sustain a plea of purchaser without notice, the party must be a complete purchaser before notice; that is, must have obtained a conveyance and paid the whole purchase money. Doswell v. Buchanan, 3 Leigh 365, 23 Am. Dec. 280.

XII. WHO MAY SUE.

Breach of Covenant—Evidence Extrinsic—Statute.—One not a party to a deed *inter partes*, nor a privy to such party, and not named nor definitely pointed out in it as the beneficiary, cannot sue thereon, either at common law or under the Virginia statute. Code 1887, § 2415, entitled "When a person not named a party, or named jointly with others may take or sue under instrument," where it is said: "An immediate estate or interest in or the benefit of a condition respecting any estate may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." Nor is extrinsic evidence admissible to show that the covenant sued on was made solely for his benefit. Newberry v. Newberry, 95 Va. 119, 27 S. E. Rep. 899. See Ross v. Milne, 12 Leigh 204, 37 Am. Dec. 646; Clemmitt v. Life Ins. Co., 76 Va. 355; Norton v. Rose, 2 Wash. 283; Jones v. Thomas, 21 Gratt. 96; Willard v. Worsham, 76 Va. 392, citing Stuart v. James River Co., 24 Gratt. 294; Johnson v. McClung, 26 W. Va. 659, construing the West Virginia statute on this subject.

Common-Law Doctrine.—The common-law doctrine holds that an indenture is only available to the parties to it, and their privies and third persons can maintain no action of covenant thereon, although made for their benefit. Jones v. Thomas, 21 Gratt. 96. See Ross v. Milne, 12 Leigh 204; Davis v. Commonwealth, 13 Gratt. 151; Boyles v. Overby, 11 Gratt. 202; Sangster v. Commonwealth, 17 Gratt. 130; Clarkson v. Doddridge, 14 Gratt. 42; Garland v. Richeson, 4 Rand. 266; Henderson v. Hepburn, 2 Call 241.

Same—Suit on Bond—Statute.—T executed his bond as follows: March 12th 1863. I hereby bind myself, my heirs, etc., to pay —— the amount of principal and interest due from J on the tract of land purchased by him of W and wife. Witness my hand and seal the day and date above; and he delivered it to J. *Held*, J might maintain an action of covenant on the bond against T. Jones v. Thomas, 21 Gratt. 96; Clemmitt v. N. Y. Life Ins. Co., 76 Va. 360; Va. Code 1873, ch. 12, § 2; Willard v. Worsham, 76 Va. 392.

Assignment of Choses in Action—Who Could Be Sued.—Where a note, not negotiable, is endorsed by several persons in succession, the last assignee could only sue the maker and his immediate assignor, before the Act of Assembly 1807, because there was no privity of contract or consideration. Caton v. Lenox, 5 Rand. 31; Dunlop v. Harris, 5 Call 16. See also, Bronaugh v. Scott, 5 Call 88.

XIII. PLEADINGS.

A. THE DECLARATION.

Requisites.—It is an elementary rule in pleading that the declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular, and methodical statement of the injury which the plaintiff has sustained, with such precision, certainty, and clearness that the defendant may be distinctly informed of the specific grounds of the action, and thus be enabled to answer by a direct and unequivocal plea with evidence to support it. White v. Romans, 29 W. Va. 571, 3 S. E. Rep. 14. A case in which the declaration fails to conform in its averments to the essential requirements of this rule, is therefore held fatally defective and insufficient on general demurrer.

Action of Debt—Necessity to Aver and Prove Consideration.—At common law, in an action to recover money due by promissory note, not negotiable (the action being founded not on the note, but on the contract of which the note is evidence) it is indispensable to aver and prove a valuable consideration, as it is in actions on all unsealed contracts. In Virginia by statute (Va. Code 1873, ch. 141, § 10; Va. Code 1887, § 2852), in case of notes for the payment of money, a valuable consideration is *prima facie* presumed at least where an action of debt is brought on the writing (Peasley v. Boatwright, 2 Leigh 198), and by the Code of 1887, § 2852, the same doctrine is applicable to assumpsit. Crawford v. Daigh, 2 Va. Cas. 521; Jackson v. Jackson, 10 Leigh 453, 4 Min. Inst. (3d Ed.) 31. But the defendant may go into evidence touching consideration. Jackson v. Jackson, 10 Leigh 453.

Purchaser—Averments — Proof. — Claimant of the rights of a purchaser must aver in his declaration and prove that he gave a valuable consideration. Gordon v. Rixey, 76 Va. 694.

Contracts — Defendant's Promise—How Charged.—Every simple promise or agreement, to be enforceable, must be based upon valuable consideration, and when declared on, the promise or undertaking of the defendant must be charged positively and not by way of recital. The absence of such a charge is fatal to the declaration, and is not cured by verdict. If the consideration for the defendant's contract consist of an agreement on the part of the plaintiff, it must appear from the declaration that such agreement was binding on the plaintiff at the time the defendant's promise was made, else the defendant's promise is without consideration, and the declaration consequently bad. Section 3246 of the Code, does not apply to this case. Southern Ry. v. Willcox, 98 Va. 222, 35 S. E. Rep. 355.

Consideration—Essential Portion of Contract—Statement of—Proof.—The consideration, which is set forth in a declaration to support the defendant's promises sued upon, is not to be regarded as a mere

inducement or preamble; but it forms an essential portion of the contract, on which its validity depends. It must therefore be truly stated and is required to be proven at the trial as stated, or the plaintiff must fail because of the variance. If an entire consideration be stated in the declaration as the basis of the defendant's promise, the entire consideration stated and not merely a portion of it must be proven at the trial, or the plaintiff must fail because of the variance. Or if the consideration named in the declaration consist of several different things, and but one of these things is proven to be the consideration, the plaintiff must fail at the trial because of the variance. But if in a declaration several considerations are stated as the basis of the defendant's promise sued upon, some of which are void or frivolous, this is no ground for demurrer, and he may recover, though he fails to prove the void or frivolous considerations, if he proves those considerations which are good. Davisson v. Ford, 23 W. Va. 627.

Refusal to Perform—Action for Damages—Consideration Stated.—In actions founded upon special contracts to recover damages for the failure and refusal to perform the same, generally, the entire consideration must be stated, and the entire act to be done, in virtue of such consideration. James v. Adams, 8 W. Va. 568.

Requisites—Acceptance of an Order.—It is decided in Hollingsworth v. Milton, 8 Leigh 53, that if the acceptance of an order in writing is an obligation to pay within the statute (and it is so considered by the court) there is no necessity for setting out any other consideration except the fact of acceptance, which very strongly imports it.

Consideration Must Be Stated in Agreement.—A written agreement, not under seal, to deliver bonds to a certain amount must be held a *nudum pactum* if no consideration for the contract be stated on its face or disclosed by testimony. Sturm v. Parish, 1 W. Va. 125; Beverleys v. Holmes, 4 Munf. 95.

Assumpsit.—It was held, in Jackson v. Jackson, 10 Leigh 448, by an equally divided court that assumpsit might be maintained on a promissory note without averring a consideration in the declaration, citing Peasley v. Boatwright, 2 Leigh 195; Crawford v. Daigh, 2 Va. Cas. 521.

Same—Virginia Statute.—In Averett v. Booker, 15 Gratt. 163, in an action of assumpsit on a draft, not negotiable, in which there was no consideration stated, nor was it stated to be made for value received, nor any equivalent terms used showing that it was made for a valuable consideration, it was held, the paper being the only evidence, that the action was not maintainable, the jury not being allowed to infer from the paper alone that there was a consideration. The above seems to be the established law in such cases under a recent Virginia statute quoted below. Peasley v. Boatwright, 2 Leigh 195. See also, Hall v. Smith, 3 Munf. 550; Beverleys v. Holmes, 4 Munf. 95; Moseley v. Jones, 5 Munf. 23; Joliffe v. Higgins, 6 Munf. 3; 2 Barton's Law Prac. § 314; Graves' Notes on Pleading 13. "An action of debt may be maintained upon any note or writing by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party who is to be charged thereby, or his agent. And in an action of assumpsit on any such note or writing, the rule as to averment and proof of consideration shall be the same as in any action of debt thereon." Va. Code, § 2852. It was held, in Colgin v. Henley, 6 Leigh 108, decided in 1835, that under the statute of frauds in Virginia the consideration need not be set forth in the writing.

B. DEFENDANT'S PLEA.

Plea of Failure of Consideration—Statute.—Under the provisions of sec. 5, ch. 126 of the Code of this state, in any action on a contract, whether the contract be by deed or by parol, the defendant may file a plea alleging any such failure in the consideration of such contract, or fraud in its procurement, as would entitle him either to recover damages at law from the plaintiff, or to relief in equity, in whole or in part; and if such plea is sufficient in form he is entitled to prove facts showing such failure in the consideration in whole or in part. Fisher v. Burdett, 21 W. Va. 626; W. Va. Code 1899, ch. 126, § 5. See Sterling v. House, 25 W. Va. 64, where the defendant was not allowed to file a special plea, alleging failure of consideration, because the contracts sued upon were those made in the purchase of several organs, which had not been paid for, while the only damage the defendant had suffered was on account of the plaintiff breaking his contract to continue furnishing defendant with organs for sale.

Sealed Instrument Imports Consideration—Defence of Want of, or Failure—Statute.—An obligation under seal imports valuable consideration, requiring no proof thereof, and neither at common law nor under W. Va. Code 1899, ch. 126, § 5, can want of consideration be shown in defence of an action on it, but as to failure of consideration, that may, under the statute, be shown, though not at common law.

There is a difference between want and failure of consideration in such case. Williamson v. Cline, 40 W. Va. 194, 20 S. E. Rep. 917; Taylor v. King, 6 Munf. 358; Wyche v. Macklin, 2 Rand. 426; Harris v. Harris, 23 Gratt. 737; Fisher v. Burdett, 21 W. Va. 626. See also, Crouch v. Davis, 23 Gratt. 75; Cunningham v. Smith, 10 Gratt. 255; Watkins v. Hopkins, 13 Gratt. 743.

Want of Consideration Pleaded to Specialty, by Married Woman.—It was also held in Williamson v. Cline, 40 W. Va. 194, 20 S. E. Rep. 917; that § 15, ch. 66, Code of W. Va. 1899, did not change the law in regard to the married woman's right to bind her separate estate, and that she might in an action at law or in equity plead want of consideration against a sealed obligation given by her during coverture, unlike other persons. Hughes & Co. v. Hamilton, 19 W. Va. 366.

Debt on Bond—Breach of Warranty—Inaccurate Plea—Statute of Jeofails.—In debt upon a bond the defendant files a special plea under the act of April 16, 1831 in which he alleges that the bond was executed for part of the purchase money of a tract of land which the obligee in the bond had conveyed to the defendant, with a covenant to warrant the title thereof, free from the claims of all persons whatsoever. That a valid claim had been set up to the land by a purchaser from the defendant's vendor, and the defendant had been compelled to give up the land; and had purchased it again from said claimant at an advanced price. The plaintiff took issue on the plea, and there was a verdict for the defendant. *Held*, that if the plea does not set up a defence which is authorized by the statute, yet it asserts a substantial claim against the plaintiff; and after verdict it is cured by the statute of jeofails. Pence v. Huston, 6 Gratt. 304; Va. Code 1887, § 3399; Chew v. Moffett, 6 Munf. 120; Tomlinson v. Mason, 6 Rand. 169; Tabb v. Binford, 4 Leigh 132.

But if there is any doubt on the question of plaintiff's right to sue at law in this case there can be none as to his right to relief in equity. Koger v. Kane, 5 Leigh 606; Stockton v. Cook, 3 Munf. 68; Ralston v. Miller, 3 Rand. 44; Castleman v. Veitch, 3 Rand. 598. Being entitled to relief in equity, he is entitled to set-off under the act of 1831.

Imposition on Obligor of Bond—Vacated at Law.—Before the adoption of said act of 1831 the Virginia court held, that the defendant could vacate a bond at law because he was imposed upon in a settlement of accounts, which preceded its execution, or because the bond was founded on a false or fraudulent statement of facts. Taylor v. King, 6 Munf. 358. Or because the bond had been obtained by fraudulent misrepresentations made by the plaintiff. Wyche v. Macklin, 2 Rand. 426. But when the action was on a contract either by deed or by parol the defendant could not, at law, show that the consideration had failed in part. Tomlinson v. Mason, 6 Rand. 169; Webster v. Couch, 6 Rand. 519; Christian v. Miller, 3 Leigh 78.

After the passage of said act, it was held, that under its provisions, a tenant may set off against rents the damages accrued by the failure of his lessor to make repairs. Caldwell v. Pennington, 3 Gratt. 91. Or in an action upon a bond given for the hire of two slaves, one of whom was never delivered, the hirer is entitled to a credit for the amount of the hire of the slave not delivered. Isbell v. Norvell, 4 Gratt. 176. Or in an action on bond given for a slave the defendant may plead that the slave was unsound at the time of the sale which fact the plaintiff knew but fraudulently concealed. Fleming v. Toler, 7 Gratt. 310. Or in debt on a bond, a plea that it was given for goods which were unsound, is good. Cunningham v. Smith, 10 Gratt. 255; Watkins v. Hopkins, 13 Gratt. 743; Fisher v. Burdett, 21 W. Va. 630.

Action on Bond—Plea for Set-Off—Improper Remedy.—Where property is sold and a bond is taken and suit brought on the bond, and the defendant pleads that the property was of less value than it was represented to be, such defence, sounding altogether in damages, is bad; and the proper remedy would be an action of deceit. Tomlinson v. Mason, 6 Rand. 169; Cunningham v. Smith, 10 Gratt. 255. See Christian v. Miller, 3 Leigh 78; Huff v. Broyles, 26 Gratt. 283, and 4 Min. Inst. (3d Ed.) 791; Va. Code 1887, sec. 3299. See generally, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

Same—Failure to Make Good Title to Land.—In an action on a bond for five hundred dollars, given for the last payment of the purchase money of land, a plea that the plaintiff was to make defendant a good title to the land upon the payment of the bond, and that defendant had offered to pay it upon the making of the title, that the plaintiff had failed and refused to make the title, by reason whereof the consideration had failed to the extent of two hundred and fifty dollars, is not a good plea in substance. Watkins v. Hopkins, 13 Gratt. 743; Shiflett, etc., v. The Orange Humane Society, 7 Gratt. 297; Cunningham v. Smith, 10 Gratt. 255.

But in an action a plea that the plaintiff had failed to give the defendant possession of two acres of the land; or a plea that plaintiff had failed to deliver possession of the land for two months after the time of which by the contract he was to deliver possession; or that he had not delivered the tenement in the plight and condition in which it was at the time of the sale, and in which by the contract he was to deliver it, but delivered it in a damaged condition from injuries done or permitted in the meantime to the tenement and freehold, is a good plea, setting up a partial failure of the consideration. Watkins v. Hopkins, 13 Gratt. 743; Cunningham v. Smith, 10 Gratt. 255; Harris v. Harris, 23 Gratt. 787.

Suit to Enjoin—Contention No Force.—In a suit to enjoin defendant from disposing of certain notes executed to him by plaintiff, and to set aside a sale evidenced by the notes, a contention by plaintiff that the contract of sale was unconscionable is of no force when it appears that the property will yield from twelve to twenty-two per cent. on the investment. Loftus v. Maloney, 89 Va. 576, 16 S. E. Rep. 749.

Defence—Answer—Plea.—In Donnell v. King, 7 Leigh 393, it was held that a purchaser for valuable consideration without notice might set up such fact as a defence by way of answer as well as by plea.

Plea of Nil Debet—Effect—Variance.—The plea of *nil debet* renders it necessary that the note produced in evidence should correspond with that described in the declaration. Therefore, there is a fatal variance, and a note should be excluded as evidence, where it is described as a note for "three hundred and forty-two dollars," payable "two months after the date thereof," and the note offered in evidence is for "three hundred and forty-two dollars and twenty-five cents," payable "sixty days after date." Scott v. Baker, 3 W. Va. 285.

XIV. EVIDENCE.

A. IN GENERAL.

Deeds of Settlement—Proof of Consideration.—A deed of settlement is made, which recites that the consideration in part is the agreement by the wife to unite in a conveyance of land, a part of which is her own derived from her father, and in another part of which she has a right of dower, for the purpose of paying a debt of her husband; and she does afterwards unite in the conveyance. The deeds themselves are proofs of the consideration, and the settlement will be sustained to the extent of the value of the interests she conveys. William & Mary College v. Powell, 12 Gratt. 372. But where the relinquishment of the wife's dower interest has been first made by deed, containing no recital of an agreement to make a settlement in consideration thereof, and a subsequent settlement, made two years afterwards is sought to be set up, there must be distinct proof of the previous agreement. Fink v. Denny, 75 Va. 670; William & Mary College v. Powell, 12 Gratt. 372; Blow v. Maynard, 2 Leigh 29; Price v. Thrash, 30 Gratt. 515; Campbell v. Bowles, 30 Gratt. 652.

Recital in Deed—Evidence between Parties but Not against Creditors.—The recitals in a postnuptial deed of settlement, by the husband upon the wife, as to the consideration, though admissible against a person claiming under the husband are not evidence against the creditors who assail the validity and fairness of such deed. Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep. 1; William & Mary College v. Powell, 12 Gratt. 372; Yates v. Law, 86 Va. 119, 9 S. E. Rep. 508; Blow v. Maynard, 2 Leigh 29; DeFarges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805; Perry v. Ruby, 81 Va. 317; Price v. Thrash, 30 Gratt. 523; Massey v. Yancey, 90 Va. 626, 19 S. E. Rep. 184; Lewis v. Caperton, 8 Gratt. 148. Nor are answers of the husband and wife evidence in their favor in a suit by creditors attacking the deed, where no discovery is

called for. Fink v. Denny, 75 Va. 663; Hatcher v. Crews, 78 Va. 460; Perry v. Ruby, 81 Va. 317; Campbell v. Bowles, 30 Gratt. 663; Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615; Yates v. Law, 86 Va. 119, 9 S. E. Rep. 508; Witz v. Osburn, 83 Va. 227, 2 S. E. Rep. 33; Robbins v. Armstrong, 84 Va. 810, 6 S. E. Rep. 130; Lewis v. Caperton, 8 Gratt. 148; Lewis v. Mason, 84 Va. 738, 10 S. E. Rep. 529.

Mortgage as Evidence—Extrinsic Evidence.—G being indebted to H and having mortgaged land to secure the debt, makes another mortgage of the same land to secure a debt to C by which it appears that C has undertaken to pay G's debt to H—then C makes a written promise to H to pay G's debt to him. In an action by H against C on this written promise, *held*, G's mortgage to C is proper evidence to prove a consideration moving from G to C for C's promise to pay G's debt to H, though no such consideration is laid in the declaration. Consideration unexpressed in a written promise may be proved by external evidence. Colgin v. Henley, 6 Leigh 85.

Bond—Liability of Assignee—Nature of Consideration—Effect.—With respect to the liability of the assignor of a bond, it is immaterial whether the assignment was for past or present consideration. Barksdale v. Fenwick, 4 Call 492.

Contract—Promise a Part of—How Shown.—A promise which forms a part of the consideration of a written contract is a part of the contract itself, and not a distinct collateral agreement. It can only be shown by the writing. Slaughter v. Smither, 97 Va. 202, 33 S. E. Rep. 54.

B. PAROL EVIDENCE.

To Prove a Different Consideration from That Expressed.—In equity either party may aver and prove against the other the true consideration upon which the deed was founded, though a different consideration be expressed therein. Graybill v. Brugh, 89 Va. 895, 17 S. E. Rep. 558; Duval v. Bibb, 4 H. & M. 116; Eppes v. Randolph, 2 Call 185. See 3 Min. Inst. (2d Ed., vol. 1) 120.

Nature of Contract Shown by Parol.—Although the deed does not mention that it was made in consideration of a marriage contract, the party may aver and prove it. Eppes v. Randolph, 2 Call 125. In equity as in law, the *allegata* and *probata* must correspond. Millhiser v. McKinley, 98 Va. 207, 35 S. E. Rep. 446.

To Show the True Contract and Consideration.—A sister agrees to convey to her brother a certain tract of land, and, in consideration thereof, the brother agrees to support their aged father and mother during their natural lives, and that he will bind himself thereto by written contract after the conveyance shall have been made. The sister conveys the land to him, with recital of the receipt of a money consideration of $50. *Held*, it is competent to show by parol evidence what was the contract between the parties and what was the real additional consideration for the conveyance of the land, since what the grantee was to do was collateral to the conveyance, and it contained no recital inconsistent with such collateral undertaking or contradictory thereof. Wilfong v. Johnson, 41 W. Va. 283, 23 S. E. Rep. 730. See White v. Campbell, 80 Va. 180. "And it may be observed, that when fraud and illegality of consideration, or mistake in the transaction are alleged, the door is opened wide to any parol evidence relevant to the issue." Starke v. Littlepage, 4 Rand. 368. See also, Mauzy v. Sellars, 26 Gratt. 646.

To Show Consideration and Character of Contract.—Parol evidence is admissible to prove the consideration of the bond and the character of the contract. Wrightsman v. Bowyer, 24 Gratt. 433. In this case, by a bond dated July 7, 1863, B promised to pay to W three years after date $2,000 without interest, in current funds in the state of Virginia, being money borrowed. In an action upon this bond it was held that parol evidence was admissible to prove the consideration thereof as throwing light upon the character of the contract; and the evidence showing that it was a contract of hazard, and that the parties contemplated the possibility, though not the probability, of the failure of the confederacy, and intended that the bond should be discharged in the currency in use when it fell due, judgment was entered for the plaintiff for an amount equal in value to $2,000 in United States currency then in use in Virginia, on the day it fell due, with interest from that date. Summers v. Darne, 31 Gratt. 791. On this subject it is said in Harvey v. Alexander, 1 Rand. 230, that whatever may be the rule in a court of law, a court of chancery will inquire into the real consideration. Quarles v. Lacy, 4 Munf. 251. See also, Eppes v. Randolph, 2 Call 125; Brent v. Richards, 2 Gratt. 539; Wood v. Harmison, 41 W. Va. 376, 23 S. E. Rep. 560; Casto v. Fry, 33 W. Va. 449, 10 S. E. Rep. 799; Rogers v. Verlander, 30 W. Va. 619, 5 S. E. Rep. 847; Effinger v. Kenney, 24 Gratt. 116; Gatewood v. Burrus, 3 Call 194; Rucker v. Lowther, 6 Leigh 259.

To Show from Whom Consideration Moves.—In the case of Marks v. Spencer, 81 Va. 751, the evidence establishes that the settlement upon the wife was upon consideration moving from the wife's father, though the deed recites 'it was paid by the husband,' and the settlement is upheld. Cronie v. Hart, 18 Gratt. 739; Straus v. Bodeker, 86 Va. 543, 10 S. E. Rep. 570.

Parol Evidence—Inadmissible—To Vary or Contradict a Written Instrument—Principal and Agent.—In the case of Ruckman v. Lightner, 24 Gratt. 19, an agent had executed a promissory note in his own name, given for the price of cattle purchased for use of the Confederate States government and was not allowed to show these facts by parol evidence, but was compelled to pay the notes according to their face. This case was decided on the ground that parol evidence is inadmissible to vary or contradict a written instrument. See Greenleaf on Ev., § 275 to 281; also, Early v. Wilkinson, 9 Gratt. 68; Towner v. Lucas, 13 Gratt. 705; Carrington v. Goddin, 13 Gratt. 587.

Same—Conveyance to Daughter—In General.—B in his lifetime, conveyed land to his daughter's husband by deed reciting a valuable consideration. Here it was held that parol evidence is inadmissible to contradict, vary or add to a written instrument, but it is always admissible to show the real nature and character of the consideration and in this case it was shown that the deed was intended to create an advancement for the daughter. Bruce v. Slemp, 82 Va. 352. See Slaughter v. Smither, 97 Va. 202, 33 S. E. Rep. 534; Chinn v. Murray, 4 Gratt. 348. It is said in Click v. Green, 77 Va. 838, that it is well settled that the consideration named in the deed may be enquired into, citing Summers v. Darne, 31 Gratt. 804. But he who undertakes to show a different consideration must do it by satisfactory proof. McDearman v. Hodnett, 83 Va. 281, 2 S. E. Rep. 643; Peale v. Thurmond, 77 Va. 753; Watkins v. Young, 31 Gratt. 84; Jarrett v. Nickell, 9 W. Va. 345.

Bonds—Verbal Promise to Surrender.—One cannot, under the law, set up and prove, in avoidance of his

bond that he was induced to execute it by the obligee's assurance that he should not be required to pay any part of it. Chapman v. Persinger, 87 Va. 596, 13 S. E. Rep. 549; Towner v. Lucas, 13 Gratt. 705; White v. Campbell, 80 Va. 181; Foster v. Rison, 17 Gratt. 340; Watson v. Hurt, 6 Gratt. 633; Burtners v. Keran, 24 Gratt. 70.

Privy to a Deed—Avoidance—Want of Consideration.—A defendant being privy to a deed cannot avoid it, in a court of common law, by parol evidence, on the ground of want of consideration, for he is estopped from averring such matter against a specialty. Taylor v. King, 6 Munf. 358, 8 Am. Dec. 746.

Testimony of Party in Interest—Only One Party Living.—Though the wife be dead, the husband is not competent to prove what was the consideration of a postnuptial settlement upon her. Marks v. Spencer, 81 Va. 751; Fink v. Denny, 75 Va. 669. See also, William & Mary College v. Powell, 12 Gratt. 372; Warwick v. Warwick, 31 Gratt. 70; Smith v. Bradford, 76 Va. 758; Johnston v. Slater, 11 Gratt. 321. And under Va. Code 1818, ch. 172, § 22, the creditor was also incompetent. See Marks v. Spencer, 81 Va. 751.

C. PRESUMPTION—BURDEN OF PROOF.

"For Value Received."—The words "for value received," in a note *prima facie* establishes a valuable consideration, where it becomes necessary to prove such consideration. Williamson v. Cline, 40 W. Va. 194, 20 S. E. Rep. 917; Averett v. Booker, 15 Gratt. 164; Barksdale v. Fenwick, 4 Call 492.

Mercantile Securities—Sealed Instruments—Presumption of Consideration.—Consideration is presumed in case of mercantile securities, *prima facie* as between the original parties, conclusively as to subsequent holders for value and without notice. M'Niel v. Baird, 6 Munf. 316. See monographic *note* on "Bills, Notes and Checks" appended to Archer v. Ward, 9 Gratt. 622. So in common-law securities under seal, a valuable consideration is conclusively presumed. Harris v. Harris, 23 Gratt. 751; Watkins v. Hopkins, 13 Gratt. 743; Cunningham v. Smith, 10 Gratt. 255; Goodall v. Stuart, 2 H. & M. 111. See 3 Min. Inst. (Part 1, 2d Ed.) 440. See generally, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

Checks—Evidence of Debt.—A check upon a bank implies that it was given in payment of a debt due by the drawer to the party in whose favor it is drawn, or for money loaned by the latter to the former at the time of the execution of said check; and though such implication may be repelled by evidence that the check was not so given, but was in fact given for a loan by the drawer to the payee, such evidence being in conflict with the apparent purport of the transaction, ought to be very strong to repel the said implication, and to establish the contrary fact. Terry v. Ragsdale, 33 Gratt. 342; McClain v. Lowther, 35 W. Va. 297, 13 S. E. Rep. 1003; McVeigh v. Chamberlain, 94 Va. 77, 26 S. E. Rep. 395. See also, Ford v. McClung, 5 W. Va. 165; Peasley v. Boatwright, 2 Leigh 195; 5 Am. & Eng. Enc. Law (2d Ed.) 1080.

Negotiable Paper—Holder's Position—Burden of Proof.—The production alone of a negotiable note, check or bill of exchange, furnishes *prima facie* evidence of consideration, and casts upon the defendant the burden of proving the want or failure thereof, and in an action upon such instrument it is unnecessary to aver a consideration in the declaration. See McClain v. Lowther, 35 W. Va. 297, 13 S. E. Rep. 1003; Peasley v. Boatwright, 2 Leigh 195, and cases cited in the paragraph above.

Same—Total Failure of—In Case of Fraud.—A total failure of consideration of a negotiable instrument does not impose on the innocent holder the burden of proving that he gave value for it. The mere possession by the holder is *prima facie* evidence that he is holder for value, and that he came by it honestly; but if the evidence raises a suspicion of fraud, duress, or illegality, that throws the burden on the holder to show that he gave value for it. Wilson v. Lazier, 11 Gratt. 477.

Assignment of Claim—Presumption of Consideration.—A written assignment of a claim does not necessarily import a valuable consideration; and if it be fairly inferrible, from the circumstances, that the assignment was a gift, the assignor cannot be held responsible to make good the claim to the immediate assignee, or to his assignees for value. Wood v. Duval, 9 Leigh 6.

Recitals in Deeds, Evidence to Contradict—Presumption.—A deed which purports to have been made for a valuable consideration cannot be shown to be voluntary in order to raise a trust in favor of the grantor, and if there was in fact no consideration, but the deed recites a pecuniary consideration even merely nominal, as paid by the grantee, this statement raises a conclusive presumption of an intention that the grantee is to take the beneficial estates, and extrinsic evidence in not admissible to contradict the recital, and to show that there was in fact no consideration, except in cases of fraud or mistake. Eaves v. Vial, 98 Va. 188, 34 S. E. Rep. 978, 6 Va. Law Reg. 303; Pusey v. Gardner, 21 W. Va. 469. See admission of parol evidence in connection with "Resulting Trusts" and "Record of Title," discussed in Throckmorton v. Throckmorton, 91 Va. 42, 22 S. E. Rep. 162.

Settlement on Wife—Relinquishment of Interest by Her.—It was said in Blow v. Maynard, 2 Leigh 29, that where the wife relinquishes an interest in her husband's estate in consideration of a settlement upon her, and the deed of the relinquishment and deed of settlement are contemporaneous, or made about the same time, so that it may be reasonably presumed that the two deeds are part of the same transaction, the court will so presume, and will look upon the relinquishment as the consideration which produced the settlement. William & Mary College v. Powell, 12 Gratt. 372, approved in Keagy v. Trout, 85 Va. 401, 7 S. E. Rep. 329.

Postnuptial Settlements—Presumption.—Every postnuptial settlement by a husband who is indebted is presumed to be voluntary as to his then existing creditors, and therefore fraudulent and void as to them, unless those claiming under it can show that it was made for valuable consideration; and the burden of proof is on those claiming under the settlement. Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep. 1; Fink v. Denny, 75 Va. 663; Hatcher v. Crews, 78 Va. 460; DeFarges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805; Perry v. Ruby, 81 Va. 317; Massey v. Yancey, 90 Va. 626, 19 S. E. Rep. 184. Further as to burden of proof, see Blow v. Maynard, 2 Leigh 30; Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615; William & Mary College v. Powell, 12 Gratt. 382; Keagy v. Trout, 85 Va. 401, 7 S. E. Rep. 529; Quarles v. Lacy, 4 Munf. 251; Witz v. Osburn, 83 Va. 227, 2 S. E. Rep. 33; Price v. Thrash, 30 Gratt. 515; Lewis v. Mason, 84 Va. 731, 10 S. E. Rep. 529; Robbins v. Armstrong, 84 Va. 810, 6 S. E. Rep. 130. Also, see Bank v. Patton, 1 Rob. 499. See generally, monographic *note* on "Fraudulent

and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

Answer—Burden of Proof.—Where the bill charges a settlement to be voluntary, the answer does not shift the burden and is not evidence for the respondents, but the defence must be proved. Perry v. Ruby, 81 Va. 317; Hatcher v. Crews, 78 Va. 460.

Receipt of Wife's Money by Husband—Presumption.—A conveyance of property by the husband to the wife, in consideration of moneys of the wife previously collected and used by the husband with her consent and with no promise on his part to repay such money, will be invalid as against existing creditors. Moneys so used are deemed gifts in law and no subsequent agreement between the husband and wife, to the prejudice of his creditors, can make that a debt which was originally a gift. Flynn v. Jackson, 93 Va. 346, 25 S. E. Rep. 1; Throckmorton v. Throckmorton, 91 Va. 42, 22 S. E. Rep. 162, and cases cited. Nor will a conveyance made by the husband to the wife at the time of their marriage, in consideration thereof, be valid as against existing creditors. Flynn v. Jackson, 93 Va. 347, 25 S. E. Rep. 1; Bennett v. Bennett, 37 W. Va. 396, 16 S. E. Rep. 638. See Beecher v. Wilson, 84 Va. 813, 6 S. E. Rep. 209; Perry v. Ruby, 81 Va. 317; Miller v. Cox, 38 W. Va. 747, 18 S. E. Rep. 960; Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. Rep. 410; Zinn v. Law, 32 W. Va. 447, 9 S. E. Rep. 871; Bank v. Atkinson, 32 W. Va. 203, 9 S. E. Rep. 175.

Conveyance from Father to Child—Recital of Consideration.—There is a presumption of an advancement where there is a recital of a nominal consideration in a conveyance of real property from a father to a child. Watkins v. Young, 31 Gratt. 86; McClanahan v. McClanahan, 36 W. Va. 34, 14 S. E. Rep. 419; Kyle v. Conrad, 25 W. Va. 760; McDearman v. Hodnett, 88 Va. 281, 2 S. E. Rep. 643. See also, 2 Min. Inst. (4th Ed.) 515, 516; Darne v. Lloyd, 82 Va. 859, 5 S. E. Rep. 87; 1 Am. & Eng. Enc. Law 776; Roberts v. Coleman, 37 W. Va. 143, 16 S. E. Rep. 482. And though, where a substantial consideration is recited, the transaction is supposed to be a purchase, this presumption may be rebutted and for this purpose parol evidence is admissible. Bruce v. Slemp, 82 Va. 352, 4 S. E. Rep. 692.

Wife Holding Property against Creditors—Burden of Proof.—In holding property in opposition to the husband's creditors the burden of proof is on the wife to show that she gave valuable consideration for such property or that it has never come into the possession of her husband. Campbell v. Bowles, 30 Gratt. 653; Blow v. Maynard, 2 Leigh 29; William & Mary College v. Powell, 12 Gratt. 372; Price v. Thrash, 30 Gratt. 515; Fink v. Denny, 75 Va. 663; Hatcher v. Crews, 78 Va. 460; Perry v. Ruby, 81 Va. 317; Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615; Keagy v. Trout, 85 Va. 401, 7 S. E. Rep. 329. And after having shown valuable consideration, the burden then rests on the creditors to show fraud, but it requires less evidence to show it than if the transaction were between strangers. Wood v. Harmison, 41 W. Va. 376, 23 S. E. Rep. 560; Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780; Hutchinson v. Boltz, 35 W. Va. 754, 14 S. E. Rep. 267. See Livey v. Winton, 30 W. Va. 554, 4 S. E. Rep. 451; Greer v. O'Brien, 36 W. Va. 277, 15 S. E. Rep. 74; Harden v. Wagner, 22 W. Va. 356.

Postnuptial Settlements—Burden of Proof.—It is well settled that a postnuptial settlement is presumed to be voluntary and void, and to be upheld when assailed by creditors, must be supported by proof independent of the answers of those claiming under the settlement. Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615; Lewis v. Mason, 84 Va. 731, 10 S. E. Rep. 529; William & Mary College v. Powell, 12 Gratt. 372; Paynes v. Coles, 1 Munf. 373; Lewis v. Caperton, 8 Gratt. 148; Price v. Thrash, 30 Gratt. 515; Ruth v. Owens, 2 Rand. 507; Beckwith v. Butler, 1 Wash. 224; 4 Min. Inst. (3d Ed.) 1193; Hatcher v. Crews, 78 Va. 460; Fink v. Denny, 75 Va. 663; Blow v. Maynard, 2 Leigh 30.

Same—Inference from Evidence.—In detinue for slaves, the question being whether a contract between plaintiff and defendant's testator, was a gift or a sale of the slaves by the latter to the former, the defendant demurs to the plaintiff's evidence. *Held*, the evidence states facts, from which it may fairly be inferred, that the contract was a sale, though there was no express proof of any valuable consideration paid or stipulated, and that therefore it was a sale. Hansbrough v. Thom, 3 Leigh 147.

Effect of Seal—Estoppel.—The addition of a seal operates as an estoppel, and concludes the party from denying the consideration or questioning the facts set forth in the instrument. Cromwell v. Tate, 7 Leigh 301.

XV. RELIEF IN EQUITY.

Bond — Consideration Unexpressed.—A court of equity will relieve against a bond, given to secure title to lands, although the consideration was not expressed in the bond. Hackett v. Alcock, 1 Call 463 (533). See Faulkner v. Davis, 18 Gratt. 651.

Mistake—Reformation of Instrument—Negligence.—Equity will reform instruments executed under mutual mistake, as to the consideration, but this can never be done unless the true state of the case can be established. Chapman v. Persinger, 87 Va. 581, 13 S. E. Rep. 549.

But equity will not extend its aid to one who has been guilty of culpable negligence; it requires that the party who asks relief on the ground of mutual mistake as to the consideration, shall have exercised at least the degree of diligence which may fairly be expected of a reasonable man under the circumstances. Persinger v. Chapman, 93 Va. 349, 25 S. E. Rep. 5; Foster v. Rison, 17 Gratt. 331; Towner v. Lucas, 13 Gratt. 705; Harris v. Harris, 23 Gratt. 766; White v. Campbell, 80 Va. 181; Chapman v. Persinger, 87 Va. 581, 13 S. E. Rep. 549.

Failure of —Defect of Title—Injunction Granted.—In Virginia, equity will enjoin the collection of the purchase money of land, on the ground of defect of title, after vendee has taken possession, under conveyance from vendor with general warranty, if the title is questioned by a suit either prosecuted or threatened, or if the purchaser can shew clearly that the title is defective. Koger v. Kane, 5 Leigh 606; Yancey v. Lewis, 4 H. & M. 390; Grantland v. Wight, 5 Munf. 295; Ralston v. Miller, 3 Rand. 44.

Defect in Title—Injunction against Collection of Purchase Money Refused.—The plaintiff, in Long v. Israel, 9 Leigh 556, being unable, for want of funds, to purchase a certain tract of land, procured the defendant, a third party, to purchase it and have the conveyance made to the plaintiff; for which the plaintiff gave his note for $900 to the defendant. A defect in the title being proved, equity refused to enjoin a collection of said note.

Failure of—Confederate Money—Duress.—Where a party residing in Greenbrier county, in 1863, is compelled, by threats of arrest for disloyalty to the confederate government, to receive confederate

treasury notes in payment of a debt created before the beginning of the rebellion, he is entitled to relief against such payment by a sale of the land involved in the transaction, to enforce his vendor's lien. Ludington v. Gabbert, 5 W. Va. 330. It was held, in Simmons v. Trumbo, 9 W. Va. 358, overruling Mann v. Lewis, 3 W. Va. 215, and Mann v. McVey, 3 W. Va. 232, that similar threats did not amount to duress, and relief was refused.

Relief in Equity—Refused—Title to Property Not Clear.—A purchaser, having taken possession of an estate, is not entitled to relief in equity, against a judgment for the purchase money, on the ground that the title of the vendor is not clearly shown to be good; but is bound on his part to prove it bad. Grantland v. Wight, 5 Munf. 295; Beale v. Seiveley, 8 Leigh 670; Ralston v. Miller, 3 Rand. 44.

Relief against Judgment—Allegations—Proofs.—Where a purchaser comes into a court of equity for relief against a judgment at law, on the ground of a defect in the vendor's title to part of the tract of land purchased, it is not enough for him to allege such defect or want of title: he must prove an actual eviction, or superior title in some other person. Yancey v. Lewis, 4 H. & M. 390.

Failure to Give Bond—Decree to Cancel Deed.—Where the consideration of a deed for land was the grantee's promise to give a bond, binding himself to support the grantor's parents and the grantee refused to give such bond a cancellation of the deed was decreed. Wilfong v. Johnson, 41 W. Va. 283, 23 S. E. Rep. 730.

Equity Will Not Relieve for Inadequacy of Consideration—Exceptions.—Equity will not relieve the makers of a note given for the purchase money of a newspaper for mere inadequacy of consideration, unless the inadequacy is such as to shock the conscience, and of itself amount to fraud. Jones v. Degge, 84 Va. 685, 5 S. E. Rep. 799; Matthews v. Crockett, 82 Va. 394.

Fraud—Enquiry into Consideration.—Under circumstances inducing suspicion that a bond (on which a judgment at law had been obtained against an executor), was counterfeit or fraudulent, upon a bill filed by the executor, relief was given in equity, by directing an issue to try whether the bond in question was the deed of the testator or not, and if so, what was the consideration on which it was founded. West v. Logwood, 6 Munf. 491.

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269 *Young for &c. v. Johnston.

July Term, 1853, Lewisburg.

Bonds—Discharge*—Case at Bar.—F was indebted to J, and J wanting money in the absence of F borrowed of Y one hundred and fifty dollars, for which he gave his note with the understanding that on the return of F he would pay it; and accordingly upon the return of F he paid the amount to Y and took in the note. Some two years afterwards F and J had a settlement of their accounts, when F was found to be the debtor of J, and gave his note for the balance. Some years subsequent to this settlement F found the note among his papers, and believing it had been omitted in the settlement between himself and J, assigned it for value, and an action was brought upon it in the name of Y for the benefit of P, the then holder of the note. Upon the evidence the court was of opinion that the note was embraced in the settlement. But if not, by the payment F became a creditor of J for so much money paid for his use; and the note was discharged and extinguished by such payment, and was not revived by the omission of it in the settlement.

This is an action of debt brought by Young for Porterfield against Johnston, on an obligation in these words:

"Due D. S. Young, on demand, one hundred and fifty dollars, for value received. Witness my hand and seal this 9th day of February 1833.

Zach. Johnston. [Seal.]"

Issue was joined on the plea of payment; and a verdict was thereon found for the defendant. The only evidence on the part of the plaintiff was the obligation. The defendant introduced a single witness B. F. Frye; who proved that on the 19th of December 1831, he purchased of the defendant one hundred and fifty barrels of flour, to be delivered in February following, and to be paid for at the end of twelve months, according to a covenant between the 270 *parties, which was exhibited. That in February 1833 (about the time the price of the flour became due), witness being absent from home, and defendant being in want of money, the defendant called upon the plaintiff and borrowed one hundred and fifty dollars, with the understanding that upon his return witness was to take up the obligation which defendant executed to plaintiff for said borrowed money; and which is the same sued upon. That upon his return witness did take up said bond, and retained it in his possession. That some time afterwards, witness and defendant had a partial settlement of the flour transaction; which settlement, with sundry receipts for items embraced therein, were produced and recognized by witness. That in that settlement is an item of cash one hundred and fifty dollars, which witness could not identify as being or not being the obligation for one hundred and fifty dollars; and he could not say whether the obligation had or had not been settled between himself and defendant. That he had mislaid it for seven or eight years, and accidentally found it enclosed in a letter. That in 1841 he assigned it, for value received, to Crawford. That witness was a merchant when the obligation was executed, and when the partial settlement was made, and it was his habit, when he received or gave a bond in payment, so to enter it, and not as cash. That upon a final settlement of the flour transaction, he fell in debt to the defendant, and executed his bond for the balance due, and that he held the obligation for one hundred and fifty dollars for some years after the final settlement of the flour transaction and until he assigned it to Crawford. This was all the evidence in the case. The plaintiff moved the court to set aside the verdict and grant him a new trial: first, because the verdict was contrary to the evidence; and, secondly, because the

*See generally, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

witness, after the rendition of the
271 verdict, recollected facts material *to the issue, and had made affidavit thereof; which affidavit was introduced in support of the motion. The substance of the affidavit was, that since his examination as a witness in the case, affiant recollected that having sold his property in 1835 or 1836 to Stuart, said Stuart, to meet his payment, purchased a number of affiant's bonds, including one which had been executed to the defendant, and when said Stuart produced said bond and wanted credit for it, affiant recollected that he held the said obligation for one hundred and fifty dollars, and was disposed to offset it against the said bond; but upon reflection, knowing said defendant to be good for the amount of said obligation, he concluded to accept his own bond to the defendant in part of Stuart's payment, and look to defendant for the one hundred and fifty dollars; and that his memory being refreshed by this circumstance, he did not believe that said obligation of one hundred and fifty dollars ever was settled between himself and defendant. The court refused to set aside the verdict, and grant a new trial, believing that the verdict was in accordance with the evidence, and that justice had been done: To which opinion of the court the plaintiff excepted. All the evidence which was before the jury, and the affidavit aforesaid, are set out in the bill of exceptions. Upon the application of the plaintiff a supersedeas was awarded.

J. B. Baldwin and R. P. Kinney, for the appellant.

A. H. H. Stuart, for the appellee.

MONCURE, J., after stating the case, proceeded:

The question to be decided by this court is, Whether the Circuit court erred in refusing a new trial?

I think the evidence which was before the jury fully sustains their verdict; and shows, not only that the obligation was paid by Frye to the plaintiff, at the request
272 *and on account of the defendant, but that it was paid out of the defendant's money in Frye's hands; and the amount so paid was afterwards included in the settlement between Frye and the defendant. In February 1833 the defendant was in want of one hundred and fifty dollars; and having more than that amount in Frye's hands, would have gotten it from him; but Frye was from home, and he borrowed it from the plaintiff, and gave him the obligation therefor, with the understanding that Frye would take it up on his return home; which Frye accordingly did. These facts are not contradicted or countervailed by any evidence in the case or anything in the affidavit, and fully establish the payment of the obligation to the plaintiff. If they had stood alone they would have sustained the verdict. In connection with the other evidence in the case they show that the payment thus made by Frye, at defendant's request and for his use, was afterwards included in a settlement between them. It was obviously intended to have been paid out of the price of the flour, and to have been included in the settlement of that transaction. It is not probable that so large an item would have been forgotten; especially as we see that very small items, one of them as small as five or six dollars, were included in that settlement. Nor is it probable that, if not forgotten, Frye would have given his bond for the balance due on account of the flour, and afterwards paid it without having any credit for the payment made in discharge of the obligation for one hundred and fifty dollars. In addition to all this, there is a credit in the settlement corresponding precisely with this payment in time and amount. One of the items of the settlement being, "Cash 1st March 1833, one hundred and fifty dollars." The 1st of March 1833 was two or three weeks after the date of the obligation and about the time no doubt of Frye's return. There is nothing in the form of the entry
273 tending to *show that it does not refer to the payment of the obligation. There was no occasion for expressly naming the bond in the entry, as it was no doubt well understood between the parties at the time of the settlement. The amount and time of payment were alone material. The settlement exhibited was not a formal account between the parties, but a brief summary of items of payment made by Frye to and for the defendant, the apparent object of the summary being to ascertain the total amount of all the payments. Nor is there anything in the fact that interest is charged on the item of one hundred and fifty dollars in the settlement from the 1st of March 1833, instead of the 9th of February 1833, the date of the obligation, which tends to show that the item does not refer to the payment of the obligation. The payment having been made a few days after the date of the obligation, no interest was probably charged upon it by the plaintiff. The form of the obligation tends to show that it was intended as a mere due bill to be taken up in a few days. Frye having made the payment for the defendant, and out of his funds, could only charge interest on the amount paid, and from the time of payment. That the obligation was not delivered by Frye to the defendant at the time of their settlement, is not a very material circumstance. The settlement took place a year or two after the payment of the obligation. The obligation had been mislaid by Frye, and may have been forgotten by both parties; especially if it was merely given as a due bill or memorandum to be taken up in a few days.

Thus stands the case on the evidence as it was before the jury. Would it have been materially altered by the facts set out in the affidavit? I do not think that it would. Those facts merely tend to show that the credit or claim of Frye for money paid in discharge of the defendant's obligation, was omitted, by mistake or design, in their

settlement. This is so inconsistent
274 *with the circumstances of the case and the written evidence, that I think the affiant must have been mistaken in his recollection of an occurrence that had transpired about fourteen years before he made the affidavit. But even if it be conceded that there was such an omission in the settlement, it would merely make Frye a creditor of the defendant for the money paid for his use in discharge of the obligation, with interest from the time of payment; and would not revive the obligation which was discharged and extinguished by such payment.

I think therefore the court was right in refusing a new trial, and that the judgment should be affirmed.

The other judges concurred in the opinion of Moncure, J.

Judgment affirmed.

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275 *McMaster v. McMaster's Ex'ors.

July Term, 1853, Lewisburg.

Wills—Construction*—Case at Bar.—D M and A M have each five children, and R M M is the child of A M. Testator regards R M M with great favor, and gives him a plantation and a legacy of two thousand dollars. Testator then says, "I will and bequeath to the children of A M and D M and to R M M all the funds remaining after every just claim against my estate has been satisfied, to be equally divided between them." HELD: That the fund is to be divided into ten shares, one of which is to be given to each of the children of A M and one to each of the children of D M; and thus giving to R M M but one-tenth of the fund.

The case is stated in the opinion of Judge Samuels.

A. H. H. Stuart, for the appellant.
Michie, for the appellees.

SAMUELS, J. This cause is brought here by appeal from a decree of the Circuit court of Rockbridge county. A bill was filed in that court by William M. McMaster and Robert B. McMaster, two of the legatees in the will of Robert McKee, for the purpose of having the construction of a certain clause of the will judicially ascertained; and for the purpose of having an account of testator's personal estate in the hands of the executors, and for the due execution of the will in all respects. The Circuit court rendered a decree upon all subjects thus brought before it; and from so much of the decree as put a construction on the controverted clause in the will, an appeal was allowed by this court on behalf of Robert B. McK. McMaster, one of the legatees designated in that clause.

Looking to other clauses in the will it is seen that the testator regarded Robert
276 B. McK. McMaster the *legatee, with great favor; that he gave him the plantation on which testator lived at the date of his will, all his books and two thousand dollars; the money being bequeathed for the purpose of giving the legatee a thorough education. The 13th clause in the will, out of which this controversy arises, is in these words: "I will and bequeath to the children of Arthur McMaster and David McMaster and to Robert B. McKee McMaster all the funds remaining after every just claim against my estate has been satisfied, to be equally divided between them."

Arthur McMaster had five children, of whom Robert B. McK. McMaster the appellant was one; David McMaster also had five children.

Three different constructions of this clause have been insisted on in the progress of the cause:

1st. That Robert B. McK. McMaster should take one full third of the residuum, also one-fifth of another third bequeathed to Arthur McMaster's children.

2d. That he should take one-third of the residuum, the other children of Arthur McMaster another third, and the children of David McMaster the remaining third. This construction was insisted on here by the appellant's counsel.

3d. That the residuum should be divided into ten shares, and one given to each of Arthur McMaster's five children, and one to each of David McMaster's five children, thereby giving to the appellant one-tenth only thereof.

The construction last stated was adopted by the Circuit court, and is, in my opinion the true construction. The appellant was included in the description "the children of Arthur McMaster;" describing him afterwards by name could not, of itself, give him more than he would otherwise have taken. The will does not in terms direct a division into three parts; and then a subdivision of one part into four parts;
277 and of *another part into five parts; and that the remaining part without further division be given to appellant. Nor is there anything in the will which by necessary implication would lead to that result. On the contrary, it is perfectly obvious that the testator was dividing the residuum between individual legatees and not between

*Wills—Construction.—Where a bequest is made for several persons, in general terms indicating that they are to take equally as tenants in common, each individual will take the same share; in other words the legatees will take *per capita*. The same rule applies where a bequest is made to one who is living, and to children of another who is dead, whatever may be the relation of the parties to each other or however the statutes of distribution might operate upon those relations in case of intestacy. Thus where the gift is to A's and B's children such children take as individuals, *per capita*. The substance of this rule of construction is, that, in the absence of explanation the children in such a case are presumed to be referred to as individuals, and not as a class. Hoxton v. Griffith, 18 Gratt. 578, citing the principal case; also, Brewer v. Opie, 1 Call 212; Crow v. Crow, 1 Leigh 74. See also, citing and approving the principal case for this proposition, Senger v. Senger, 81 Va. 699; Walker v. Webster, 95 Va. 382, 383, 28 S. E. Rep. 570.

classes; no purpose is indicated which would be subserved by dividing them into classes and not regarding them as individuals. The amount of the bounty is the residuum; the objects of that bounty are the children of Arthur McMaster and those of David McMaster, designated by a general description, and we may add, by the particular description. It only remains to ascertain their respective interests; and that question is determined by the direction that the bounty is "to be equally divided between them."

The testator having already, in previous clauses of the will, given to the appellant a large portion of his estate, may, from abundant caution, have included his name in the residuary clause lest it might be held that nothing more was intended to be given him.

I am of opinion there is no error in the part of the decree appealed from, and that it should be affirmed.

The other judges concurred in the opinion of Samuels, J.

Decree affirmed.

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278 *Beale's Adm'r v. Botetourt Justices for &c.

July Term, 1858, Lewisburg.

1. **Executors and Administrators—Action on Administration Bond—Error of Form—Effect*—Case at Bar.**—In an action upon the official bond of an executor against himself and his sureties for a devastavit, upon the plea of conditions performed, the execution which issued on the decree *de bonis testatoris*, directed the sheriff to levy the debt of the goods and chattels of B executor of L, instead of the goods and chattels of L in the hands of B to be administered. This is an error of form and not of substance, and the execution having been returned, "no assets in the executor's hands," and no motion having been made to quash it, it must be regarded in this suit as an execution against the executor as such, and not in his own right.
2. **Same—Same—Immaterial Issue—Effect—Case at Bar.**—In such an action, a plea that the execution issued irregularly and unlawfully after the expiration of more than a year and a day from the time of the decree, without any previous proceeding by way of *scire facias* or otherwise to authorize the same, presents an immaterial issue; such an irregularity would not render the execution void, but only voidable; and it cannot be avoided by pleading or proof in this collateral suit.

***Executors and Administrators—Action on Administration Bond.**—See the principal case cited and approved in Franklin v. Depriest, 13 Gratt. 271.

Limitation of Actions—Avoidance by Issuance of Execution.—In Reilly v. Clark, 31 W. Va. 575, 8 S. E. Rep. 511, it is said: "As to the second ground, it is admitted that the period between the return day of the first and the issuance of the second execution was more than ten years; but it is insisted that, although the issuance of the second execution was irregular and erroneous, the said execution was merely voidable, and could not be assailed in this collateral suit. *Beale v. Botetourt, 10 Gratt. 278.*"

The case is stated by Judge Moncure in his opinion.

Boyd, for the appellant.
Michie, for the appellees.

MONCURE, J. This is an action of debt brought in the name of the justices of Botetourt, at the relation of Bush, against Beale, on the latter's official bond as executor of Long; and the object of it is to recover the amount of a decree obtained by Bush against Beale as executor of Long, on which a fieri facias was issued and returned, "no assets in the executor's hands." There was a demurrer to the declaration, which the court below sustained; and judgment was thereupon rendered for the defendant. But this court reversed the judgment, and remanded the cause for 279 *further proceedings. Bush v. Beale, 1 Gratt. 229. Issues were joined on general replications to four pleas: 1st, conditions performed; 2d, no such record; 3d, that the execution in the declaration mentioned was sued out irregularly and unlawfully, after the expiration of more than a year and a day from the time of the rendition of said decree, and without any previous proceeding, by way of scire facias or otherwise, to authorize the same; and 4th, that the cause of action did not accrue within ten years next before the commencement of the suit. The defendant demurred to the evidence; which consisted of the executorial bond, the record of the suit in which the decree was rendered, and the fieri facias and return thereon. A verdict was found for the plaintiff for the debt in the declaration mentioned, to be discharged by the payment of the amount of the decree, subject to the judgment of the court on the demurrer to the evidence; and judgment was rendered on said demurrer for the plaintiff. Whether that judgment be erroneous or not, is the question now to be considered and decided.

The evidence fully sustains the judgment of the court in favor of the plaintiffs on the issues joined on three of the pleas; to wit, the 1st, 2d and 4th. The exhibition of the bond, record, execution and return mentioned in the declaration, made out a prima facie case for the plaintiffs on these issues. There is no variance between the allegations and the proofs. The execution it is true commands the sheriff to levy the debt of the goods and chattels of Beale executor of Long, instead of the goods and chattels of Long in the hands of the executor Beale to be administered. But this is an error of form and not of substance. The law prescribes no form of execution against an executor. The execution ought of course to show that it is to be levied de bonis testatoris. The words "executor of Christian Charles Long," added to the 280 *name of Beale in the execution, are of no utility except to show that the execution was against Beale as executor. The insertion of the word "as" before the word "executor" would have left no room for doubt that the execution would have been

to be levied de bonis testatoris. The omission of that word may render the character of the execution equivocal. The words, "executor of Long," may have been added as mere descriptio personæ; or may have been added to show that the execution was to be levied of the goods of the testator: They are consistent with the latter view. The law invests the executor with the title to the testator's goods, and makes them the goods of the executor. And execution against the goods of the executor may be an execution against the goods of the testator. If the execution in this case be equivocal on its face, the doubt is removed, by the surrounding circumstances: It issued upon a decree de bonis testatoris. It was treated by the sheriff as an execution de bonis testatoris; his return being "no assets in the executor's hands." It was regarded as such by the parties; no motion having ever been made by either of them to quash it; but the relator having based this suit upon it as an execution de bonis testatoris; and the defendant having impliedly admitted, by his pleadings in the suit, that such is its character. It must therefore be regarded as an execution against the executor as such, and not in his own right. The cause of action on the executorial bond accrued on the return of the execution, "no assets in the executor's hands;" and ten years not having elapsed after such return and before the institution of the suit, it was of course not barred by the act of limitations. I am now considering the case in reference to the issues joined on the 1st, 2d and 4th pleas. The objection cannot be raised under them, that the execution was sued out after the expiration of more than a year and a day from the date of 281 *the decree, and without any previous proceeding by way of scire facias or otherwise to authorize the same. It will be presumed, in the absence of proper averment and proof to the contrary, that the execution was regularly issued.

But the third plea puts the fact directly in issue, that the execution was sued out irregularly and unlawfully, after the expiration of more than a year and a day from the time of the rendition of the decree, and without any previous proceeding by way of scire facias, or otherwise, to authorize the same. And if this issue were material, it would probably be necessary to reverse the judgment; there being no evidence tending to show that there was any previous proceeding which authorized the issuing of the execution; and the burden of proving that fact devolving, as it would seem, on the plaintiffs, as having the affirmative of the issue. But I do not think the issue is material. If the supposed irregularity exists it does not render the execution void; but, at most, only voidable. Until it is avoided it must be regarded as a valid execution. It cannot be avoided by plea or proof in this collateral suit. It might be quashed or set aside by the court from which it issued, on the motion of the defendant founded on notice to the plaintiffs. A judgment on which no execution is issued within a year and a day from its date, is, generally, so far presumed to be satisfied as to render a scire facias to revive it necessary. It will be revived on the return of the scire facias, as a matter of course, unless good cause be shown to the contrary. The object of the scire facias is merely to give the defendant a day in court to show such cause. The defendant may waive this benefit; and if he has no such cause to show, it will be his interest to waive it, for he will thereby save the costs of the scire facias. If an execution be issued without a scire facias, and the defendant move to quash it, 282 the plaintiff may show *that another execution was issued within a year and a day from the date of the judgment; or that he was prevented from issuing one by writ of error, injunction, cesset executio, or agreement of the parties, until within a year and a day next before the date of that which is moved to be quashed; and the motion will thereupon be overruled. If an execution, irregularly issued without scire facias, be levied on the goods of the defendant, he would have some motive to have it quashed. But if it be returned nulla bona, he would have no such motive, unless he had good cause to show against the revival of the judgment; and would naturally be willing to waive his right to a scire facias. It is at least very doubtful whether he would be allowed to have the execution quashed, after long acquiescence, when the plaintiff may have lost his evidence to show that it was properly issued, and when his judgment may be barred by the act of limitations. But certainly, so long as it remains unquashed, neither the defendant, nor any other person, can avoid it in any collateral suit, by pleading or proving that it was irregularly issued. The execution is important evidence in his case, as showing by its return that the defendant was guilty of a devastavit; and it seems to show that fact, whether it were irregularly issued or not. The sheriff was bound to execute it in either case; and having returned it no effects, the devastavit was thereby established, and a right of action accrued on the executorial bond. See 2 Tidd's Prac. 1030, 1031, 1072, 1153, 4 and 5; Watson on Sheriffs 139, 7 Law Libr.; Shirley v. Wright, 1 Salk. R. 273; Campbell v. Cumming, 2 Burr. R. 1187; 1 Rob. Pr. 56 and 507. This case is at least as strong as that of bail, who, it has been held, cannot, in a scire facias on his recognizance, object that the ca. sa. against his principal was irregularly issued. Petersdorff on Bail 355-359, 10 Law Libr. 283 197-199, and cases cited in *notes f and y. The doubt expressed by Petersdorff as to the correctness of this opinion, is not sustained by the case of Thomas v. Young, 15 East's R. 617, which he cites for the purpose. The bail was there discharged on the ground that without his knowledge a cognovit had been given by his principal to pay the debt by installments.

If the issue on the third plea was, as I

think, immaterial, a verdict thereon for the defendant would not have entitled him to a judgment if the verdict had been for the plaintiffs on the other issues; but judgment would have been rendered for the plaintiffs non obstante veredicto. It follows that the judgment in this case was properly rendered for the plaintiffs.

I think there is no error in the judgment, and am for affirming it.

The other judges concurred in the opinion of Moncure, J.

Judgment affirmed.

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284 *Moore & als. v. Holt.

July Term, 1858, Lewisburg.

1. **Foreign Attachments in Equity§—Priorities—Injunction—Case at Bar.**—Process in a foreign attachment is served upon a garnishee having property of the absent debtor in his hands; and afterwards other creditors sue out attachments at law against the same party as an absconding debtor, which are served upon the same garnishee; and before the foreign attachment is ready for a hearing, they obtain judgments and an order for the sale of the property in the hands of the garnishee. The plaintiff in the foreign attachment may amend his bill and enjoin the sale.

2. **Same§—No Affidavit—Endorsement.***—It is not necessary that the plaintiff in a foreign attachment shall file with the clerk an affidavit of the nonresidence of his debtor before the process is issued, in order to constitute it, with the endorsement in the nature of an attachment, a lien when served.

3. **Same§—Same—Same—Right of Officer under.**—The endorsement in the nature of an attachment does not authorize the officer serving it, to take the effects out of the hands of the garnishee, or to require him to give security to have them forthcoming; nor does it operate as an injunction so as to subject a party to the penalty of a contempt for disobedience. If the plaintiff desires such an order of the court, as will effect these purposes, he must file the affidavit according to the terms of the act.

4. **Same§—Same—Statements in.**—It is not necessary to state in the endorsement on the *subpœna* the character or amount of the claims for which the attachment is issued. This is to be done in the bill.

5. **Same§—Sufficient Proof of Nonresidence.†**—What circumstances are sufficient to show that the debtor had gone beyond the limits of the state without an intention to return when the process issued in a foreign attachment was served.

6. **Same§—Decree—Recital as to Order of Publication—Effect in Appellate Court.‡**—The decree states that the order of publication against the absent defendant had been duly published. It is to be taken in an appellate court that everything required by the statute was done.

7. **Same§—By Guarantor.**—A guarantor of a debt may maintain a foreign attachment against his principal, before he has paid the debt.

8. **Letters of Credit—Guaranty‖—Case at Bar.**—A letter written by a party to merchants with whom he had been in the habit of dealing, introducing to them his brother who was a stranger to them, stating that this brother was going to their city to purchase goods, and requesting them to introduce him to some of the houses at which the writer dealt, "with assurance that any contract of his will and shall be promptly paid," is a guaranty.

***Foreign Attachments in Equity—No Affidavit—Endorsement.**—The principal case was cited in Pulliam v. Aler, 15 Gratt. 59, to the point that it is not necessary that the affidavit of nonresidence shall be filed before process issues to constitute it, with the endorsement in the nature of an attachment, a lien when served. See principal case also cited in Hall v. Bank, 14 W. Va. 610.

Same—Affidavit—Time of Making.—It is well settled that the affidavit, required by the statute to authorize a court to issue out an attachment against the estate or effects of an absent debtor, may be made, either before or after the bill is filed. The principal case was cited for this proposition in Cirode v. Buchanan, 22 Gratt. 216; Chapman v. Railroad, 26 W. Va. 320 (see, in this case, a somewhat extended quotation from the principal case, pp. 313-315); *foot-note* to Fisher v. March, 26 Gratt. 766. See also, O'Brien v. Stephens, 11 Gratt. 610, and *foot-note*; monographic *note* on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624.

§See monographic *note* on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624.

†**Foreign Attachments—What Constitutes Nonresidence.**—See principal case cited in Dean v. Cannon, 37 W. Va. 129, 16 S. E. Rep. 446; *foot-note* to Clark v. Ward, 12 Gratt. 441; *foot-note* to Long v. Ryan, 30 Gratt. 718.

‡**Same—Decree—Recital of Due Service of Process—Effect in Appellate Court.**—In Steenrod v. Railroad Co., 27 W. Va. 12, it is said: "The decree of June 5, 1880, states that the cause came on to be heard, among other things, upon the order of publication against the nonresident defendants 'duly executed.' This according to the settled law is conclusive as to the due publication of the order, so far as the appellate court is concerned. Hunter v. Spotswood, 1 Wash. 145; Gibson v. White, 3 Munf. 94; *Moore v. Holt, 10 Gratt. 294.*" See, in accord, the principal case cited in Arnold v. Arnold, 11 W. Va. 456; Scott v. Ludington, 14 W. Va. 392; Taylor v. Cox, 32 W. Va. 163, 9 S. E. Rep. 76; *foot-note* to Craig v. Sebrell, 9 Gratt. 131.

‖**Letters of Credit—Interpretation.**—Letters of credit are regarded as mercantile instruments, and, according to the better opinion, they should receive not a strict and technical, but a fair and reasonable interpretation, according to the true import of their terms, and what may be fairly presumed to have been the intention and understanding of the parties. Tischler v. Hofheimer, 83 Va. 35, 4 S. E. Rep. 370, citing *Moore v. Holt, 10 Gratt. 294;* Douglass v. Reynolds, 7 Peters' R. 113; Lawrence v. McCalmont, 2 Howard 426.

Written Instruments—Parol Evidence.—The principal case was cited in Woodward, etc., Co. v. Foster, 18 Gratt. 207, to the point that parol evidence of the relations of parties, and of the circumstances under which a written contract—especially a mercantile instrument—was made, may be given in order to explain the intention when not plainly expressed.

See further, monographic *note* on "Bills, Notes and Checks" appended to Archer v. Ward, 9 Gratt. 622.

285 *This was a proceeding by foreign attachment, in the Circuit court of Botetourt county, by Samuel P. Holt against Joseph W. Holt an absent debtor, and James Snodgrass and others, home defendants. The case is stated by Judge Lee in his opinion.

Mays and Lackland, for the appellants.
F. T. Anderson, for the appellee.

LEE, J. This is a contest between persons claiming to be creditors of a common debtor, and seeking priority out of the proceeds of his effects, which have proved inadequate to the satisfaction of all.

The suit of the appellee was what is called "a foreign attachment," commenced by a subpœna sued out on the 12th of October 1846, with the usual endorsement to attach the effects of the absent debtor in the hands of the home defendants, and to restrain the latter from disposing of them till the further order of the court. It was made returnable to the November rules following; and upon the day on which it issued, it was executed upon the defendant Snodgrass, who had in his possession a stock of goods and other effects belonging to the debtor Joseph W. Holt. After the service of this process, that is to say, on and after the 17th day of October 1846, the appellants and other creditors of the said Joseph Holt sued out their several attachments at law, and the same were levied upon the same property.

At the November term of the county court of Botetourt, these creditors obtained judgments upon their respective attachments, with orders for the sale of the attached effects; and thereupon the appellee, who had filed his bill at the November rules, filed a supplemental bill, setting out the proceedings of these creditors, alleging that they were about to proceed to execute the orders of sale of the goods, and praying 286 for an *injunction to restrain them from so doing, and that the goods might be applied to his benefit according to the prayer of the original bill. The appellants and others of the attaching creditors filed their answers, contesting the appellee's right to recover according to the pretensions of his bill, and claiming priority for themselves out of the attached effects. Subsequently the goods were sold by an agent agreed upon by the parties and the proceeds brought into court; and there having been a reference and a report under an interlocutory order made in the cause, on the 9th of September 1848, the cause was heard, and a decree pronounced sustaining the right of the appellee to recover according to his pretensions, and also awarding to him priority out of the proceeds of the attached effects; and the injunction which had been granted to restrain the creditors who had taken attachments at law, was accordingly perpetuated, and the receiver who held the fund was directed to pay over the same to the complainant, and the attaching creditors to pay the costs of the supplemental bill. From this decree the defendants Moore, Brough and Smith, applied for and obtained an appeal to this court.

The first question presented in this case is as to the regularity of the proceeding by injunction at the suit of the creditor in a foreign attachment to restrain creditors who have attached the same effects by proceedings at law, from appropriating them to their use. This question is however sufficiently answered by the case of Erskine v. Staley, 12 Leigh 406, in which it is distinctly held that an application to the court of chancery to enjoin a sale in such a case under the judgment at law is entirely regular and proper; and the judge who delivered the opinion in the case states that it is the only remedy the plaintiff in the foreign attachment could resort to.

It is objected on the part of the appellants, that the 287 *appellee's attachment was issued irregularly, and was void because no such affidavit of the nonresidence of the debtor as is required by the statute, had been made and filed before the subpœna with the endorsement of attachment issued. It has never been the practice, so far as I have been able to learn, to file an affidavit of nonresidence with the clerk, in order to authorize him to issue the subpœna and to make such an endorsement in the nature of an attachment thereon as the plaintiff's counsel may direct. According to the long established usage of the state, such an endorsement without a previous affidavit, serves as a notice to the home defendant not to part with the effects of the debtor in his hands without leave of the court, and when served upon the home defendant, creates a lien in favor of the creditor, of which neither the absent debtor nor the garnishee, by any act of theirs, nor any third person, by any attachment or other process of law subsequently levied, could deprive him. This practice has been repeatedly recognized as regular, both by the chancery courts and the Court of appeals. Smith v. Jenny, 4 Hen. & Munf. 440; McKim v. Fulton, 6 Call 106; Williamson v. Bowie, 6 Munf. 176; Erskine v. Staley, 12 Leigh 406. An endorsement in the nature of an attachment has not, it is true, been construed to authorize the officer serving it, to take the effects out of the hands of the garnishee, or to require him to give security to have them forthcoming; nor does it operate as an injunction so as to subject a party to the penalty of a contempt for disobedience. If the plaintiff desire such a formal order of the court as will serve these purposes, he must file the affidavit according to the terms of the act: but for the purpose of a notice to the garnishee and to secure a lien upon the property, a subpœna with an endorsement in the nature of an attachment, comes in place of the formal order of the court, and had indeed 288 superseded *it in practice, and rendered it unnecessary as early as Smith v. Jenny, decided in 1809. The act certainly does not require the affidavit to be filed before the subpœna can issue, and I

am aware of no case from which any inference can be fairly made to require it. The case of Brien v. Pittman, 12 Leigh 379, referred to by the counsel, does not so decide. The court in that case held that it was error in the court below to proceed to decree against absentees without an affidavit of nonresidence, or that upon enquiry at their usual places of abode, they could not be found. Nothing is intimated of any necessity to file this affidavit before the subpœna issues; and it is expressly held that the answer of a defendant admitting that he was a nonresident would render any affidavit unnecessary. I think the objection cannot be sustained.

The next objection is, that the attachment was void for uncertainty, because neither the character nor the amount of the claims for which the attachment is sued out is stated in the endorsement on the subpœna. The endorsement however is of course to be understood as referring to the bill to be filed, in which the nature and amount of the complainant's demands must be properly exhibited. It is argued, however, that a plaintiff, after issuing his subpœna with an endorsement in general terms, and after it had been served, might purchase up other claims against the debtor, and include them in his bill, and thus practice a fraud upon other creditors who had acquired rights after his attachment had been served on the garnishee, but before his purchase of such additional claims. The answer to this is that the court cannot presume such a fraud, and must refer the ownership of the claims set up in the bill filed to the time of the suing out of the subpœna, in the absence of proof or suggestion to the contrary; but that it is entirely competent to any party interested to set up such a case, in some proper manner, in de-
289 fence of his *rights; and upon its being made out, the court will restrict the operation of the attachment to the subject which it properly embraces, and not suffer it to be used to defraud those who may have acquired rights after its emanation.

The next objection is, that the proof in the case was not sufficient to show that the defendant Joseph W. Holt was a nonresident of the commonwealth at the time the suit was instituted. The bill alleges that at the time of the emanation of the subpœna, the said Joseph Holt "was and still is a nonresident of the commonwealth of Virginia, and that upon enquiry at his usual place of abode, he could not be found, so as to be served with process." The preamble of the statute, 1 Rev. Code 1819, p. 474, ch. 123, recites, that whereas creditors had experienced great difficulties in the recovery of debts due from persons residing out of the jurisdiction of this commonwealth, &c., and then goes on to provide that where any suit had been or thereafter should be commenced for relief, against any defendants who are out of this country, and others within the same, having effects in their hands, &c., upon affidavit that such defendant or defendants are out of the country, or that upon enquiry at his, her or their usual place of abode, he, she or they could not be found, so as to be served with process, the court may make proper orders to secure the attached effects, and appoint a day in the succeeding term for the appearance of such defendants, &c., a copy of the order fixing such day to be published as thereby provided. Now it might be held, upon an equitable construction of this statute, that where a debtor has actually left his usual place of abode and set off for a distant state, with the intention not to return to his residence, but in future to reside out of the state, an attachment sued out after his departure might be sustained, although it chanced he had
290 *not actually passed the state line at the time the subpœna issued. But however this may be, I think it may be very fairly and sufficiently inferred from the evidence that on the 12th of October 1846, the defendant Joseph Holt was out of the state, and that he had left it without the animus revertandi, but with a formed purpose to take up his residence in another state. It appears that he was a merchant doing business in Botetourt county; that he was not successful in business, or at all events that he was much involved and embarrassed by his debts; that he left home on the 15th of September 1846, under such circumstances as induced a witness, who professes to have noticed them, to believe that his intention was not to return, though the ostensible purpose for which he went away was to purchase goods. After his departure, the first that appears to be heard of him is from Beverly in the county of Randolph, (west of the mountains,) and on the route of the Ohio river. From that place he writes a letter to the witness, who appears to have been a confidential friend, dated the 1st of October 1846, in which he avows his purpose not to return, though he intimates that such was not his purpose when he left home. He speaks of his debts, gives some directions about winding up his business, and paying them as far as possible, and speaks of his future prospects in business. He intimates that appearances were against him, and that he had no doubt he would be looked upon about Amsterdam (his former residence) as a "confirmed rascal," but hopes to prove to the contrary, in the future. A short time after this he is heard from in Indiana, through a letter addressed by him to the same witness, in which he states that he had been in Cincinnati, had there purchased a stock of goods, and was then selling them in Indiana. Now as he was in Beverly on the 1st of Oc-
291 tober, a place which we know *judicially, is but three or four days' easy journey at the very utmost, from the Ohio river, upon which he could have a speedy passage to Cincinnati, where he appears to have been, and a short time after he was in Beverly, was in Indiana selling a stock of goods which he had in the mean time purchased in Cincinnati, in the absence of evi-

dence of any detention or delay in Virginia, I think it may be reasonably inferred that as early as the 12th of October he had passed out of the state of Virginia, and that he had left the state without the intention to return; and as the moment he left it with the intention to take up his future residence elsewhere, he ceased to be a resident of this state, I regard the allegation of nonresidence as sufficiently proved in the cause.

The next objection is, that there is no proof in the record to show that the order of publication against the alleged absent defendant had been duly executed as the law requires. The decree, however, states that the order of publication against Joseph Holt had been duly published, and as due publication requires both the insertion of the order in a newspaper for the prescribed period, and the posting of it at the court-house door in due time, the decree must be construed to import that both were done. And it has been decided by this court on several occasions, that where the decree states that publication had been made, it will be sufficient, and this court will not look into the record for the evidence of the fact. Hunter's ex'or v. Spotswood, 1 Wash. 145; Gibson v. White, 3 Munf. 94; Craig v. Sebrell, 9 Gratt. 131. I think this objection also should be overruled.

The fifth ground of error assigned by the appellants is, that there was no such relation subsisting between Joseph Holt and the appellee as would entitle the latter to maintain an attachment against him: 292 That *the appellant was at most but a guarantor or security for debts of Joseph Holt not yet paid, and not such a creditor as this remedy was provided for by the statute to enable him to recover a debt due. I do not think, however, that the remedy intended to be provided by this statute is of so restricted a character as this assignment of error and the argument of the appellant's counsel would seem to suppose. For although, in the case of Wilson v. Koontz, 7 Cranch R. 202, it is said that although the proceeding is in chancery, yet the matter is a case at law between the parties, the remark was obviously intended to be applied to that particular case, which was a simple attachment in chancery to recover the amount of a note which must have been recovered by a suit at law if the defendant had not been a nonresident. But there is no doubt that purely equitable rights may be secured and enforced through the medium of the foreign attachment.

The fifth section of the statute, 1 Rev. Code 1819, p. 476, plainly extends the provisions in relation to "absent debtors" proper, to all cases of suits in chancery against any absent defendants, concerning any matter or thing whatever; and in the case of Templeman v. Fauntleroy, 3 Rand. 434, we see that purely equitable claims as well as legal demands may be made the subject of foreign attachment: And we are told that "where the case properly belongs to the court of equity, all equitable rules and principles will attach to it." Carr, J., p. 441. Now it cannot be doubted that the claim of a party standing in the condition of a guarantor or surety, to protect himself against loss by reason of the failure of the principal debtor, is such an equitable right as may be enforced through the medium of a foreign attachment. If the debt be due, and the principal debtor can be served with process, the right of the surety to 293 maintain a bill *quia timet proper, is undeniable. If the principal debtor, however, be out of the commonwealth, then the attachment comes in place of the service of process upon him. And if the debt be not due, a court of equity, upon familiar principles analogous to those of the bill quia timet proper, can have no difficulty in protecting a surety against loss by reason of the absence of the debtor from the commonwealth. But I regard this as a matter which is settled by the case of Williamson v. Bowie, 6 Munf. 176. In that case the court sustained an attachment in chancery against a nonresident maker of a note, to indemnify and relieve an endorser, who, in reference to the holder, stood as a mere surety for the debt. And there can be no substantial difference between the case of an endorser in such a case and a surety or guarantor, such as is the appellee in this case. Both are in effect but sureties for a debt properly due from another.

The same principle is deducible from the case of McKim v. Fulton, 6 Call 106, though the report of the case is somewhat obscure. The bill was filed on behalf of one partner of a mercantile concern which had been dissolved, to attach the effects of the other partner who was a nonresident, and to have them so applied as to exonerate the plaintiff from liability for the debts of the firm which the nonresident partner, upon the dissolution of the firm, had taken upon himself to pay. Now as the nonresident partner had agreed to pay the debts of the firm and to save the other harmless, as between themselves, the former became the principal debtor, and the latter the surety merely; Buchanan v. Clark, supra; and although the plaintiff had not been made liable for any of the debts of the firm, so far as it appeared, yet the attachment to secure him against his contingent liability was sustained by the Court of appeals, al- 294 though it had been *discharged by the chancellor. In the case of Williamson v. Bowie, above cited, the promissory note which the plaintiff had endorsed and against which he sought indemnity, had not been paid, and had not become payable when the attachment was taken out. Yet that was deemed no objection to granting the relief prayed for. In this case all the debts against which the appellee was held entitled to protect himself by his attachment, had become due and payable before the attachment was issued, and in this respect the case is stronger than Williamson v. Bowie.

But it is insisted that the appellee was not in fact a surety for Joseph Holt; that

the letter of credit on the faith of which it was said the goods were furnished, was no guaranty but a mere letter of introduction or recommendation, upon which the appellee could not have been liable in a court of law; and at all events, that he could not have been made liable unless notice had been given him that his guaranty was accepted, and of the amount of goods furnished upon it. A guaranty is a collateral engagement or undertaking to be responsible for the debt of another upon his failure to perform his engagement. The language used must express in a clear and explicit manner, an intention on the part of the guarantor to make good the engagement of the principal in case of his default. Russell v. Clark, 7 Cranch. 69, 90, 91. But as a guaranty is regarded as a mercantile instrument, it is not to be interpreted by any strict technical rules of construction, but by what may be fairly presumed to have been the intention and understanding of the parties. Douglass v. Reynolds, 7 Peters' R. 113; Lee v. Dick, 10 Peters' R. 482; Bell v. Bruen, 1 How. S. C. R. 169. In this case the appellee, a merchant doing business in the country, writes to a mercantile house in Richmond with which he was in the habit of 295 dealing, stating that *his brother was going to Richmond to purchase goods, and as he was unacquainted there, the writer requests his correspondents to introduce him to some of the houses at which he (the writer) dealt; "with assurance that any contract of his will and shall be promptly paid." Now I think there could scarcely be a more unambiguous, clear and explicit expression of intention on the part of the writer to assume the liability of a surety upon the default of the principal, and those to whom the letter might be shown could not understand it in any other sense. It is not at all like the letters in the case of Russell v. Clark, referred to by the counsel. In those letters, as the chief justice states in delivering his opinion, while there were to be found expressions alluding to that reciprocity of benefits which results from the intercourse of merchants with each other, there was no intimation of any intention on the part of the writers to become answerable for the parties introduced. They were simply letters of introduction and recommendation, such as are usual among merchants, manifesting the friendship of the writers for the parties introduced, and their solicitude that the party to whom they were addressed should aid their operations so far as his own view of his interests would induce him to engage in the transactions of a house of high character and having the particular good wishes of the writers.

I think the letter in this case might properly have been regarded by those to whom it was shown as the guaranty of the appellee for such sales as they might make to Joseph Holt upon the faith of it; and no question can be raised as to consideration, as it is well settled that it is not necessary there should be a consideration directly between the persons giving and receiving the guaranty. It is sufficient if the party for whom the guarantor becomes surety receives a benefit, or the party to whom the 296 guaranty is given suffers a *loss, as an inducement to the surety to become the guarantor. Morley v. Boothby, 3 Bing. R. 107, 11 Eng. C. L. R. 53; Burn v. Guy, 4 East's R. 190; Willatts v. Kennedy, 8 Bing. R. 10, 21 Eng. C. L. R. 200.

As to the questions whether the guaranty was accepted, and whether due notice of such acceptance of the advances made upon it, and of the default of Joseph Holt, was given to the appellee, I have to say that however they might have been determined in an original action at law against the appellee by a party who had made the advances, yet that they cannot now be raised in this case in a manner to be at all available to the appellants, except in connection with the allegation of fraud and collusion between the Richmond merchants and the appellee. But this allegation is, I think, wholly unsustained by the proofs. Indeed the only circumstance of the appellee's having the claims of the Richmond merchants in his possession and the suing out attachments in their names, which tends to raise even a suspicion of the fairness of the transaction, is, I think, satisfactorily accounted for. Those claims were no doubt sent to the appellee with authority to use the names of the creditors, if necessary to enable the appellee to secure himself from loss on account of his liability for them; and the attachments were sued out after this suit was brought, out of abundant caution, for the purpose of securing the appellee so far as they might serve that purpose, in case it turned out that he could not maintain his foreign attachment.

Laying aside then the charge of fraud and collusion, I think the circumstances of this case are such as to constitute a waiver on the part of the appellee, of all the questions above suggested, and a distinct recognition of his liability. It is clear, as I think, that the goods were sold by the 297 Richmond merchants to Joseph *Holt upon the credit of the appellee's guaranty. There was a strong moral obligation on the part of the latter to pay the debts if Joseph Holt failed to do so, even if the creditors had lost their legal right to recover against him by failure to give such notices as might have been required. It is clear from Joseph Holt's letter to Snodgrass, that he regarded his brother as not only morally but legally bound for these debts, and that he believed his brother so considered himself. And in his original bill, the appellee distinctly admits both a moral and legal obligation on his part to pay them. This bill, it is true, was not filed until the November rules, which, though the earliest possible period at which it could have been filed, was yet after the appellants had sued out their attachments; but as the Richmond creditors, whose debts had been guarantied, were named as parties defendants in the subpœna of attachment sued out on the

12th of October, before any of the attachments at law had issued, and as they could not have been made defendants for any conceivable purpose except to enable the appellee to maintain his attachment by virtue of his liability for the debts due them, I think the bill on this point should relate back to the issuing of the subpœna, and may properly be referred to as the fair exponent of his relation to those creditors, as understood by himself, at that time.

Both Fry and Company and Kent and Company claim in their answers that after Joseph Holt went away, but before the appellee sued out his attachment, the latter admitted his liability to them, and assumed the payment of the debts due them from Joseph, respectively. And the circumstance of their claims, as well as that of Willingham, having been sent by them to the appellee or his counsel, to be used for his benefit, and the acts and conduct of
298 the appellee, all *concur to confirm the statements of the bill, and disclose a clear recognition of his liability when he brought his suit.

Another objection which has been taken is, that it is not proven the letter of guaranty was written at the time it bears date, nor that the Richmond merchants trusted Joseph Holt on the faith of it. But the letter was delivered to Fry & Co., and was produced and exhibited by them with their answer. If it had been fraudulently antedated, it was for the appellants to show it. They have offered no proof of any such antedating; the circumstances of the case do not render it at all probable, and the court cannot presume it. And as to its effect in giving credit to Joseph Holt, the answer of the parties before referred to state explicitly that they sold their goods upon the faith of the letter, and would not have sold them without it. The letter is dated at Big Lick in Botetourt county on the 18th of March 1846; it is delivered to Fry & Co., and in five or six days afterwards, these merchants in Richmond let him have goods amounting altogether to upwards of two thousand dollars, and he a stranger to them all and having no other introduction excepting this letter with a memorandum which appears to have been written at the foot of it and signed by one Edward Carter, in which he stated that he considered that goods sold on time to Joseph Holt, to the amount of fifteen hundred dollars, would be paid for by him. No one can doubt, I think, that the parties, in making these sales to Joseph Holt, did rely upon the guaranty of the appellee with whom they were acquainted, and who had been a dealer with them himself.

The last ground of error assigned is, that the suit should have been in the names of the appellee and Carter, and not of the appellee alone. But it may be a question whether Carter's memorandum is any
299 guaranty *at all; and if it could be so construed, it is wholly separate and distinct from that of the appellee, though on the same paper, and he was liable, severally, if at all, upon it. And if he could have been made a party in this cause, yet he certainly is not so necessary a party that the decree should be disturbed because he is omitted.

None of the errors assigned is, as I think, a sufficient ground for reversing the decree; nor have I been able to discover any such in any part of it; and I am of opinion that it should be affirmed.

The other judges concurred in the opinion of Lee, J.

Decree affirmed.

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300 *Hillis v. Hamilton, Adm'r & als.

July Term, 1853, Lewisburg.

Executors and Administrators—Suit for Account of Administration—Laches*—Case at Bar.—A suit for an account of administration is brought twenty-six years after the death of the intestate, twenty-one years after the death of the administrator, long after his estate is settled up by his administrator showing that there is no personal assets, and in the absence of the first administrator's books and papers, against his heir who at his death was an infant two years old. The staleness of the claim is conclusive against it.

William Hillis the elder died in 1808, having first made his will, which was duly admitted to record in the County court of Rockbridge. By his will he gave to his widow Abigail Hillis his house and lot in the town of Lexington, for her life or until William Hillis his son should come of age; and he gave her his personal estate for life, remainder to William Hillis. He gave to his son William the house and lot in Lexington upon the death of his mother or upon his coming of age; and he charged it with the payment of three legacies of twenty-five pounds each to his three daughters, the first payable in one, the second in two and the third in three years after his son William Hillis came of age. Mrs. Young, one of the daughters, died about a year after her father, leaving her husband William Young and one child surviving her; William Hillis the younger came of age in 1815, and his mother died in 1820; when he qualified as her administrator. He died in 1825, leaving an infant son about two years old, when Robert Irvine qualified as his administrator: And he settled his administration account, showing that he was in advance to the estate.

In 1824 Jacob Haughawont and
301 Abigail his wife *who was a daughter of William Hillis the elder, instituted a suit against William Hillis the younger to recover the legacy left her by her father,

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***Executors and Administrators—Suit for Account of Administration—Laches.**—For the equitable principle governing the court in suits that have been brought after a long lapse of time, see the principal case cited in Foster v. Rison, 17 Gratt. 348, and *note*; Harrison v. Gibson, 23 Gratt. 224, and *note*; Castleman v. Dorsey, 78 Va. 349.

and her portion of her mother's estate. This suit was revived against Irvine as the administrator of William Hillis; and after an issue to ascertain the amount of Mrs. Hillis' estate, the court in July 1830 made a decree in favor of the plaintiffs for the legacy, and two hundred dollars, with interest from the 1st of September 1821, as the female plaintiff's proportion of Mrs. Hillis' estate. None of the other distributees of Mrs. Hillis were parties to this suit.

William Young having died without taking administration on the estate of his deceased wife, in 1846 James G. Hamilton qualified as her administrator; and in the same year he and William Seawright and Mary Ann his wife who was the daughter of Mrs. Young, instituted this suit in the Circuit court of Rockbridge, against Robert Hillis the son of William Hillis the younger, and Irvine the administrator, to recover the legacy left by William Hillis the elder to Mrs. Young, and also to recover his distributable interest in Mrs. Hillis' estate. Robert Hillis answered the bill, relying upon the lapse of time, the death of all the parties who knew anything on the subject, and the statute of limitations.

The accounts were referred to a commissioner, who reported that there was due to the female plaintiff, on account of the legacy to her mother, the sum of two hundred and twenty-three dollars and ninety cents, with interest on eighty-three dollars and thirty-three cents a part thereof, from the 12th of September 1848 until paid; and that there was due to her on account of her distributable share of Mrs. Hillis' estate, five hundred and twenty-four dollars and thirty-three cents, with like interest on two hundred dollars a part thereof.

302 *In April 1848 the court made a decree confirming the report, and decreeing that unless the defendant Robert Hillis should pay to Seawright and wife the sums reported by the commissioner, within six months, commissioners who were appointed for the purpose, should proceed to sell the house and lot in his possession, which he had derived from his father; it being the same devised to his father by William Hillis the elder. The plaintiffs afterwards released the decree for the legacy. From this decree Robert Hillis applied to this court for an appeal, which was allowed.

A. H. H. Stuart, for the appellant.
Michie, for the appellees.

SAMUELS, J. Separating the subject of this suit from the extraneous matter in which it was involved in the bill and subsequent proceedings, the record discloses the following case:

On or before the 4th of September 1820, one Abigail Hillis died, leaving a small personal estate, and leaving her children Mary Laughlin, Abigail Hillis, afterwards the wife of Jacob Haughawont, William Hillis, and her grand daughter Mary Ann Seawright, the female appellee, then and now the wife of Wm. Seawright, her next of kin and distributees. William Hillis qualified as the administrator of his mother's estate: he died in the year 1825, leaving the appellant Robert Hillis, then an infant of tender years, his sole heir and distributee, who took by descent from his father a house and lot in the town of Lexington. Administration on William Hillis' estate was committed to Robert Irvine. In the year 1846 suit was brought by Seawright and wife against Robert Hillis the heir, and Robert Irvine the administrator, of William Hillis, for an account of Abigail Hillis' estate, and for payment of Mary Ann Seawright's distributive share

303 therein. *The bill nowhere alleges in terms that the bond given by William Hillis for the administration of Abigail Hillis' estate, bound his heir; we may suppose however, that it was in the form prescribed by the act of assembly, which would bind the heir.

Robert Hillis alone answered; he defended himself by objecting the staleness of complainant's demand; and by alleging that the money claimed by complainants had been paid, relying upon the lapse of time as affording presumptive evidence of such payment.

The Circuit court directed certain accounts to be taken to ascertain the amount of the distributive share sued for, and the amount of William Hillis' personal estate. These accounts being taken, it appeared that there was no personal estate out of which complainant's demand could be paid. A decree was rendered for the sale of the house and lot aforesaid, for the purpose of paying that demand: from this decree the appeal before us is taken.

Passing by any other error in the proceedings by which the decree was arrived at, yet it must be reversed for reasons affecting the existence of the demand asserted.

The question "what was the amount of Abigail Hillis' estate for distribution?" lies at the foundation of this controversy. By the dim lights shed upon this question, we are able to perceive that William Hillis insisted that certain money received by him at the hands of his mother, was given him by way of advancement. This pretension is resisted by the distributees, who insist that the money was only loaned, and should be accounted for as part of the estate. The money in controversy forms a large proportion of the estate alleged to have belonged to the intestate.

After the lapse of twenty-six years since the death of Abigail Hillis, and after the rights of complainants as her distributees had accrued; after the lapse of

304 *twenty-one years from the death of William Hillis, who was charged with the duty of administering the estate; long after William Hillis' estate had been administered by Irvine his administrator, and the amount thereof settled; and in the absence of William Hillis' books and papers, Robert Hillis his heir at law is called on to litigate the question, "What was the amount

of Abigail Hillis' estate for distribution?"

This delay of itself is gross laches; it renders complainant's claim obnoxious to the objection of staleness. The fact that Mrs. Seawright was a feme covert at the time the right accrued, and has continued to be so ever since, loses its force when assigned by the husband as a reason for his want of diligence; he was under no disability and shows no excuse for the delay.

Adhering to the decisions of this court, and approving the reasons upon which they are founded, in the cases of Todd & wife v. Moore's adm'r, 1 Leigh 457, Carr's adm'r, &c. v. Chapman's legatees, 5 Leigh 164, I am of opinion to reverse the decree and dismiss the bill because of the staleness of the demand asserted. If anything further were needed to justify this conclusion, it would be found in the presumption that complainant's demand has been already paid. The lapse of more than twenty years, of itself affords the presumption which stands for full proof, unless repelled by other evidence. In this case nothing is shown to repel the presumption; on the contrary it is aided by other circumstances disclosed in the record.

The other judges concurred in the opinion of Samuels, J.

Decree reversed.

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305 *Clarke v. McClure.

July Term, 1853, Lewisburg.

1. **Ejectment—Defence of Adverse Possession—Defendant Claiming under Parol Gift*—Case at Bar.**—An open, exclusive, notorious and uninterrupted possession of land for more than twenty years, taken, held, and claimed under a parol gift from a plaintiff in ejectment, for a life not yet terminated, is no bar to his recovery in the action.

2. **Adversary Possession—When Defendant Estopped to Controvert Title.**—As a general rule, possession, to give title, must be adversary; and where a defendant has entered under the plaintiff, and acknowledged his title as that under which he holds, he cannot controvert it.

3. **Same—Title Must Be Adverse in Inception.**—To make out a title by adverse possession, as a general rule, the title must be adverse in its inception.

4. **Same—Entry Made by Permission of Owner—When Holding Becomes Adverse.†**—An adverse possession depends upon the intention with which the possession was taken and held. Wherever the act itself imports that there is a superior title in another, by whose permission and in subordination to whose still continuing and subsisting title, the entry is made, such entry cannot be adverse to the owner of the legal title; and such possession so commencing cannot be converted into an adverse possession, but by disclaimer, the assertion of an adverse title and notice.

5. **Same—Vendee Entering under Equitable Title—Effect‡—Case at Bar.**—A vendee who enters under an executory contract which leaves the legal title where it was, and contemplates a future conveyance, enters in subordination to it, holds under and relies upon it to protect his possession in the mean time. And in such case, as also in the case of lessee, mortgagor, *cestui que trust* and the like, where one is in under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession, which could silently ripen into a title by adverse possession under the statute of limitations.

6. **Same—Entry under Parol Gift—Effect§—Case at Bar.**—An entry on land under a parol gift from the owner, and a claim to hold any estate by virtue of the gift, is in its nature a recognition of the continued existence of a subsisting title in the legal owner; and a claim to hold any estate by gift from the legal owner, is a claim to hold in subordination to his legal title.

This was an action of ejectment in the Circuit court of Ohio county, instituted in March 1847 by John McClure against William F. Clarke. On the trial the 306 *plaintiff deduced his title by regular conveyances from the commonwealth. The defendant introduced evidence tending to prove that Andrew McClure under whom he claimed, entered into possession of the premises about June 1819, and held and

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*Ejectment—Defence of Adverse Possession.—See monographic *note* on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

†Adversary Possession—Entry Made by Permission of Owner—When Holding Becomes Adverse.—In the fourth headnote of the principal case it is held, an adverse possession depends upon the intention with which the possession was taken and held. Wherever the act itself imports that there is a superior title in another, by whose permission and in subordination to whose still continuing and subsisting title, the entry is made, such entry cannot be adverse to the owner of the legal title; and such possession, so commencing cannot be converted into an adverse possession, but by disclaimer, the assertion of an adverse title and notice. For this proposition see the principal case cited and approved in the following cases: Creekmur v. Creekmur, 75 Va. 436; County of Alleghany v. Parrish, 98 Va. 622, 25 S. E. Rep. 882; Boggess v. Meredith, 16 W. Va. 31; Cooey v. Porter, 22 W. Va. 124; Flynn v. Lee, 31 W. Va. 489, 7 S. E. Rep. 431; Swann v. Thayer, 36 W. Va. 53, 14 S. E. Rep. 425. See also, citing the principal case, Taylor v. Philippi, 35 W. Va. 560, 14 S. E. Rep. 132; monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137; *foot-note* to Creigh v. Henson, 10 Gratt. 231.

‡Adversary Possession—Vendee Holding under Equitable Title.—On this subject see the principal case cited and approved in Nowlin v. Reynolds, 25 Gratt. 141, and *note*; Chapman v. Chapman, 91 Va. 399, 21 S. E. Rep. 813; Core v. Faupel, 24 W. Va. 244; Ketchum v. Spurlock, 34 W. Va. 599, 12 S. E. Rep. 833; Bowie v. Poor School Society, 75 Va. 305; Callihan v. Hall, 4 W. Va. 532; Pitzer v. Burns, 7 W. Va. 74; Hudson v. Putney, 14 W. Va. 575, 576. See monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

§Same—Entry under Parol Gift—Effect.—In Lewis v. Overby, 31 Gratt. 616, it is said: "As is truly said in the argument of the learned counsel for the appellees, the authorities are uniform to the effect that lands cannot pass in Virginia by parol gift, but only by descent, adverse possession, deed or will. *Clarke v. McClure, 10 Gratt. 315-16.*"

occupied the same from thence until the fall of 1840 or 1841, when he died: And whilst he so held it, erected thereon valuable houses at his own cost and for his own use, and received the rents and profits thereof for his own use until his death: And that since his death his widow, and afterwards the children with the assent of said widow, held the said property and received the rents to their own use until the 11th of January 1847, when they contracted to sell the same to the defendant Clarke, and put him in possession. Also evidence tending to prove that Andrew McClure so held and occupied the said property as one claiming to have bought or got the same from the plaintiff and to be the owner thereof in fee: And that the widow and children, after his death, held it in the same manner.

The plaintiff thereupon proved that Andrew McClure was his brother; and introduced evidence tending to prove that said Andrew was a carpenter; that he came to Wheeling shortly before the year 1819, poor and embarrassed, with a considerable and expensive family; that he entered upon the premises aforesaid at the suggestion and by the permission of the plaintiff, under a verbal understanding or agreement, that he should go upon the premises, improve, live on and enjoy it for his life, or for the life of himself and wife; and then that the plaintiff would give or convey the same to John McClure, jr., the son of said Andrew, then a boy several years old: That Andrew McClure at various times down to 1838, admitted this understanding or agreement, and that his rights in the property were in conformity to it; and that the widow of said Andrew and one of the 307 defendant's vendors, *both in the life time of the said Andrew, and since his death, made similar admissions: And also that the rents and profits of said property whilst so held by Andrew McClure, and his widow and children, were fully equal to the cost of the improvements erected upon the property by Andrew McClure. It also appeared that the widow was still living at the time of the trial.

The court thereupon, at the instance of the plaintiff, instructed the jury, 'that if they believed from the evidence, that Andrew McClure entered into the premises by virtue of a verbal agreement with his brother to improve and enjoy the same, and take the rents thereof either for his own life or that of himself and wife, and that at the death of the said Andrew or that of the survivor of himself and wife, the said plaintiff was to give or convey the said property to the said John McClure the son of said Andrew; and that the said Andrew McClure held and occupied the said property during his life until his death, under the said agreement and in acknowledgment of the same; that then such occupation and holding ought not to be deemed adverse, so as to bar the plaintiff's action. And that if said agreement was not limited to the life of said Andrew, but extended to that of his wife, and that she was yet living, if the same was by parol, and never executed by deed, and the legal title always remained in the plaintiff, such agreement was no bar to the recovery of the plaintiff, notwithstanding the said widow was still living."

The defendant then moved the court to instruct the jury, "that if they believed that the defendant, and those under whom he claimed, have had the exclusive, open, notorious and uninterrupted possession of the land in controversy in this cause, during more than twenty years next before the commencement of this action, claiming to own an estate for life, which has 308 *not yet expired, such claim being, during all that time, known to the plaintiff, then such possession and claim are sufficient to bar the recovery of the plaintiff in this action." Which instruction the court gave, but with this qualification: "Provided the jury believe from the evidence, that such life estate, so possessed and claimed as the instruction supposed, was derived and claimed under some one, other than the plaintiff; and was not a life estate derived and claimed by parol from the plaintiff himself, by the said Andrew McClure and said Andrew and wife, for the life of the former or that of the survivor of them."

The defendant then moved the court to give the same instruction as that last asked as aforesaid, with the addition at the close of it, of the following: "Notwithstanding such possession and claim may have been commenced by Andrew McClure under whom the defendant claims, by virtue of a parol gift from the plaintiff to the said Andrew McClure." This instruction the court refused to give; and the defendant excepted to the refusal of the court to give the instructions asked for by him, and for giving the addition to the first instruction so asked for. There was a verdict and judgment for the plaintiff; and upon the application of the defendant a supersedeas was awarded.

Russell, for the appellants.
Fry, for the appellee.

ALLEN, J. This was an action of ejectment, in which the defendant relied upon an adverse possession in himself and those under whom he claimed, to defeat the plaintiff's recovery. A bill of exceptions was filed, setting out evidence on both sides. It does not appear that all the evidence is so set forth; but it must be intended to have set forth, if not all, at least so much of the evidence as served to 309 show the materiality *of the instructions which each party asked for: And the instructions themselves must be construed with reference to the facts, which the evidence set forth, proved or tended to prove. The court gave the instruction asked for by the plaintiff; and gave the first instruction asked for by the defendant, with a qualification; and refused to give the second instruction asked for by the defend-

ant: And the bill of exceptions brings up for review the correctness of these decisions.

The questions, though presented under different aspects, at last resolve themselves into one.

John McClure, the fee simple owner of a lot in the city of Wheeling, permitted his brother Andrew to enter upon, improve and enjoy the property, and take the rents, under an alleged verbal gift of the property to his brother for his life or the lives of himself and wife; and Andrew, as it was contended, claimed to own an estate for life derived from such verbal gift; which claim was known to John McClure during the whole time that his brother held the possession.

On these facts the question arises, Whether an open, exclusive, notorious and uninterrupted possession for more than twenty years before the institution of this suit, taken and held as aforesaid and under such a claim, was such an adverse possession as would bar the plaintiff's action of ejectment?

As a general rule, possession, to give title, must be adversary. And where the defendant has entered under the plaintiff, and acknowledged his title as that under which he holds, he cannot controvert it. Thus the lessee is not permitted to dispute the title of the landlord. Having entered under and holding in subserviency to it, it is that which maintains and justifies his possession, and he impeaches his own title by assailing it. Where it is sought to make out a title by adverse possession, the 310 possession as a general rule *should be adverse in its inception. Where the original possession was taken in subordination to the title of another, it has been decided that the tenant could not, by his own act, change the character of his possession.

It has however been held, that a person who has taken possession by agreement, may under certain circumstances, disavow the title under which he had entered; and that an open and explicit disclaimer of a holding under such title, accompanied with the assertion of an adverse title in himself, and notice to the party under whom he entered, will made his possession adverse to the rightful owner. The privity existing between them is said to be dissolved by such a proceeding; that his possession becomes tortious, and in effect equivalent to an ouster of the rightful owner; and the statute begins to run from the time of such wrongful act, as in any other case of a tortious ouster. An adverse possession depends upon the intention with which the possession was taken or held. Whenever the act itself imports that there is a superior title in another by whose permission, and in subordination to whose still continuing and subsisting title, the entry is made, such entry cannot be adverse to the owner of the legal title; and such possession so commencing cannot be converted into an adverse possession, but by a disclaimer, the assertion of an adverse title and notice. "It would," says Judge Marshall in Kirk v. Smith, 9 Wheat. R. 241, "shock the sense of right, which must be felt equally by legislators, and by judges, if a possession which was persuasive, and entirely consistent with the title of another, should silently bar that title."

In conformity with these principles, it is held that the possession of the purchaser from the plaintiff without deed, is friendly to the plaintiff, and stops the running of the statute. Gay v. Moffitt, 2 Bibb. R. 506. In Williams v. Snidow, 4 Leigh 311 14, the same doctrine *was laid down and acted on, although the vendee had been put in possession, had paid the purchase money and used and occupied the property for his own exclusive benefit. But the contract was executory, no conveyance had been executed, the contract recognized the legal title as outstanding, and the entry was in subordination thereto.

It is supposed that a different rule in regard to adverse possession, has been established in sundry cases decided in the Supreme court of the United States, beginning with the case of Blight's lessee v. Rochester, 7 Wheat. R. 535; followed by The Society for the propagation of the Gospel v. Clarke, 4 Peters' R. 480; Bradstreet v. Huntington, 5 Peters' R. 402; Willison v. Watkins, 3 Peters' R. 43; Boone v. Chiles, 10 Peters' R. 177; Zeller's lessee v. Eckert, 4 How. S. C. R. 289. These cases contain dicta of the judges, which, considered apart from the cases in which they were uttered, would seem to imply that the possession without a conveyance is to be treated as adverse to that of the vendor.

If such be the rule of that court, it is a sufficient answer to say that the case of Williams v. Snidow, ubi supra, establishes the law to be otherwise in Virginia, and conforms with the doctrines of the English cases. But the cases themselves, when examined, show that in almost every instance the person in possession claimed the absolute estate. The case of Blight's lessee v. Rochester, 7 Wheat. R. 535, is the leading case; and the remarks of Chief Justice Marshall have in almost totidem verbis been reaffirmed in all the subsequent cases. There the plaintiffs were the heirs of John Dunlop, a citizen of the United States. John was the brother of James Dunlop an alien, who came to the country after the treaty of peace, but before the treaty of 1794. After the death of James Dunlop, one Hun- 312 ter, *professing to have purchased a piece of the land of which James had died seized, from his brother John, sold and conveyed the land to the defendant, who entered and held possession.

The title of James Dunlop, not being in existence at the date of the treaty of peace was not protected by the treaty of 1794, and James being an alien when he died, nothing descended to his brother John; and the effort on the part of the heirs of John Dunlop, was to recover the land, not because they had title, for no such title descended

to their ancestor, but because, as Hunter had professed to have purchased from John Dunlop, and to have conveyed the title so alleged to have been purchased, to the defendant, that this was a recognition of the title in John Dunlop, and the purchaser from Hunter was estopped from denying their title. From this statement it will be perceived that the defendant, who purchased from Hunter, though he supposed Hunter was selling and conveying the Dunlop title, entered as owner of the absolute estate. Notwithstanding he purchased and received a conveyance of a derivative title, he entered and held for himself as owner of the fee. So far from his act importing a superior outstanding title in Dunlop, in subordination to which he held, he claimed by virtue of his deed, the title against Hunter his immediate vendor, and those from whom Hunter professed to have purchased. Where the vendor has actually conveyed, his title is extinguished, and he can no longer sue; and though in fact Hunter may not have purchased from John Dunlop, yet he professed to convey that title to the defendant, who entered as vendee of the absolute estate, and not in subordination to a title which he supposed to be extinguished by his own deed. The defendant holding in his own right by a deed which purported to pass the legal title, there was nothing in the relation of the *parties which estopped him from showing the plaintiffs had no title whatever: And this was the amount of the decision in that case.

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Willison v. Watkyns, 3 Peters' R. 43, was the ordinary case of a tenant disavowing the title of his landlord, and holding over. The case has no bearing on this question. In The Society for the propagation of the Gospel v. Clarke, 4 Peters' R. 480, it appeared that the state, under the idea that the title of the society for the propagation of the Gospel was divested by the revolution, granted the land to the town of Paulet, which leased to Clarke. The court held that the town claimed as grantees of the state; that their title, though derivative from and consistent with the plaintiff's title, was a present claim in fee in exclusion of the plaintiffs, and their possession was adverse. This therefore was the ordinary case of a vendee to whom a deed has been made. He claims through, but recognizes no subsisting title in the vendor. So in the case of Bradstreet v. Huntington, 5 Peters' R. 402, the tenant in possession claimed under an absolute conveyance in fee from one tenant in common. The court held that one who enters under a deed purporting to convey to him an estate in fee, claiming to be sole, and exclusive, and absolute owner in fee thereof for forty years, may be regarded as holding adverse to all the world. In this the same principle is affirmed as in the other cases; the entering and holding was not in subordination to a subsisting admitted title in another. The case of Boone v. Chiles, 10 Peters' R. 177, was a complicated controversy in equity, involving questions of trust and fraud. Zeller's lessee v. Eckert, 4 How. S. C. R. 289, was the case of a holding over after the determination of a particular estate; and it was decided that as the right of entry accrued on the determination of the particular estate, such holding over, if accompanied with a disclaimer of the *title, might, under the circumstances, be sufficient to raise an adverse possession. These cases as decided, do not conflict with the principles recognized in Williams v. Snidow. They establish the rule as the law of that tribunal, that a person having the complete legal title and possession, or entering under a deed purporting to convey the legal title, and holding the exclusive possession, is considered as holding adversely to all the world, including those from whom his title and possession are derived. The entry or the holding in such case imports no recognition of a subsisting title in another; by whose permission, and in subordination to whose subsisting and continuing title, the party entered or holds.

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An attention to this principle reconciles most of the authorities, and the generality of expression indulged in by some of the judges in regard to vendor and vendee, must be construed with reference to the cases before the court. It is said for instance that the possession of the vendee is adverse to the title of the vendor. In the case itself the vendee claimed to be invested with that title, and therefore denied all title in the vendor. His title being as he supposed complete, his possession under it was adverse to the vendor, as it was to the rest of the world. But in the case of a vendee who enters under an executory contract which leaves the legal title where it was, and contemplates a future conveyance, the vendee necessarily enters in subordination to it, holds under, and relies upon it, to protect his possession in the mean time. How such a possession could be treated as adverse to the owner of the legal title, I cannot comprehend. In all these cases of vendee who has no deed, of lessee, mortgagor, cestui que trust, &c., where one is in under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious, wrongful possession, which could silently ripen into a title by adverse *possession under the statute of limitations. The law under certain circumstances, such as long possession and exclusive enjoyment, acquiescence, abandonment, &c., raises a presumption of a deed, a release, &c., but does not erect a legal title upon the foundation of an adverse possession. On the contrary, it resorts to a presumption from his holding under the title, not that his possession was adverse to such title, which would be against the fact, but that he has been clothed with it. Otherwise, there would never have been a necessity for this doctrine of presuming a deed. The courts do not as a general rule, presume a deed short of the period necessary to bar a right of entry in cases of adverse

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possession. If such possession as has been adverted to could be treated as adverse, it would have been sufficient without a resort to presumptions. It seems to me that the court in Sumner v. Stevens, 6 Metc. R. 337, did not give sufficient weight to the distinction which I have supposed to exist, unless indeed there is something peculiar in the local law of Massachusetts, which does not appear in the report of the case.

The possession of a grantee under a defective conveyance, but which the parties by mistake, believe to be good, may not be a possession taken and held in subordination to the title of the legal owner. No such title is recognized in the act of taking possession; the quo animo with which he enters and holds is the same as if the conveyance clothed him with the complete title; and therefore such possession so taken and held may be adverse to the legal owner.

But the proposition, if good law, is no authority for the decision to which it was supposed to be analogous. The case was that of an entry by a son under a parol gift of the father, and the sole and exclusive possession by the son thereafter: Such possession was held to be adverse. No title to lands can be acquired in Virginia by a parol gift. A title can only pass or 316 be acquired *by a grant, or deed, or devise, or descent, or by an adverse holding. He who enters under a parol gift, enters with the knowledge that such gift vests no title to real estate in him. When he enters therefore by permission of the owner, claiming to hold any estate by virtue of the gift, as such parol gift cannot operate to divest the title of the legal owner, the very fact of such permissive entry under such a claim is in its nature a recognition of the continued existence of such subsisting title in the legal owner; and the claim to hold any estate by gift from the legal owner, is a claim to hold in subordination to his legal title. The legal title must be somewhere; his entry and claim disavows such title in himself, and asserts it to be in another by whose permission he has entered, and in virtue of whose alleged gift he claims to hold. When he sets up such entry and the possession so held as adverse to the legal owner, he repudiates his own title and possession. When it is shown that the possession commenced under such verbal gift, and the estate for life is claimed in virtue of it, the party so entering and holding thereby admits that the gift is executory and inchoate, and so continues until a conveyance is made. Such a gift implies an intention on the part of the owner to convey. The entry and claim to hold for life, and the exclusive occupation and enjoyment, are all consistent with the original design of the parties, and do not tend to prove a disavowal of the legal owner's title, accompanied with the assertion of an adverse title in himself. On the contrary, every such act under the claim to own an estate for life in virtue of the alleged gift, is to be referred to the original recognition of the title of the legal owner when possession was delivered. To hold that such permissive occupation, use and exclusive enjoyment under parol gifts can amount to an adverse possession, would lead to serious consequences in Virginia. It is a 317 common *practice for the father to place his son in possession of the portion he destines for him, and to permit him to hold possession and take the profits to his exclusive use; but for prudential reasons he retains the legal title. It is called a gift, and both parties understand that at some future day it will be consummated by a conveyance or a devise. But it has never been supposed that these acts divest the owner of his legal title, or prevent him from re-entering and resuming possession. According to the pretensions of the appellant, a possession so taken and held, with a claim to own an estate in fee, would be adverse, and could be set up as a bar to a recovery by the legal owner. I think the law is otherwise, and that the court below did not err against the appellant in any of the decisions complained of. I am therefore for affirming the judgment.

DANIEL and SAMUELS, Js., concurred in the opinion of Allen, J.

MONCURE and LEE, Js., dissented.

Judgment affirmed.

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318 *Smith's Ex'or v. Spiller.

July Term, 1853, Lewisburg.

Bonds—Endorsement!Equivocal—Proof of Meaning*—Case at Bar.—W H S executes his bond to F S for four thousand dollars, payable four years after date. At the time and immediately after W H S signs the bond, F S endorses on the back thereof as follows: "*Memorandum.* If I do not collect the money due on the within note of my nephew W H S during my life, then it is never to be collected; and I give it to him. F. S." The endorsement being equivocal in its character, all the circumstances attending the transaction, the cotemporaneous conduct and declarations of the parties, evidence of their purposes and motives, may be looked to as showing what kind of instrument was within their contemplation and design. And held this endorsement a part of the bond and irrevocable without destroying the bond.

This was an action of debt in the Circuit court of Wythe county by Francis Smith's

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***Bonds—Endorsement at Time of Making Bond—Effect.**—In Campbell v. Campbell, 22 Gratt. 645, it is said: "It is too well settled by the decisions of this court, to admit of doubt or discussion, that a writing endorsed on a bond at the time of its execution, operating in favor of obligor and signed by the obligee, is to be considered as part of the condition of the bond. Gordon v. Frasier, 2 Wash. 130; *Smith's Ex'or v. Spiller, 10 Gratt. 318*, and cases there cited." See, in accord, citing the principal case, Wendlinger v. Smith, 75 Va. 318. The principal case is distinguished in Carter v. Noland, 86 Va. 571, 10 S. E. Rep. 605; Calwell v. Caperton, 27 W. Va. 412. See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

executor against William H. Spiller. The action was on a bond in the following words:

$4,000. Four years after date I bind myself, my heirs, &c., to pay Francis Smith or order four thousand dollars, for value received. Witness my hand and seal this 30th September 1823.

Wm. H. Spiller. [Seal.]

As the pleadings were finally made up, the issues were upon two pleas filed by the defendant. One of them the plea of non est factum with an affidavit stating the facts on which the plea was based: And on this plea the plaintiff took issue. The other was a special plea: That at the time of the making of the writing obligatory in the plaintiff's declaration set forth, to wit, on the 30th day of September 1823, the plaintiff's testator Francis Smith who was the uncle of the defendant, endorsed by 319 his own hand a memorandum *in writing upon the back of said writing obligatory, and as a part thereof, which said endorsement bears date on the 30th day of September 1823, and is signed by the said Smith and is to the following effect, to wit: "Memorandum.—If I do not collect the money due on the within note of my nephew Hickman Spiller during my life, then it is never to be collected; and I give him that sum." And the defendant in fact says that the said Francis Smith did not collect the money due on the said note of the said defendant during his the said Francis Smith's life. And so by the terms of said endorsement and contract of the parties, the obligation aforesaid has been satisfied and discharged.

To this plea the plaintiff replied specially, that the said memorandum in writing endorsed on the bond, which is set out in the plea, was not a part of said bond as alleged in the plea, but was a testamentary paper; and was afterwards revoked by Smith in his life time. To this replication the defendant rejoined, that the said memorandum was a part of the bond, and was not a testamentary paper revoked by Smith in his life time: And upon this the issue was joined.

Upon the trial and after the evidence had been submitted to the jury, both parties asked for instructions which were intended to raise the same question made upon the second plea of the defendant and the replication thereto. The court refused to give the instructions asked for by the plaintiff, and gave that asked for by the defendant. The first instruction asked for by the plaintiff is, that the memorandum set out in the plea, is on its face and according to its true legal construction and import, a testamentary paper or will, by which the said Francis Smith bequeathed the sum of four thousand dollars, for which the said bond had been given, to the defendant William H. Spiller, if he the said Francis H. Smith should not, during his life, proceed to collect the same; and that being a 320 testamentary *paper or will, it was revocable at the pleasure of the said Francis Smith.

Second. That although the jury may believe from the evidence, that the memorandum endorsed on the said bond, was written and signed by Francis Smith, and attested by A. Findlay in the presence of William H. Spiller; and with his assent and approbation at the time of the execution of said bond, either before or after the said bond was delivered by said Spiller to said Smith, still the memorandum in writing cannot be regarded as part of said bond so as to constitute, in connection with it, an entire contract.

Third. That the cancellation of said memorandum in writing by Smith or by his direction, was in contemplation of law a revocation of said testamentary paper or will, and of the bequest therein made; unless the inference which the law makes from such cancellation, of an intent to revoke, be rebutted by evidence showing that Francis Smith did not intend that the said cancellation should operate as a revocation of said testamentary paper. These instructions were refused by the court. There were others asked and given, which it is not necessary to state.

The defendant then asked the court to instruct the jury: That if they shall believe from the evidence, that the endorsement set out in the defendant's second plea, was made at the time of the execution of the bond, and as a part of the same transaction and contract, that then the said endorsement was not a testamentary act, and could not be revoked or canceled without the consent of both parties. And if they shall further believe, from the evidence, that said endorsement did so form a part of the contract, that then, under the issues in this cause, they should find a verdict for the defendant. This instruction the court gave. The plaintiff excepted to the opinion of the court refusing to give the instructions 321 asked by him; and also *to the opinion of the court giving the instructions asked for by the defendant.

There was a verdict and judgment for the defendant: And the plaintiff having asked for a new trial on the ground that the verdict was contrary to the evidence, that motion was overruled; and the plaintiff again excepted. The facts are stated in the opinion of Judge Daniel. To this judgment a supersedeas was allowed by this court on the application of the plaintiff.

The cause was twice elaborately argued; the first time by Cooke and Patton, for the appellant, and Floyd and J. W. Sheffey for the appellee; and on the second argument by B. R. Johnston and Patton, for the appellant, and Floyd and J. W. Sheffey, for the appellee. The single question was whether the endorsement on the bond was a part of it, and therefore irrevocable by Smith; or whether it was a testamentary paper, and therefore revocable by him.

DANIEL, J. This suit is founded on a single bill in these words:

"$4,000. Four years after date I bind myself, my heirs, &c., to pay Francis Smith or order four thousand dollars, for value received. Witness my hand and seal this 30th September 1823.

Wm. H. Spiller. [Seal.]"

On the back of it was a memorandum in writing as follows:

"Memo.—If I do not collect the money due on the within note of my nephew Hickman Spiller during my life, then it is never to be collected; and I give him that sum.

Francis Smith.

Sept. 30, 1823.

Teste: A. Findlay."

322 *This memorandum appears to have been partially erased by means of a pen drawn over it; but the words were left sufficiently plain to be read by taking a little care. Smith died in 1844, and it is most probable that this erasure was made by him a few years before his death. Findlay his friend and confidential agent, who had frequent access to his papers, states in his testimony, that since the execution of the note (bond) he had frequently seen it, and always with the endorsement on it unobliterated until some twelve or eighteen months before Smith's death, when he saw that a pen had been drawn over the endorsement.

The case turns on the legal character and effect of this endorsement. The defendant contending, on his part, that it should be treated as a part of the writing obligatory, and that Smith could not cancel it without at the same time canceling the whole bond; and the plaintiff on the other hand, endeavoring to maintain that the memorandum endorsed was testamentary in its nature; and that consequently Smith had a perfect right to cancel or obliterate it, and leave the bond still in full force. These opposing views are distinctly presented by the second plea, the replication thereto and rejoinder; and were also necessarily involved in the plea of non est factum and the issue joined thereon. The same views of the character of the endorsement, with little variation, are disclosed by the parties respectively in the instructions which they severally asked from the court, and in the opposition which each made to the instructions asked by the other.

The course of the court in respect to the instructions, the verdict and judgment are in accordance with the views of the defendant. Are they correctly so?

In the cases of Broke v. Smith, Moor 679; Burgh v. Preston, 8 T. R. 483; and 323 Gordon v. Frazier, 2 Wash. *130, the general principle is asserted, that a memorandum endorsed on a bond at the time of its execution, operating in favor of the obligor, and signed by the obligee, is to be considered as part of the condition of the bond. And in the cases of Creig v. Talbot, 9 Eng. C. L. R. 56; Shermer v. Beale, 1 Wash. 11; and Price v. Kyle, 9 Gratt. 247, decided by this court, at its last session in this place, the same rule was held applicable to like memoranda made at dates subsequent to the execution of the bonds on which they were respectively endorsed.

The endorsement under consideration bears date on the same day with the bond, (30th September 1823,) and it is proved by the attesting witness that it was made and signed by Smith immediately after Spiller had signed and sealed the bond, at the same desk, and before the bond had been folded up and put away.

If then the language employed in the memorandum can by any fair interpretation or intendment, be regarded as language of contract or agreement, there ought, I apprehend, to be no hesitation in holding, under the authority of the cases above cited, that the memorandum constitutes a condition to the bond. It has been insisted however by the counsel of the plaintiff here, that whatever might be the force of such decisions as applied to an endorsement, the words of which imported a contract or agreement on the part of the obligee, they can be of no avail when invoked as authority to control the operation of an endorsement whose language is plainly testamentary: That in construing the endorsement we can look only at the bond and endorsement; and that the words employed in the latter are not susceptible of any other import than that of a testamentary disposition of the former: that the endorsement is nothing more than a bequest of the bond. It must be conceded that a writing, executed by an obligee on the back of a bond, plainly indicative 324 *of a testamentary purpose, would not (if in other respects valid) cease to be a will merely because of its position, even though it should contain no other disposition of property than that of the bond, in favor of the obligor. It is however equally obvious to remark, that it is of rare occurrence that a will or testamentary disposition of property is found on the back of a bond. And where the language of a writing executed by the obligee and occupying such a position in reference to a bond is of equivocal or doubtful meaning, indicative in some aspects of a testamentary purpose, and yet susceptible of a construction which would make the words employed words of contract, qualifying the bond in any degree however slight, advantageously to the obligor, the mere position of such writing may, I think, in a controversy respecting its true character, be properly relied on as a circumstance tending to show that the obligee designed the writing as a binding rather than as a testamentary instrument. And in all such controversies, when the question is not as to the meaning of words employed in an instrument of well defined character, but whether a paper of a doubtful character was designed to operate as one instrument or as another, all the circumstances attending the transaction, the cotemporaneous conduct and declarations of the parties evincive of their purposes and motives, may be looked to as showing what

kind of instrument was within their contemplation and design.

The case of Robertson v. Dunn, 2 Murph. R. 133, cited by the defendant's counsel, is one strongly illustrative of this rule. There the question was, whether a certain instrument was to be considered a deed of gift or a testamentary paper. It was written by a friend for the maker, who told him at the time that she wished him to write a deed of gift. After reciting that the instrument was in consideration of the love and affection which the maker 325 had for her children, *the first clause proceeds in these words: "1st. I give and devise to my son Needham one negro man Essex, one negro girl Martha, two feather beds, steads and furniture, and one horse, to be possessed after my death." By the second and third clauses like provisions were made for two other children. And the fourth and last clause was as follows: "4thly. All the rest of my estate that I may die possessed of, I give to my three sons Christopher, Herbert and John." The court, after adverting to the use of the word devise as a slight circumstance tending to show a purpose to make a will, referred to the words "to be possessed after my death," employed in the first, second and third clauses, as showing a precaution which would have been useless in a will, which could not take effect until after the death of the testator; and in respect to the fourth clause, the judge delivering the opinion said there was nothing in it indicative of the way in which the maker of the instrument intended it to operate; for whether the property given by it was a gift or legacy, its quantum was referrible to her death and could not be ascertained before. The fact that no executor was appointed, and the circumstance that the recitals expressed that the gifts were made in consideration of love and affection, which expression would have been unnecessary in a will, were also relied on as showing that a gift and not a will was intended; and the judge in conclusion said, that in order to explain all doubt and to ascertain whether the person who executed the paper intended it to operate as a deed of gift or a will, it was proper to look not only to the contents of the instrument, but also to the evidence showing how she really considered it; and seeing that she had called upon the witness to write her a deed of gift and to have it recorded, which it was not very likely she would have done, had she believed she 326 was making a will, the *court found no difficulty in treating the instrument as a deed, and not as a testamentary paper.

The language of the endorsement before us is of equivocal import. The contingent benefit designed for the obligor could not be fully consummated till the death of the obligee; and in this respect the endorsement is like a will. But in one most important feature it differs from a will: For whilst a will is revocable in divers ways, the disposition made in favor of the obligor could, according to the terms of the endorsement, be revoked or annulled only in one mode, to wit: by the collection of the bond by the obligee in his life time. It is unnecessary and unusual to insert in a will or testamentary disposition a clause declaring the right of the testator to revoke, or making its bequests dependent on the contingency that the testator should not in his life time revoke them. And it would be not only unnecessary and out of the usual course, but wholly inconsistent with the nature of the instrument, to provide, in a paper designed as a will, for a power of revocation by some particular mode, when with or without such provision, the paper itself could only continue to exist by the pleasure of the maker, and could at any moment be made nought by a single stroke of his pen. This feature in the writing in question, accompanied by the fact that it was endorsed on the bond cotemporaneously with the execution of the latter, tends to the conclusion that something other than a mere testamentary disposition of the bond was in the design of the parties. The manner in which the endorsement was intended to operate is, at least, by this view, made doubtful, and a resort to the circumstances leading to and attending the execution of the bond and endorsement, rendered proper.

It appears from the evidence that at the time of the execution of the bond and 327 endorsement, Smith was a *man of great wealth, and that he had only one child, a daughter; that Spiller was his nephew (his only nephew of the whole blood); that he had been raised by Smith, who entertained strong feelings of affection for him; and that Smith had often avowed and manifested a strong desire to advance him; that Spiller was desirous of entering into a partnership in mercantile business with John & R. M. Preston; that he was without means; that the portion of capital to be paid by Spiller, into the mercantile concern, was five thousand dollars, and that it was furnished him by Smith. It does not appear at what precise time the money was advanced by Smith, but it is probable that four thousand dollars was advanced at the time the bond was executed, or a few days before; as there was a letter of Smith's in evidence, dated the 12th September 1823, twelve days before the execution of the bond, and directed to Spiller, in which he informs him that four thousand dollars was ready; and it is proved by Findlay the subscribing witness, that the bond was executed for the four thousand dollars, and that some time thereafter (when, he does not state,) Smith either gave or remitted to Spiller, the farther sum of one thousand dollars, for which last sum, no note was ever executed, and of which there was no entry ever made by Smith on his books.

The witness farther proved that he was present at the execution of the bond; that he was requested by Smith to write it, and

did so; that on Smith's telling him to write the bond, Spiller seemed a good deal surprised, and showed both by his manner and his remarks, that he had not expected to be called upon to execute a bond; that while the witness was writing the bond or immediately after, when Spiller was called upon to sign it, he made some objections to doing so, and remarked to Smith, (as well as witness could recollect,) that
328 if ever he was able to pay the *amount, he could do so as well without the bond as with it. That some conversation then took place between Smith and Spiller, the words or purport of which the witness could not recollect; that Spiller then signed the bond; and that Smith immediately thereafter, as has been before stated, made and signed the endorsement at the same desk, before the bond was folded up and put away; and that the endorsement was then shown to Spiller.

In reply to a question propounded by the defendant to the witness, whether there was not on his own mind an impression, made by what occurred at the time when Spiller first objected to sign the bond, and then after conversation with Smith did sign it, that the object of Smith in requiring a bond was to provide for Spiller in the event of his failure in business, he said the impression had for a long time been on his mind that Smith did intend to secure the amount of the bond, in the event of Spiller's failure in business, for the benefit of Spiller; but he could not say whether such impression was on his mind at the time of the execution of the bond, or that it was produced by any conversation or anything that then occurred; nor did he know that it was produced by anything said either by Spiller or Smith, at any time, in relation to the bond.

Apart from the impressions on the mind of the witness as to the object of Smith in requiring a bond, (to which, as the witness could not refer them to anything said or done by the parties it would be improper to attach much, if any weight,) the evidence of what occurred at the time of the transaction tends, I think, very strongly to support the theory of the case, as maintained by the defendant's counsel here, to wit, that the advancement of the money was understood by the parties not as an ordinary loan; but was made with the understanding that if Spiller should fail in
329 *business, Smith might, if he should think proper to do so, collect the amount and dispose of it in such manner as he should think best for Spiller and his family. It is manifest that Spiller did not look upon the advancement as placing him and his uncle in the ordinary legal relation to each other of debtor and creditor. Else why should he object to signing the bond or express any surprise that one should be demanded?

Be this as it may, the inference is irresistible that the endorsement operated as an inducement leading to the execution of the bond. The mere order of time in which the bond and endorsement were executed is immaterial. Spiller objects to signing the bond; a conversation then takes place between him and Smith, and then Spiller signs the bond, and Smith immediately thereupon makes and signs the endorsement. It would be in direct opposition to any fair inference which can be drawn from the testimony, to suppose that the endorsement was made by Smith ex mero motu, and not in pursuance of some understanding had between the parties immediately before the execution of the bond. It may be conceded that if the endorsement was in form and phrase plainly a testamentary disposition, the fact that it was placed on the bond by the agreement or understanding of the parties, would not prevent it from operating as a will. And it is true that the conversation between the parties immediately preceding the execution of the instrument is not detailed, and that there is nothing expressly contradicting the hypothesis of the plaintiff's counsel, that whatever might be Smith's purposes with respect to the collection of the bond, he did not mean to come under any obligation respecting them; that Spiller's objection to executing the bond was not founded on any right he had to insist on terms qualifying his obligation or in any distrust which he entertained of the manner in which Smith would exercise the power which the bond would confer upon
330 *him; but in an apprehension that, by the death of Smith without a will, the generous purposes of the latter, then entertained and avowed, with respect to the ultimate disposition of the bond, might be accidentally defeated; and that the objection was overcome by Smith's agreeing to place on the back of the bond a testamentary memorandum that the bond should never be collected, if not collected by himself during his life.

But as we have endeavored to show, the endorsement is not on its face plainly a will, but is of doubtful character; and as by the fair inference to be drawn from the testimony, it appears to have been made in pursuance of an agreement between the parties, it would, I think, be more reasonable to suppose that it was designed to operate as a contract rather than as a will.

The instrument whose character is controverted, is found not where we should expect to find a will, but where we would naturally look for a defeasance, condition or qualification of the obligation to which it refers. It is shown to have been placed there not by the mere spontaneous act of the writer, but in pursuance of the agreement of the parties. According to its terms, its operation might be prevented in one, but in only one of the many modes by which a will may be revoked. The words which, the plaintiff insists, give character to the instrument as a voluntary act, "and I give him that sum," are by no means

peculiarly and exclusively appropriate to a will, but belong rather to a gift: Whilst the preceding words are well adapted for expressing a stipulation founded on valuable consideration.

If however there were words denoting much more strongly than any to be found in the endorsement, that the endorsement was voluntary, it would by no means follow that either a will, or any other instrument revocable at the mere pleasure
331 of the obligee, was *designed. For any words capable of binding the obligee with respect to the subject matter of the obligation, may, if endorsed by him at the time of the execution of the bond, be treated as a condition. And whilst a parol executory gift, or promise to give, upon the death of the obligee, might not be binding, the same promise, if evidenced by a sealed instrument, I apprehend, would be; and would be as incapable of revocation or of being rendered inoperative, except in the mode or upon the contingency provided for in such instrument, as if the promise were founded on a valuable consideration.

I do not deem it necessary to make any comment on the evidence in relation to the conduct and declarations of the parties subsequent to the execution of the bond and endorsement, or to distinguish such of it as was incompetent from that which was competent to be used for the purpose of throwing light on the intention of the parties as to the operation of the endorsement, in as much as that testimony does not tend to alter but rather to confirm the views which I have taken of the case. Looking to the bond and endorsement and the proofs of the circumstances preceding and attending their execution, I have come to the conclusion that the endorsement was designed to operate not as a testamentary instrument, but as a condition or qualification limiting the duration of the obligation to the life of Smith. That, as such, it was not in the power of Smith to cancel the endorsement without at the same time canceling the bond; and that consequently the bond could not be enforced by the executor of Smith.

The case has been twice argued in this court, with an ability and a research on the part of the counsel of the respective parties commensurate to the interest and importance of the questions involved. The transaction is one of a novel character, and I have encountered difficulties in arriving at a conclusion, free from doubt,
332 *as to its true import. After, however, having given to the subject the best consideration I could, I feel satisfied that justice will most probably be attained and the intention of the parties effectuated by permitting matters to remain as they are, and am for affirming the judgment.

MONCURE and SAMUELS, Js., concurred in the opinion of Daniel, J.

ALLEN and LEE, Js., dissented.

Judgment affirmed.

333 *Philips & als. v. Martiney's Ex'or.

July Term, 1853, Lewisburg.

(Absent LEE, J.*)

Trover and Conversion†—Case at Bar.—K the owner of a slave for life, in 1836 sells him to M, who in the same year sells him to J, who gives him to a daughter, by whom he is taken out of the state. K dies in 1846, and then the owners of the remainder in the slave bring trover against M to recover the value of the slave. HELD:

1. **Same—Right to Possession.**—The plaintiff not having had the right to the possession of the slave at the time M sold him, cannot maintain this action against M.
2. **Same—Statute of Limitations.**—If the sale by M gave the plaintiff a right to bring trover against M, the action was barred by the statute of limitations.

This was an action of trover in the Circuit court of Randolph county brought in 1850 by Ely Philips and others, legatees of Richard Kittle, against the executor of William Martiney deceased, to recover the value of a slave named Elijah. The defendant pleaded the general issue and the statute of limitations. On the trial the parties waived a jury and submitted the case to the court. The facts were, that Richard Kittle died in 1830, having first made his will by which he gave to his wife for her life a part of his estate, including a slave named Peg; and at her death it was to be divided among his heirs. The slave Elijah was the child of Peg born whilst she was in the possession of Mrs. Kittle. In August 1836 Mrs. Kittle sold Elijah, then about two years old, to William Martiney. In the same year Martiney sold the slave to Joseph Johnson, who gave him to his daughter: And she in the same year removed him
334 to the state of Arkansas. *Mrs. Kittle died in 1846. The Circuit court rendered a judgment for the defendant: And the plaintiffs thereupon applied to this court for a supersedeas, which was awarded.

Goff, for the appellants.

Hoffman, for the appellee.

DANIEL, J. In this case the whole matter of law and fact was submitted to the judgment of the court below. The judge has decided against the right of the plaintiff to maintain his action; and, I think, properly. The action of trover is given to redress an injury to the right of possession. And in order to maintain the action, it is necessary for the plaintiff in the action to show that he not only has a right of property in, but also that he had a right to the immediate possession of, the thing converted, at the time of the conversion. Gordon v. Harper, 7 T. R. 9 The sale of the slave by Mrs. Kittle, the life tenant under

*JUDGE LEE had decided the cause in the Circuit court.

†**Trover and Conversion—Plaintiff Not Having Right to Possession.**—See principal case cited in *foot-note* to Eastern Lunatic Asylum v. Garrett, 27 Gratt. 163; Harvey v. Epes, 12 Gratt. 170.

the will of Richard Kittle, was made in 1836, and the sale by Martiney, against whose executor the suit is brought, was made in the same year: And Mrs. Kittle's death occurred in the year 1846. Supposing the action to be founded on the sale by Martiney, either of the grounds relied on by the defendant presented a complete bar to it. The plaintiffs, at the date of the sale, had no right to the possession of the slave, and more than five years had elapsed at the time of the institution of the suit, since the date of the sale. There is nothing to connect Martiney with the subsequent removal of the slave out of the state. No action founded on the forfeiture of the life estate, under the statute, could therefore ever have been maintained against him. And even if it could, the bar of the statute of limitations would still have been insuperable, as the removal also occurred
335 in the year 1836. *The wrong committed by Martiney in undertaking to sell a full estate or title in the slave, was a single act, fully consummated so soon as the sale was made. Whatever remedies the plaintiffs may have had for the redress of that wrong, I think the court below has properly decided that the one selected cannot avail them. The question has been decided the same way in the case of Nations v. Hawkins, 11 Alab. R. 862, and in the case of Lewis v. Mobley, 4 Dev. and Batt. 323.

I think the judgment should be affirmed.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

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336 *Nickell & Miller v. Handly & als.

July Term, 1853, Lewisburg.

Wills—Blended Trusts—Case at Bar.—Testatrix devises and bequeaths a small farm, slaves and other property on the land to a trustee for the life of her daughter H, remainder to the children of H living at her death. And the trustee is directed so to use and conduct the farm, slaves and other property as to be most advantageous to the interest and support of said H and her children during her life time. There are five children, and the husband of H is dead. H becomes indebted; judgments are recovered against her; and she is discharged as an insolvent debtor: And then her creditors file a bill to subject her interest in the property to the debts: HELD:

1. **Same—Same—Rights of Cestuis Que Trust.***—H and her children are not entitled to have set apart for each of them an equal share of the trust property or its annual products; but it is to be held by the trustee, and the annual products are to be applied to their support according to the necessities of each.

2. **Same—Same—Rights of Creditors.**—The creditors would only be entitled to the ratable portion of H of any surplus of the annual products of the trust subject, after providing for the support of herself and family; and as any such surplus is not alleged or shown to exist, the bill was properly dismissed.

3. **Same—Same—Same—Surplus.**—If any surplus product now exists or shall hereafter exist, plaintiffs may file a bill to subject it, notwithstanding the dismissal of this bill.

This was a suit in equity in the Circuit court of Monroe county, instituted by James M. Nickell and Robert Miller against Henrietta F. Handly and Isaac Campbell, to subject certain property held in trust by Campbell, to satisfy debts due to the plain-

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*Wills—Blended Trusts—Rights of Cestuis Que Trust.—Mr. Barton, 2 Barton's Ch. Prac. (2d Ed.) 951, says: "When property is settled for the maintenance of a family, the expenditure must not exceed the annual income, nor can any debts contracted by the head of the family (himself only one of the *cestui que trusts*), nor by the trustee (although the profits of the trust property be pledged for their payment), be charged on the prospective profits beyond the current income, so as to deprive the beneficiaries of the support provided for them. * * * * The purpose is to protect the property against the waste and improvidence of the *cestuis que trust*, and to make that which, under their management, would have been dissipated in a short time a permanent fund, furnishing some support for the household for an indefinite period. Hence, no one of the *cestuis que trust* has any interest separable from the rest, which can be discharged or disposed of by him. The fund is provided for the common support of the family, and can only be enjoyed jointly. Minor's Institutes, vol. 2, p. 197, citing Markham v. Guerrant, 4 Leigh 279; Mundy v. Vawter, 3 Gratt. 518-547; Heth v. R., F. & Pot. R. R. Co., 4 Gratt. 482; Perkins v. Dickinson, 8 Gratt. 335; *Nickell et al. v. Handley et als., 10 Gratt. 336;* Johnston v. Zane *et als.*, 11 Gratt. 570, and *note*; Scott v. Loraine, 6 Munf. 117; Roanes v. Archer, 4 Leigh 551; 1 Lomax's Digest 280 *et seq.* See also, Penn *et al.* v. Whitehead *et als.*, 17 Gratt. 515. For cases in which the provision for the children is treated merely as the motive for the gift, see Bain & Bro. v. Buff's Adm'r, 76 Va. 371; Leake, Trustee, v. Benson, 29 Gratt. 153; Averett v. Lipscombe, 76 Va. 407; Atkinson, Trustee, v. McCormick, Trustee, 76 Va. 800; Manzy v. Manzy, 79 Va. 539; Christian & Gunn v. Keen, 80 Va. 372; Richardson v. Seever's Adm'r, 84 Va. 270, 4 S. E. Rep. 712; Seibel v. Rapp, 85 Va. 30, 6 S. E. Rep. 478; Mosby v. Paul's Adm'r, 88 Va. 537, 14 S. E. Rep. 336; Stace v. Bumgardner, Trustee, 89 Va. 425, 16 S. E. Rep. 252; Young v. Easley, 94 Va. 197, 26 S. E. Rep. 401."

In addition to the cases cited by Mr. Barton in support of the first proposition above laid down, see, citing and approving the principal case, Morriss v. Morriss, 33 Gratt. 74; Brown v. Lambert, 33 Gratt. 265; French v. Waterman, 79 Va. 625; Armstrong v. Pitts, 13 Gratt. 243; McClure v. Cook, 39 W. Va. 579, 20 S. E. Rep. 615. See also, Doswell v. Anderson, 1 P. & H. 185.

The principal case is cited in Garland v. Garland, 87 Va. 763, 13 S. E. Rep. 478, but that was a case of a "Spendthrift Trust."

The principal case is also cited in the following cases: Bain v. Buff, 76 Va. 375; Stace v. Bumgardner, 89 Va. 422, 16 S. E. Rep. 252; Walke v. Moore, 95 Va. 734, 30 S. E. Rep. 374; these cases supporting the second proposition above laid down by Mr. Barton. See discussion of the question in 2 Va. Law Reg. 40; 3 Va. Law Reg. 734; 5 Va. Law Reg. 428, 429, 493.

tiffs by Henrietta F. Handly. The case is fully stated by Judge Samuels in his opinion.

Price, for the appellants.
Caperton, for the appellees.

SAMUELS, J. This is an appeal
337 from a decree of *the Circuit court of Monroe county, in a suit wherein the appellants were complainants, and the appellees were defendants. The bill alleged that each of the complainants had obtained a judgment against the defendant Henrietta F. Handly; that a writ of capias ad satisfaciendum was issued on each judgment, on which she was arrested, and afterwards discharged as an insolvent debtor, surrendering no property or debts in her schedule. The bill further alleges, that by the will of the late Mary Ann Handly, land, slaves and other personal property were conveyed to Isaac Campbell in trust for the benefit of said Henrietta F. Handly, then the wife of Alexander Handly, and her family; that the property was still held by the trustee Campbell; that Alexander Handly the husband was dead; that all or some of the articles which constitute the debts of complainants were necessaries furnished to Henrietta F. Handly and her family, at the instance of Campbell the trustee. The parties Handly and Campbell were the only defendants to the bill. The bill prayed for a sale of Henrietta F. Handly's interest in the trust estate to pay the debts due complainants, and for general relief.

The defendant Campbell alone answered. He admitted the conveyance in trust, and alleged that he had performed his duties as trustee as fully as he was capable of performing them; that he always deemed it his business to furnish H. F. Handly and her family everything necessary for their support, out of the proceeds of the farm and negroes. He denied the right of complainants to interfere with his execution of the trust; he denied emphatically that any of the articles were furnished at his request; he did not admit that what complainants called the equitable interest of Henrietta F. Handly could be taken or sold to satisfy complainants' debts, alleging that
338 thereby the whole *purpose of the conveyance would be defeated without the action or assent of the grantor or grantee.

Copies of the will of Mary Ann Handly and the codicil thereto, are filed with the bill. The provisions of these papers, so far as they are involved in this suit, in substance invest Isaac Campbell as trustee with the title to the plantation on which testatrix resided, containing one hundred and ninety acres, during the life time of H. F. Handly, the daughter of testatrix; after her death remainder over to such of her children as may be then living. The trustee was directed so to use and conduct the farm or plantation as to be most advantageous to the interests and support of said Henrietta F. Handly and her children during the life time of the said Henrietta. He is also invested as trustee during the life time of said Henrietta, with the title to several slaves and other personal property particularly described, upon the same trusts; and after her death remainder over to her children then living.

The exhibits filed by complainants fully prove their judgments and the discharge of their debtor under the insolvent laws; but there is no proof that the debts or any part of them, were contracted by the authority of Campbell the trustee.

The record nowhere shows the precise number of Henrietta F. Handly's children; it may, however, be gathered from certain clauses in the will, that they were as many as five in number if no more.

The testatrix obviously intended that the property, real and personal, set apart by testatrix for her daughter and her family, should be kept together for their joint support during the life time of her daughter. The sale of the specific property prayed for could not be made, because no title, legal or equitable therein vested in the debtor; her only interest was in the products of the property. It would be at variance with well settled rules in regard to the preservation
339 of personal *property held in trust, or property in which there are expectant interests, to expose it to a public sale; thereby scattering it broadcast over the country, and rendering it impossible to reclaim it when the purposes of the trust, or the rights of the expectants shall require its production. I am therefore of opinion the Circuit court decided rightly in refusing to decree a sale of the specific personal property as prayed for in the bill of complainants.

It remains to be considered whether under the prayer for general relief the court should have sequestered Mrs. Handly's interest in the products of the property, real and personal, or her alleged equitable estate in the subject itself for the benefit of her creditors. If Mrs. Handly had any interest therein subject to her own disposal, or which could be separated from the interests of others without impairing their rights, such interest might, on familiar principles, be subjected to the payment of her debts. Coutts v. Walker, 2 Leigh 268; Haleys v. Williams, 1 Leigh 140. The creditors of an insolvent debtor can derive from the debtor only such interest as he held, and in the language of the statute, may "lawfully depart withal."

There is nothing in the nature or law of property which would prevent the testatrix, when about to die, from appropriating her property to the support of her poor and helpless relations, according to the different conditions and wants of such relations; nothing to prevent her from charging her property with the expense of food, raiment and shelter for such relations. There is nothing in law or reason, I conceive, which should prevent her from appointing an agent or trustee to administer her bounty. The difference in the conditions of the beneficiaries necessarily requires a difference in the amounts to be expended on each

individual; and the casualties of life may render this inequality still greater.

It is impossible to foresee the 340 *vicissitudes in affairs, and to provide by will in advance for every event; and no practicable mode exists to meet these difficulties but to authorize the appointment of some agent, trustee or other person to exercise the power which the testatrix is prevented by death from exercising herself. The leading intent here is to support Henrietta F. Handly and her children, and to promote their interests; and the trustee is directed to carry this intent into execution. The duty of supporting a family, especially on a limited amount of property, necessarily requires unequal expenditures upon different members of the family; an infant of tender years is sustained at less expense than an adult; a child in good health will grow and in time be able to sustain itself; whereas another, in a sickly condition, or of unsound mind, may require long continued assistance and the expenditure of large sums of money; all of which clearly fall within the scope of the duty to support the family. The will obviously intends that the property shall be kept together for the life time of the daughter; its products are charged with the unequal and varying amounts necessary to support the beneficiaries: The products of every part of the property are charged with the whole burden, the amount of which can only be known from time to time whilst the trust is in the process of execution. It may be and very probably is the case that the property, if kept together and economically managed, would do no more than support the family. If, however, Mrs. Handly, either by direct conveyance, or indirectly by operation of law, can withdraw from the trust property one-sixth part thereof, or any other given proportion, then it must be held that another beneficiary may do the same thing; and thus the charge upon the whole property may be thrown upon a fragment of it. By keeping a small amount of property upon a little farm a family living thereon may be supported; but if 341 *divided, the shares of each would be inadequate to his or her support. If testatrix had intended to give equal benefits to her daughter and each child, nothing was easier than to have said so; yet she has not said so; but on the contrary, has conferred benefits which in any event must be unequal and varying from time to time; and which in certain contingencies likely to occur, may become greatly unequal.

The general principles which must give the rule in this case, I conceive to have been firmly established by repeated adjudications of this court. In Coutts v. Walker, 2 Leigh 268, Walker a judgment creditor was not permitted to subject the equitable estate of Patrick Coutts in real property but in strict subordination to the rights of Jane Coutts who held an annuity charged thereon.

In Roanes v. Archer, 4 Leigh 550, a conveyance of land and slaves was made by James Roane, intended, amongst other things: 1st. For the use of himself and Elizabeth his wife during their joint lives. 2d. If Roane should survive his wife then to his use for life. The joint estate of the husband and wife was protected from the husband's creditors; the husband's separate estate contingent on the event of surviving his wife, was held liable.

In Scott and wife v. Gibbon, 5 Munf. 86, an equitable interest of the husband held jointly with his wife under a deed of marriage settlement, was held not liable for the husband's debts; the separate interest of the husband created by the deed was held liable to the creditor.

In Markham v. Guerrant & Watkins, 4 Leigh 279, a husband conveyed property in trust for the support of himself and wife and children. The husband, without the assent of the trustee, contracted a debt, and his creditors sought to subject the property of the trust subject to the payment of 342 their demand. It was held *by this court that the husband could not directly or indirectly derange the plan of the trust, and thereby affect injuriously the interests of his wife and children, the other cestuis que trust.

In Perkins' trustee v. Dickinson, 3 Gratt. 335, it was held that an equitable interest of husband and wife, held jointly under a deed made before marriage, should not be subjected to the payment of the husband's debt.

In no one of these cases did the court proceed upon the ground of any entirety of interest in the husband and wife. In some of them no such entirety existed, if it can exist in regard to merely equitable interests; in every one of them the decision was founded on the reason that the wife's right jointly with the husband to have the enjoyment of the subject conveyed was invaded; in every one of these cases the interest of the husband, if it could be separated from that of his wife without injury to her interests, would promptly have been subjected to his debts.

In our case the amount of property to be expended for any member of the family necessarily depends upon unforeseen occurrences. The testatrix has placed Campbell the trustee in her place, and given him power by means of her property to supply the varying wants of the family. To allow one member of the family to seize upon a given portion of the property and appropriate it to his or her use, would be to invade the just power of the trustee; and would lead inevitably to injury upon the rights of others.

The only difficulty I have felt in the case grows out of the fact that it is possible, however remotely, that after providing a reasonable support for the family, according to the true intent of the will, a surplus of the products from the trust estate may remain; that surplus should be divided between Mrs. Handly and her children; and her portion held subject to the 343 *claims of her creditors. Yet the

bill alleges no such case; and if at any time it shall exist, complainant may seek the appropriate relief. I am of opinion that the decree rendered in this case will not preclude complainants from pursuing their remedies when a right shall arise, or even if it has already arisen, and with this explanation, am for affirming the decree.

MONCURE, J. The first question to be considered in this case is, Whether the appellee Henrietta F. Handly, is entitled to any, and if any, what interest in the property devised and bequeathed to the appellee Isaac Campbell, in trust for the benefit of her and her children during her life time, by the will of her mother Mary Ann Handly?

That the will does not create a naked power, to be exercised or not at the mere option of the trustee, is certain. That it does not confer on him a power of appointment which he may exercise in favor of some, to the exclusion of other objects of the testator's bounty, or by unequal apportionments among them all, is, I think, equally certain. It creates a plain and naked trust, for the benefit of the said Henrietta F. Handly and her children during her life. She is entitled to the benefits of the trust subject, or an interest in them, during that period; and the only question, I think, is, Whether she is entitled to all the profits, according to the cases of Wallace & wife v. Dold's ex'ors, 3 Leigh 258, and Stinson, ex'or, v. Day & wife, 1 Rob. R. 435; or only to an equal portion thereof with each of her children, according to the natural import of the words used in the will, and the construction ordinarily put upon such words? In my opinion she is entitled only to the latter. The cases of Wallace & wife v. Dold's ex'ors, and Stinson, ex'or, v. Day & wife, were very different from this. There the testator's daughter was held to be entitled to the whole 344 profits *during her life, upon the construction of the clause creating the trust, compared with the context and general scheme of the will. And even there, Tucker, P., in the former, and Stanard, J., in the latter case, dissented from the rest of the court, and were of opinion that the testator's daughter was entitled only to an aliquot portion with her children. But here the trust is expressly created for the benefit of the daughter and her children; and there is nothing in the context or general scheme of the will tending to show that the words of the clause creating the trust were not intended to be used in their plain and ordinary sense, and to give an equal interest to the daughter and her children in the profits during her life. It is obvious from the whole will that her children were at least as much the objects of the testator's bounty as herself. It not only creates the trust for their benefit as well as hers during her life, but gives to them the trust subject itself at her death, and gives them present specific legacies, and makes them and other grand children of the testatrix her residuary legatees. It is difficult to conceive a case in which children would be entitled to the benefit of such a trust, if they be not entitled here. Well may I ask, in the words of President Tucker in Wallace & wife v. Dold's ex'ors, "If the testator really did mean what I think he meant, what plainer words could he have used to convey that meaning? And if this court decides that these words shall not convey that meaning, what words shall a testator adopt to convey it?" It was resolved in Wild's Case, as reported in 6 Coke's R. 288, and has been hitherto treated as an undeniable position, that under a devise to a parent and children, the children, if there be any, and if no manifest and certain intent appears in the will to the contrary, will take jointly with their parent by purchase. 2 Jarm. on Wills 312. That resolution governs this case, and Henrietta 345 F. Handly is entitled *only to an equal portion with each of her children of the profits of the trust subject during her life.

The next question to be considered is, Whether her interest is liable for her debts, and became vested in the sheriff for the benefit of the appellants when she took the oath of insolvency under their executions?

Property has certain legal incidents of which it cannot be divested, and all conditions adopted for that purpose are necessarily repugnant and void: One of these incidents is, its liability for the debts of its owner. "Upon the principle which forbids the disposition of property divested of its legal incidents, it is clear that no exemption can be created by the author of the gift from its liability to the debts of the donee; and property cannot be so settled as to be unaffected by bankruptcy or insolvency, which is a transfer by operation of law of the whole estate; and it is immaterial for this purpose what is the extent of interest conferred by the gift, the principle being no less applicable to a life interest, than to an absolute or transmissible property. Whatever remains in the bankrupt or insolvent debtor at the time of his bankruptcy or insolvency, becomes vested in the person or persons on whom the law in such event has cast the property." This is the language used in 1 Jarm. on Wills 816, and it is fully sustained by the authorities therein cited. "There is no doubt," as Lord Eldon said in Brandon v. Robinson, 18 Ves. R. 429, "That property may be given to a man until he shall become bankrupt: it is equally clear generally speaking, that if property be given to a man for his life, the donor cannot take away the incidents to a life estate; and a disposition to a man until he shall become bankrupt and after his bankruptcy over, is quite different from an attempt to give it to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to 346 *amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited." The condition

must determine the interest, or it is repugnant and void. The continuance of the interest and its exemption from liability for the debts of the owner, is a legal impossibility.

The case of a settlement on a married woman, or in reference to coverture, is an apparent exception to the rule that conditions restraining the power of alienation and exempting property from liability for the debts of its owner, are repugnant and void. But a feme covert can own no property at law: Separate property is a creature of equity. And as equity confers the power of alienation as an incident to the trust for separate use, it allows the power to be modified as convenience or the exigency of the case may require. "When this court (says Lord Cottenham) first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found as a part of such law that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation." Tullett v. Armstrong, 4 Mylne & Craig 377, 18 Eng. Ch. R. 404. But this doctrine is not applicable to unmarried women, a restriction on the alienating power of a woman not under coverture, being no less inoperative than a similar restraint on the jus disponendi of a person of the male sex. 1 Jarm. on Wills 830. And even in case of a settlement on a married woman, a restriction on her power of alienation is confined to the coverture,
347 *and begins and ceases with it; so that when she becomes discovert, she has the same power of disposition over her property as other persons. Id.; Barton v. Briscoe, Jacobs' R. 603; Jones v. Salter, 2 Russ. & Myl. 208, 6 Cond. Eng. Ch. R. 463; Woodmeston v. Walker, 2 Id. 197, 6 Cond. Eng. Ch. R. 457; and of course it is as much liable for her debts as is the property of other persons for their debts.

It follows from what has been said, that, whatever may have been the case during the coverture of Henrietta F. Handly, after she became discovert, as she seems to have been when she contracted with the appellants and when their judgments were obtained against her, she had power to dispose of her property, and it was liable for her debts; and therefore her interest in the trust subject in question is so liable, and became vested in the sheriff for the benefit of the appellants when she took the oath of insolvency under their executions.

The cases of Markham v. Guerrant & Watkins, 4 Leigh 279, and Perkins' trustee v. Dickinson, 3 Gratt. 335, are much relied on by the counsel for the appellees. But these were cases of settlements on a feme covert, in which attempts were made by creditors of the husband to subject the separate estate of the wife to the payment of his debts contrary to the intent and purpose of the settlements. They may be sustainable on the ground before stated, that in such settlements restrictions on the power of alienation and modifications of the legal incidents of property are admissible. When the intent of the settlement is to create a separate estate, it matters not that during its existence the enjoyment of the property is to enure to the husband and children as well as the wife. The main purpose of the settlement being the support of the wife, and the benefit of her husband and
348 children *being mere incidents of that purpose, these restrictions and modifications are as admissible as if the use and enjoyment of the wife alone were provided for. These cases may also be sustainable on the ground of the peculiar nature and object of the trusts and of the extent of power and discretion given to the trustees therein.

It can make no difference that the subject in this case, instead of being given to one, is given to several; and, instead of being given to them directly, is given to a trustee for their benefit. The fact that at the date of the will one of the beneficiaries was a feme covert, and others were infants, made it convenient and proper to place the subject in the hands of a trustee during the life time of the cestui que vie. But it is placed in his hands only for the purpose of being so used and conducted "as to be most advantageous to the interests and support of" all the beneficiaries. No purpose is indicated to give them unequal interests, or to leave the extent of their respective interests to the arbitrary discretion of the trustee. Such a purpose, if intended, should be expressed in the will or be plainly inferrible from the words therein used. Otherwise the words should be received in their natural and ordinary import, and equality of benefit should be the rule. See 1 Jarm. on Wills 822; 1 Roper on Legacies 794; and Story's Eq. § 974; and cases therein cited.

I am of opinion that the decree should be reversed with costs to the appellants against the appellee Henrietta F. Handly, and the cause remanded, with directions to make her children parties, to take the proper accounts, and to subject her interest in the trust subject, since she took the oath of insolvency, and hereafter during her life, to the payment of the executions of the appellants.

349 *The other judges concurred in the opinion of Samuels, J.

The decree was as follows:

The court is of opinion, that the defendant Henrietta F. Handly, or her creditors deriving title from her, could claim only her ratable portion of any surplus of the products of the trust estate after providing for the support of herself and family; which surplus is not alleged or shown to exist or to be likely to exist.

The court is further of opinion, that if any surplus of such products already exists, or shall hereafter exist, it will be competent

for the appellants by proper proceedings for the purpose, to subject Henrietta F. Handly's portion thereof to the satisfaction of their demands, notwithstanding the dismission of the bill in this case.

The court is therefore of opinion there is no error in the decree appealed from; and it is therefore adjudged, ordered and decreed that the same be affirmed, and that the appellants pay to the appellees their costs about their defence in this court expended.

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350 *Bell's Heirs v. Snyder & als.

July Term, 1853, Lewisburg.

1. **Writ of Right—Defect in Plea—Verdict—Case at Bar.**—In a writ of right the writ and count are against four persons by name. The plea states the surname of one of the four differently, but it speaks of them as the aforesaid, etc., referring to the persons mentioned in the count. The replication to the plea gives the name as in the count. After verdict for the tenant it is too late to object to this error if it be such.
2. **Same—Demandants Claim as Heirs of Patentee—This Must Be Proved.**—In a writ of right the demandants claim as heirs of B the patentee of the land; and they claim upon the seizin of their ancestor. They must prove that they are the heirs of B.
3. **Same—Same—Evidence—Pleadings.**—In the pleadings and verdict the demandants are spoken of as the heirs of B. This is not proof that they are the heirs.
4. **Same—Same—Same—Report of Surveyor.**—The report of the surveyor who surveyed the land in controversy under the order of the court speaks of one of the demandants as heir of B. This is not evidence that he is such heir.

The case is sufficiently stated by Judge Lee in his opinion.

A. H. H. Stuart, for the appellants.

Michie, Fry and Woodson, for the appellees.

LEE, J. This is a writ of right brought in the Circuit court of Pendleton county in the names of James Bell and others against Adam Snyder and three others as tenants. The writ and count describe the demandants as being in part immediate heirs of Joseph Bell deceased, in part heirs of two others of the immediate heirs of said deceased, who were dead, and in part devisees of another heir, who was also deceased, and all as heirs and legal representatives of the said Joseph Bell deceased. The tenants named in the writ and in the count are Adam Snyder, Lewis Snyder, Peter Beverage and Samuel Rexrode. A plea was 351 filed on *behalf of the tenants in which they are described as "the aforesaid Adam Snyder, Lewis Snyder, Peter Rexrode and Samuel Rexrode." This plea disclaims title to a portion of the land demanded, and then proceeds: "And the said Adam Snyder, &c., cometh and defendeth the right of the said Joseph Bell's heirs, devisees, &c., &c." A replication was filed in which the tenants are styled "The said Adam Snyder, Lewis Snyder, Peter Beverage and Samuel Rexrode;" and the mise was joined on the mere right. A trial took place between the parties and there was a verdict for the tenants, which was set aside by the court. After a second ineffectual trial of the case, a third was had which resulted in a verdict for the tenants. This verdict was in the following words: "We the jury do say that the tenants Adam Snyder, Lewis Snyder, Peter Beverage and Samuel Rexrode, have more right to hold the tenement which Joseph Bell's heirs demand against them by their writ of right than Joseph Bell's heirs to have it as they demand." The demandants moved the court to grant them a new trial, but the court overruled the motion; and the demandants excepted. The bill of exceptions sets out the documentary testimony read on the trial, and the evidence of the witnesses on both sides, instead of the facts which the evidence proved. A judgment was rendered on the verdict, and the demandants applied for and obtained a supersedeas from this court.

It is now suggested on behalf of the plaintiffs in error, that the verdict should be set aside and a repleader awarded because of the irregularity of the joinder of the mise upon the mere right; the tenants named in the writ and count being Adam Snyder, Lewis Snyder, Peter Beverage and Samuel Rexrode, while in the plea filed the name of "Peter Beverage" is replaced by that of "Peter Rexrode;" and so no plea on behalf of Peter Beverage, and yet a verdict 352 *and judgment are rendered in his favor as well as of Adam Snyder, Lewis Snyder and Samuel Rexrode. I think, however, the objection should not prevail. The name "Peter Rexrode," where it occurs in the plea, may be a clerical error for "Peter Beverage," or it may be the party may have been called indifferently by both names. The language of the plea is "the aforesaid Adam Snyder, Lewis Snyder, Peter Rexrode and Samuel Rexrode," identifying the four tenants who were pleading as the same four named in the writ and count, though one is called by misnomer or a plurality of names, "Peter Rexrode" instead of "Peter Beverage" as named in the writ and count. The demandants having suffered him to plead in the name of Peter Rexrode, have recognized him as the same man they have called Peter Beverage; and it is too late, after verdict, for them to take advantage of the apparent discrepancy. The statute of jeofails declares that no judgment after verdict shall be reversed for any defect or default in the writ, original or judicial, or for a variance in the writ from the declaration or other proceedings, or for any mispleading, insufficient pleading or misjoinder of issue, or for mistake of the christian or surname of either party," &c. 1 Rev. Code 1819, ch. 128, § 103, p. 511. And the irregularity here is, as I think, sufficiently embraced within the terms and meaning of this provision, and is thereby effectually remedied.

But it is contended on the part of the plaintiffs in error, that the verdict is contrary to the evidence and the justice of the case, and that the Circuit court erred in refusing to grant a new trial. The bill of exceptions taken to the opinion of the court overruling the motion for a new trial, is plainly obnoxious to the objection that it states the testimony given by the witnesses, and not the facts which, in the opinion of the court, it sufficed to prove. And
353 as the parol *evidence is in some respects conflicting nad contradictory, this court, according to the rule established in Bennett v. Hardaway, 6 Munf. 125, as modified by Carrington v. Bennett, 1 Leigh 340; Ewing v. Ewing, 2 Leigh 337, and other cases, must, in considering the motion for a new trial, disregard all the parol testimony on the part of the plaintiffs in error; and only allow the new trial if it shall be of opinion, after giving to the defendants in error the full benefit of all the testimony on their part, that the verdict is still contrary to the evidence. Pasley v. English, 5 Gratt. 141. Now tried by this rule, the question here is speedily determined; for it can scarcely be contended that if the evidence of the witnesses on the part of the plaintiffs in error be disregarded, and that on the part of the defendants alone considered, this court can say that the Circuit court ought to have granted a new trial. I am of opinion therefore upon this ground to affirm the judgment. But if the court could look into the evidence of the plaintiffs, and could give to it its fullest effect, I think there is still another and a fatal objection to their pretensions.

It is apparent that the demandants, if entitled to recover at all, upon their own proofs, could only recover upon the seizin of their ancestor; for no proof is given of such seizin themselves as would enable them to recover upon it. And yet no evidence was offered by them to prove that they were, as they claimed to be, the heirs and legal representatives of Joseph Bell, to whom the patent under which they claimed title, issued; nor did they in any other way by proof connect themselves with the said patentee. Now upon the trial of the mise joined on the mere right, the demandant must prove both the seizin of the ancestor upon which he relies, and that he is the heir or legal representative of such ancestor. It is true that under our act reforming the method of proceeding in writs
354 *of right and giving the forms of the pleading, he does not count upon the seizin "by taking the esplees" as at common law, but the act does not dispense with the necessity of proving the seizin. Green v. Liter, 8 Cranch R. 229. And where a party claims as lineal heir, he must prove that the ancestor from whom he derives title was the person last seized of the premises as his inheritance, and that he is the heir of such ancestor. Co. Litt. 11 b; Jenkins v. Pritchard, 2 Wils. R. 45; 2 Greenl. Ev. 307; Adams on Eject. (by Tillinghast) 282. In 2 Saund. 45 f, it is said on the authority of Bro. Droit 48, that in a writ of right nothing can be pleaded but a collateral warranty; and that everything else may be given in evidence on the mise joined. The same is stated to be the rule in Booth on Real Actions, 98, 112; and in Tissen v. Clarke, 3 Wils. R. 419; though in Jackson on Real Actions, p. 288, it is said to be laid down too broadly, and that there are some other matters (of which he gives an instance), which the tenant was always required to plead specially. But wherever the writ was brought upon the seizing of an ancestor, it was a good defence at common law to show that the demandant was not the heir of the person supposed to have been disseized: And in an assize of mort de'ancestor, the tenant could make this defence without any special plea, because one of the points of the writ to be enquired of by the assize was whether the demandant was the next heir of the person last seized. Jackson on Real Act. 177. In a writ of entry and disseizin and certain writs of præcipe, it would seem that the right of the demandant to bring the action as heir was not brought in question under the general issue, yet as it was obviously essential to the maintenance of the action, it might always be traversed by an appropriate special plea. Jackson, p. 155, 177. But such a plea was a plea in bar, not a plea in abatements. See forms of such pleas, Jackson, p. 181, 182,
355 *183. In Virginia our statute furnishes the form of a plea by which the tenant put himself upon the assize on the mere right, and provides that at the trial any matter may be given in evidence that might have been specially pleaded: And I think there can be no doubt that upon the mise joined on the mere right, every affirmative matter going to the right and title of the demandant, the want of which might have been pleaded in bar of this action (as contradistinguished from matter in abatement), is necessarily put in issue, and he put to proof of the same. Now where the demandant seeks to recover as heir, the fact that he is heir is as material an element of his right to recover as is the title or seizin of his ancestor, and it as much devolves upon him to prove the former as it does to make out the latter.

The case of Linton v. Bartly, 9 Leigh 444, does not conflict with the foregoing opinion. In that case, there was proof that the demandants were heirs at law of the ancestor, but there was proof that there was one other who had been omitted. The nonjoinder of the omitted heir was clearly a matter in abatement, and was not therefore available on the mise joined. The cases of Green v. Liter, 8 Cranch R. 229; Garrard v. Henry, 6 Rand. 110; and Walker v. Boaz, 2 Rob. R. 155, only prove the same general doctrine that on the mise joined matter of abatement cannot be taken advantage of by the tenant; but none of them touches the question arising in this case.

It is argued, however, that from the form

of the pleadings in this case, taken in connection with the surveyor's report and the verdict, it must be regarded as an admitted fact in the case that the demandants were the heirs of Joseph Bell, as they claimed; and no proof was therefore necessary. The writ and count describe the demandants as the heirs at law and
356 legal *representatives of the said Joseph Bell; and the plea states that the tenants come and defend "the right of the said Joseph Bell's heirs, devisees," &c. In the report of the surveyor, James Bell one of the demandants is spoken of as "one of the surviving heirs of Joseph Bell deceased;" and the verdict finds that the tenants "have more right to hold the tenement which Joseph Bell's heirs demand against them by their writ of right, than Joseph Bell's heirs to have it as they demand." The description in the writ and count of the demandants, is at most mere matter of claim and averment on their part that they are such heirs, and is neither necessary nor contemplated by the forms given by the statute: And the plea merely adopts the style and description which the demandants have assumed for themselves, for sake of identification; and being framed according to the statute for the purpose of joining the mise on the mere right, it is not to be construed as admitting the claim of heirship on the part of the demandant, or any other allegation which they might insert in the writ and count not required by the statute. And the verdict is to be construed in the same way as merely adopting the description which the demandants gave of themselves in their pleadings. It cannot be considered as any finding of the fact of such heirship, but must be regarded as having been couched in the language used for the sake of conformity.

As to the statement in the surveyor's report, it was certainly no evidence that James Bell was one of the heirs of Joseph Bell. The surveyor was directed to make a survey of the land and report what he found on the ground. He was charged with no enquiry as to the relation in which the demandants stood to Joseph Bell; and any statement he might make upon the subject is to be regarded as totally irrele-
357 vant, or *as but a repetition of the pretensions of the demandants and the said James Bell already put forth in the case.

Upon the whole, it seems to me very clear that this court cannot say the Circuit court erred in overruling the motion for a new trial; and I am therefore of opinion that the judgment be affirmed.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

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358 *Schultz v. Schultz & als.

Same v. Same.

July Term, 1853, Lewisburg.

1. **Probat of Wills—Statute Saving Rights to Nonresidents—Effect of Statute of Limitations.**—The saving in the act of 1819, 1 Rev. Code, ch. 104, § 13, p. 378, in relation to wills, in favor of persons out of the state, is not repealed by the act of March 8th. 1826, Sup. Rev. Code, p. 260, in relation to the limitations of actions.

2. **Wills—Probat by Devisee—Effect.***—A devisee of a will may propound it for probat, and in so propounding it he becomes the representative of the will for the purpose of its probat, and of all persons similarly interested, though they are not made formal parties to the proceeding, and may have had no notice of its pendency; and this too whether they are *sui juris*, or laboring under infancy, coverture or other disability. And the same is the case if the propounder of the will be an executor or a legatee.

3. **Testamentary Papers—Propounded for Probat by Devisee—Effect.**†—When a paper is propounded for probat to the proper court, by a devisee, and there is a sentence of the court fairly obtained and pronounced on the merits, excluding the paper from probat, such sentence of exclusion from probat is conclusively binding upon all claiming under the paper.

4. **Courts of Probat—Jurisdiction—Admission to Probat of Testamentary Papers—Effect as to Papers Afterwards Found.**—S died in 1830, and a paper purporting to be his will, dated in 1818, was admitted to probat in the County court of Wood, and his widow qualified as executrix. In 1845, another paper purporting to be the will of S dated in 1828, was propounded for probat in the County court of Wood by a devisee therein, who lived out of the state and had not been within it until a short time before the paper was propounded for probat. The executrix of the first will appeared and contested the probat, and introduced in evidence the record of the probat of the first will. She objected that the County court had no jurisdiction to admit the second paper to probat, and therefore should not hear the evidence; but the court overruled her objection, and decided that the admission of the first paper did not preclude them from admitting the second; and that they would hear the evidence. At the next term of the court the evidence was heard, and the witnesses proved the execution of the paper; and stated that they believed the testator to be of sound and disposing mind and memory. But the court rejected the paper and refused to admit it to probat; not stating the grounds of their decision. Upon
359 appeal to the Circuit court, that *court affirmed the sentence, not stating the grounds of its decision in its judgment, though in a written opinion filed in the papers, it is put on the ground that the County court had no jurisdiction to admit the paper to probat until the probat of the first paper had been set aside. HELD:

1. **Same—Same—Same—Same.**—That the County court had jurisdiction to admit the second paper to probat or reject it, at the time it was propounded for probat.

2. **Same—Judgment on Merits—Effect.**—That the

***Wills—Probat—Conclusiveness of.**—On this question, see the principal case cited and approved in Hutcheson v. Priddy, 12 Gratt. 90; Ballow v. Hudson, 13 Gratt. 680, and *note*; Andrews v. Avory, 14 Gratt. 236, and *note*; Connolly v. Connolly, 32 Gratt. 664, and *note*; Norvell v. Lessueur, 33 Gratt. 229, and *note*.

†**Wills—Several Testamentary Papers—Revocation.**—See, citing and following the principal case, Gordon v. Whitlock, 92 Va. 727, 24 S. E. Rep. 342.

County court decided the case upon its merits, and its judgment is conclusive on the question unless reversed.

3. **Same—Same—Case at Bar.**—The Circuit court having affirmed the sentence of the County court, that sentence is still a judgment upon the merits against the paper, whatever may have been the reasons on which the judgment of the Circuit court was founded.

4. **Same—Jurisdiction—Practice in Circuit Court.**—If the Circuit court intended to decide the case on the ground of a want of jurisdiction in the County court, it should have reversed the sentence of that court, and rendered a judgment overruling the motion to admit the paper to probat on the ground of want of jurisdiction.

5. **Same—Admission to Probat of Testamentary Papers—Effect on Jurisdiction.**—The jurisdiction of a court of probat is not exhausted by the admission to probat of the testamentary papers passed upon at one time. If a codicil to the will admitted to probat be afterwards found, or a will supplemental to the first, or one which may consist with the first and has no clause of revocation, or a will without a clause of revocation, which, though it conflicts in part, may consist in part, in all these cases the two papers constitute the testator's will, and the second may be admitted to probat upon a second motion, after the first has been admitted.

6. **Same—Same—Same.**—So if the second paper has a clause of revocation, or conflicts wholly with the first, or from the scheme of the second will it is apparent that it is intended as a complete disposition of the testator's property, the court of probat has jurisdiction to admit such second paper to probat, though the probat of the first paper is not annulled, but remains in full force.

Christian Schultz, late of the county of Wood, departed this life in May 1830; and at the June term of the County court of that county in the same year, a paper writing dated the 22d of May 1818, purporting to be his last will and testament, was produced in court, and admitted to probat as such last will and testament; and upon the motion of Nancy Schultz, widow of said deceased and one of the executrixes
360 *named in the will, she was admitted to qualify as such executrix.

Some years afterwards; that is to say, on the 15th of September 1845, Michael Schultz produced in the same court another paper writing, dated the 6th of June 1828, purporting to be the last will and testament of the said Christian Schultz, and claiming to be a devisee under the provisions thereof, propounded the same for probat as such will. Nancy Schultz appeared in court and contested the probat of said paper, exhibiting the record of the probat of the former will and of her qualification as executrix under the same, and relying upon it as a bar to the probat of the newly produced paper, and to the introduction of proof of its due execution. The court however decided to hear the evidence, being of opinion that the probat of the paper of the 22d of May 1818 did not preclude them from hearing the evidence of the validity and due execution of the paper then produced, nor from admitting the same to record, provided the evidence so offered would authorize them so to do. And at the next term of the court, to which the cause was continued, after hearing the evidence, the court pronounced its sentence rejecting the paper of the 6th of June 1828, and refused to admit the same to probat as and for the last will and testament of the said Christian Schultz deceased. Afterwards, on the 30th March 1846, upon a supersedeas to the same from the Circuit court of Wood county, that court, for reasons set forth in a written opinion filed in the cause, affirmed the sentence of the County court. The reason set forth in the opinion was, that the County court had no jurisdiction to admit the second will to probat until the probat of the first had been revoked by a proceeding in equity under the statute.

In November 1845, shortly after the sentence had been pronounced by the
361 County court against the will *of 1828, Michael Schultz, with others claiming to be interested under its provisions in the estate left by Christian Schultz, exhibited a bill in the Circuit court of Wood county, setting up the said paper writing as the true last will and testament of the said Christian, and alleging the probat of the paper of the 22d of May 1818 and the qualification of Mrs. Schultz as executrix under the same, and praying the court to decree a revocation of the will of 1818 and to establish that of 1828; or if the court thought the case within the provisions of the act upon the subject, to direct an issue to try which of said papers was the true last will and testament; and also praying a discovery from the said Nancy Schultz upon several subjects, and for general relief.

In March 1846, Mrs. Schultz demurred to the bill for multifariousness; also, because more than seven years had elapsed after the probat of the will of 1818 before the filing of the bill; and also because by the true construction of the will of 1828 filed with the bill, Matilda Schultz, the only child and devisee in that will, took an estate in fee in the whole property during her life time, and at her death the same descended to the demurrant, her mother Mrs. Schultz; and so the complainants had no interest in the subject in controversy. She also at the same time filed her answer to the bill, in which she sets up and relies upon the will of 1818 as the true last will and testament of Christian Schultz; and although she admits the paper of the 6th of June 1828 to be wholly in the handwriting of her said husband, she denies that it is a valid will. She alleges that at the time of writing the same the mind of the said Christian was greatly impaired, and that he did not in fact possess sufficient mind and memory to make a valid will. She refers to what she calls the "strange and inexplicable"
362 codicil annexed *to the will, as showing that he could not have been in his right mind when he wrote that paper, and states her expectation to prove the same thing by other evidence. She admits that the complainants bore to the said

Christian Schultz the relation they state, and that they resided in the state of New York; though she says she had been informed one of the number had visited the state several times within the period of eight or nine years then last past; but she insists that the saving in the statute of wills in favor of nonresidents had been in effect repealed, and that the complainants were barred by the general limitation contained in the act from now calling in question the probat of the will of 1818. She also insists that the limitation over contained in the paper under which the complainants claimed, being made to depend on the dying of the said Maria Matilda Schultz unmarried and without children, was void because too remote; that the said Maria M. Schultz took the whole estate, absolutely, and that upon her death, (she having died unmarried and without children on the 17th of February 1839,) it descended upon her as the heir at law and sole devisee and legatee of her said daughter; and so that the complainants had no interest under or by virtue of the said will of 1828, which would enable them to call in question that of 1818, by setting up the former. She also made statements in reply to the other allegations of the bill, which it is unnecessary to notice, as the bill was subsequently dismissed as to them.

The court overruled the demurrer to the bill, and the complainants replied generally to the answer; and at the same term, upon their motion it was ordered that an issue be made up to try whether the paper of the 22d of May 1818 was the true last will and testament of Christian Schultz or not.

363 *Upon the trial of this issue, after the defendant had given in evidence to the jury the will of 1818, together with the probat thereof in the County court of Wood, and had examined witnesses in support of that will, the complainants gave in evidence the paper of 1828, with testimony tending to prove the same to be the last will and testament of the decedent; also testimony tending to prove that they were the devisees mentioned in said paper; that they were citizens and residents of the state of New York, and had never been in the state of Virginia until within a few days before the suit was brought. Thereupon the defendant gave in evidence the record of the proceeding in the County court, which resulted in the rejection of the paper of June 6th, 1828, when the same was propounded by Michael Schultz: And she then moved the court to exclude from the consideration of the jury the paper of the 6th of June 1828, because of said sentence rejecting it, and also because the bill in this case had not been filed within seven years after the will of 1818 had been admitted to probat in the County court. This motion was overruled, and said paper permitted to be considered by the jury as evidence in the cause unaffected by the sentence against it in the County court; and the defendant excepted to the opinion of the court. A verdict was then found against the will of 1818; and on the 24th of March 1848 the court pronounced its decree declaring that the same was not the true last will and testament of Christian Schultz deceased; and revoking and annulling the letters testamentary that had been granted to the said Nancy, and requiring her to pay the complainants their costs.

Immediately after this decree was pronounced; that is to say, on the 17th day of April 1848, the paper of the 6th of June 1828 was again produced in the County court of Wood by Michael Schultz, who moved

364 *the said court to admit the same to probat and to record as the last will and testament of Christian Schultz. This paper contained certain provisions touching his property, conflicting with some of the provisions of the will of 1818; and there was appended to it, by way of codicil, a long theological dissertation, in which the testator took occasion to explain the particular views which he entertained on the subject of religion, the Mosaic account of the creation of the world, and some other kindred topics. Mrs. Schultz appeared in court, and again contested the probat of said paper. Michael Schultz introduced two of the subscribing witnesses to prove the due execution of the paper and the competency of the testator; and then gave in evidence the record of the chancery suit above mentioned, which had resulted in the decree setting aside the will of 1818. The contestant Mrs. Schultz thereupon gave in evidence the proceeding of the County court of Wood, which had resulted in the rejection of the paper of the 6th of June 1828 at the October term 1845, when it was first propounded for probat by Michael Schultz; relying upon the same as a bar to the renewed application to admit the same paper to probat at that time. The court, however, overruled the objections of Mrs. Schultz, and admitted the paper of the 6th of June 1828 to probat and to record as the last will and testament of Christian Schultz; and the contestant excepted. The case was then taken by supersedeas to the Circuit court of Wood county, in which, by the judgment of the court pronounced on the 25th of April 1849, the said sentence was affirmed. Nancy Schultz then presented a petition to this court praying an appeal from the decree of the 24th of March 1848, setting aside the will of 1818; and also an appeal from the judgment of the Circuit court of the 25th of April 1849, affirming the sentence of the County court of the 17th of April 1848, by which the

365 *paper of the 6th of June 1828 was admitted to probat; both of which were allowed.

Price and Fry, for the appellant.
Patton, for the appellee.

LEE, J. By the thirteenth section of the act of 1819, concerning wills, 1 Rev. Code, ch. 104, p. 378, it is provided that when a will shall have been admitted to probat in the proper court, any person interested may within seven years afterwards

appear and by bill in chancery contest its validity; and when such bill shall be filed, an issue shall be made up to be tried by a jury, whether the paper in question be the will of the testator or not. But if no such party appear within that time, the probat is declared to be "forever binding;" with a saving in favor of infants, femes covert, and persons absent from the state or non compos mentis, of the like period after the removal of their respective disabilities. In this case it sufficiently appears that the complainants were within the saving in favor of persons absent from the state, they being citizens and residents of the state of New York, and no evidence having been offered to show that either of them had ever been in the state of Virginia until a short time previous to the institution of the suit. But it is contended on the part of the appellant, that by an equitable construction of the act of March 8th, 1826, Sup. Rev. Code, p. 260, the saving in the statute of wills above referred to, so far as it applies to persons absent from the state, must be regarded as repealed, and that such persons, after the passage of that act, could only file a bill to contest the validity of a will which had been admitted to probat within the seven years. I cannot concur in this view of the operation of the act of 1826. It is not difficult to imagine reasons why the legislature, in striking out of the act 366 of *February 25th, 1819, concerning the limitation of actions and entries into lands, the saving in favor of persons out of the country, may not at all have intended to interfere with the provision in the statute of wills giving to such persons a further period after the expiration of that limited for persons residing in the state, within which to appear and contest a will which might have been admitted to probat by an ex parte proceeding, to which they were entirely strangers, and of which they might not have been apprised until they chanced to come into the state. But however this may be, the repealing clause in the act of 1826 is confined in terms to the saving in the act of February 25th, 1819, quoting that act by its title, and declares that the entries and actions embraced by the provisions of that act shall thereafter be made and brought within the same time as if the parties entitled thereto had been within the commonwealth when their right or title accrued; and it would be against every sound rule of construction to extend its operation by implication or otherwise to a provision in a totally different act upon an entirely different subject, and which created a peculiar statutory proceeding for a particular purpose not embraced by the act containing the saving clause intended to be repealed. I think, therefore, the saving in the statute of wills, in favor of persons out of the state, is unaffected by the act of 1826, and that the complainants were not barred from contesting the will of 1818 by the time which had elapsed after it had been admitted to probat before their bill was filed.

The next objection on the part of the appellant to which I will advert is, that the contingent limitation over upon the death of Maria Matilda Schultz in the paper of 1828 under which the appellants claim, is void because too remote; and that by the operation of the act concerning estates 367 tail and executory limitations, *the whole estate of Christian Schultz would, under the provisions of said paper, be vested in fee in the said Maria, and upon her death childless and unmarried, would descend to the appellant as her heir at law; and so that the appellees had no such interest in the estate of Christian Schultz as would entitle them to maintain a bill calling in question the will of 1818. The words of the act are, that "any person interested" may appear and contest the validity of a will that has been admitted to probat, by bill in chancery; and a bill filed for such a purpose should show how the complainant has an interest in the subject entitling him to call the validity of the will in question. I think, however, if the right of the appellees to maintain their bill depended upon the validity of the contingent limitation over upon the death of Maria Matilda Schultz contained in the will of 1828, it could not be successfully assailed. Because, if it could be questioned whether such a limitation would be good at common law, there can be no doubt, I apprehend, that it is exactly embraced by the twenty-sixth section of the statute concerning conveyances, 1 Rev. Code 1819, ch. 99, p. 369; which declares that every contingent limitation in a deed thereafter made, or in the will of any person who should thereafter die, made to depend on the dying of any person without heirs, or heirs of the body, or issue, or issue of the body, or without children or offspring, or descendant or other relative, shall be held and interpreted a limitation to take effect when such person shall die not having such heir, or issue, or child, or offspring, or descendant, or other relative, as the case may be, living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared on the face of the deed or will creating it. With this statutory interpretation of the limitation in this 368 will, it cannot *be regarded as a contingent limitation made to depend on an indefinite failure of issue or children, but as confined to the time of the death of the devisee or the period of ten months thereafter; and is clearly good. The appellees, therefore, would take a certain contingent interest under the will of 1828, which the law fully recognizes, and which would be amply sufficient to bring them within the terms of the statute.

The difficult and important question in this case, however, is as to the effect of the sentence of the County court of Wood of the 21st of October 1845, rejecting the will of 1828, when first propounded by Michael Schultz; which sentence has ever since remained in its full force and unre-

versed. It is insisted on behalf of the appellant that that sentence is conclusive upon all the world, and is a complete bar both to the proceeding in chancery to set aside the will of 1818 by setting up that of 1828, and also to the proceeding in the County court of Wood to admit the latter to probat after the decree of the court in the chancery case setting aside the will of 1818; while the appellees contend that it is a bar to neither proceeding, and is in effect under the circumstances attending its rendition, to be regarded as a nullity.

It is unnecessary now to enter into a discussion as to the effect of a sentence of rejection by a court of probat fairly obtained and pronounced on the merits, of a paper propounded as a will by the nominated executor, upon the rights of a legatee named in the paper. For it has been expressly adjudicated by this court that such sentence of rejection is conclusively binding upon the legatee notwithstanding he was an infant at the time it was pronounced and was no party to the proceeding: And that the paper thus rejected cannot be again propounded for probat by the legatee. Wills v. Spraggins, 3 Gratt. 555. And it can make no difference that the will in this 369 case was propounded by *Michael Schultz one of the devisees in remainder, and not by the executrixes named in the will or either of them. The ecclesiastical courts of England have jurisdiction only so far as testaments disposing of personal estate are concerned; and it therefore devolves upon the executor named in the will, who is the legal owner of the personal estate, and the proper representative of all the interests arising under the will, to propound it for probat, and obtain the sanction of the proper tribunal for its validity. But with the real estate he has nothing to do; nor is there any provision made by the English law for probat of a will of realty. With us it is different: Our statute provides for probat, in the same courts, of wills disposing of real estate as well as of personal estate: Both kinds are to be proven and recorded in the appointed court. But as the executor here has no more concern with the real estate disposed of by the will than in England, he cannot be regarded as the peculiar or only propounder of the instrument; and it is made the duty of the court to receive a will by whomsoever propounded, whether the executor, a legatee or devisee therein named, to hear the evidence and to admit the will to probat or to reject it as the proof shall require. But the propounder of a will, whoever he may be, whether executor, legatee or devisee, necessarily becomes the representative of the will for the purpose of its probat and of all similarly interested, though they are not made formal parties to the proceeding, and may have had no notice of its pendency; and this too whether they are sui juris, or laboring under infancy, coverture or other disability. It is the policy of our law to provide promptly a representative of the estate of a decedent, and to avoid all unnecessary delays in the disposition of the estate. But when a will has been propounded by a party interested, and fairly rejected on the merits, it would defeat the policy of the law, 370 *and be productive of many mischiefs, if it could be again propounded by the same party or by others who might be interested, and the contest thus renewed from time to time. The sentence therefore against the will must be regarded as a sentence against all claiming under it. It stands upon a footing analogous to the cases known as judgments in rem, which being adjudications upon the subject matter, are regarded as final and conclusive not only in the courts in which they are pronounced, but in all others in which the same question arises. 1 Stark. Ev. 227 et seq.; Gelston v. Hoyt, 3 Wheat. R. 246; Brown v. Gibson, 1 Nott. & McCord, 326.

It is true there is a marked distinction between a sentence for and a sentence against a will where it is propounded ex parte for probat in the first instance. In the former case the sentence is binding and effectual for all legal purposes while it remains in force, but it is liable to be set aside by a proceeding in chancery provided by our statute; and in it nothing is concluded by the sentence of the probat court. This distinction, however, is nowise material to the case in judgment.

It follows that the sentence of 1845 against the will of 1828 in this case, must be regarded as binding and conclusive not only upon Michael Schultz but also upon all the other appellees claiming under it, unless the circumstances under which it was pronounced are such as to deprive it of all legal effect and render it inoperative.

It is contended on the part of the appellees, that the sentence was not upon the merits; that the County court rejected the paper not because it was not sufficiently proven to be the last will and testament of Christian Schultz, but because it considered that the sentence of 1830 admitting the will of 1818 to probat, was conclusive till reversed or in some way annulled, and that it had at that time no jurisdiction to 371 entertain *the subject of the probat of the paper of 1828. It appears from the bill of exceptions taken by the appellant upon the propounding of the will of 1828 at the September term 1845, that when the propounder Michael Schultz moved the court to hear the evidence of the subscribing witnesses and to admit the paper to probat, the appellant appeared and objected to the probat of the same, exhibiting the record of the probat of the will of 1818. Her objection was that the sentence in favor of that will was conclusive against the probat of the paper of 1828; that the court then had no power or authority to admit the latter to probat, and that it therefore should not proceed to hear the evidence touching its execution. But the court was of opinion and so expressly declared, that the probat of the paper of the 22d of May 1818 did not preclude them from hearing the evidence of the due execution and validity of the

paper of the 6th of June 1828, then propounded, nor from admitting the same to probat, provided the evidence would authorize them so to do; and it accordingly overruled the objection of the appellant, and decided that it would hear the evidence of the subscribing witnesses to the paper and any further legal evidence offered by either party. It being too late, however, to hear the testimony at that term of the court, the application was continued over till the then next term. At that term, the court proceeded to hear the evidence. Two of the subscribing witnesses who proved the execution of the paper of 1828 and of the codicil annexed, by Christian Schultz, were introduced and examined, and the signature of the third subscribing witness who was dead, was proved to be in his handwriting. And the whole evidence and the argument of counsel on both sides having been fully heard, the decision of the court was pronounced rejecting the said paper and codicil annexed, and refusing to admit the same to probat as 372 the *last will and testament of the said Christian Schultz. The precise ground on which the decision rested is not given. It may be that the court was not satisfied with the proof as to the due execution and attestation of the paper, or as to the competency of the testator. Although the two witnesses who were examined thought him of sound and disposing mind and memory at the time of the execution of the instrument, the court may have regarded it as "sounding in folly," from the internal evidence which the paper itself afforded. The justices composing it may have deemed the views and opinions contained in the "codicil" so erratic, unsound and unreasonable, that no sane man and competent to make a valid will, could ever have given utterance to them. Or the court may have undertaken to compare the will of 1818 and that of 1828 together, to pass on their construction and to decide the two were wholly incompatible and could not stand and consist together in whole or in part. What may have been the particular view of the court may not be clearly ascertained; but certainly it cannot be inferred from the record that the decision rested on the ground of want of jurisdiction, or that the court was concluded by the sentence admitting to probat the will of 1818, when nothing to that effect is stated, and when, to the contrary, it is expressly stated that the court upon the very question raised, decided that they would hear the evidence in support of the will of 1828 as well as that against it, and that it was not precluded by the probat of the will of 1818 from so doing, nor from admitting the paper of 1828 to probat if the evidence would authorize it.

But it is contended on the part of the appellees, that whatever may have been the opinion of the County court upon this question, in point of fact it had no jurisdiction of the subject of the probat of the will of 1828 when it was propounded in 1845: 373 That *by its sentence in 1830 admitting to probat the will of 1818, its jurisdiction was exhausted and it had become functus officio, and that it was concluded by the sentence in favor of the will of 1818 from passing upon the probat of the paper of 1828; and that thus the sentence of 1845 against the will of 1828 was a nullity and concluded nobody. If this be correct, there is an end of the question and of the case. I proceed then to examine this proposition.

I think it certainly cannot be maintained that in all cases where the probat court has admitted to probat a paper purporting to be a last will and testament, it has thereby fully exercised its entire jurisdiction over the subject of the testamentary disposition of the decedent's estate. To affirm this proposition would be in certain cases, (so far as the probat court is concerned,) to compel a man to die intestate as to part of his estate, though it might have been his deliberate and expressed intention to dispose of the whole. A man's last will must not of necessity be confined to one testamentary paper. It may consist of several different testamentary papers, of different dates, and executed and attested at different times. It cannot be indispensable either that they should be propounded in the court of probat at the same time. If a will has been produced and admitted to probat in the proper court, and subsequently another testamentary paper be found purporting to be a codicil to the former, it cannot be doubted that the probat court could also receive and admit it to probat at a subsequent period. Case of Reed's will, 2 B. Monr. R. 80. Nor can it be material that a testamentary paper found after a will had been admitted to probat, should purport to be a codicil to the latter, or that it should necessarily refer to it in express terms. If its provisions are but supplemental to those of the will admitted to probat, or if they do not necessarily conflict 374 *with them, or if, though to some extent the two are conflicting, yet if there are provisions in the will of prior date not in conflict nor inconsistent with those of the other, both are, I apprehend, to be regarded as parts and parcels of the last will of the testator, constituting but one whole, and that of later date (assuming that it contains no clause of express revocation of former wills,) only serving to revoke the former so far as the provisions of the two are conflicting and incompatible. And where the papers are of different dates and their provisions are conflicting, the courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the latter paper; supposing of course that such latter paper contains no express clause of revocation. 1 Jarm. on Wills 159; Coward v. Marshal, Cro. Eliz. 721; Thomas v. Evans, 2 East's R. 488; Phipps v. Earl of Anglesey, 7 Bro. P. C. 443; Goodright ex dem. Rolfe v. Harwood, 7 Bro. P. C. 489; S. C. in K. B., 1 Cowp. 87, 2 Wm. Black.

937; Hitchins v. Bassett, 3 Mod. R. 203; S. C. 1 Show. R. 537; Roberts on Wills 265; Brant ex dem. Wilson v. Wilson, 8 Cow. R. 56; 4 Kent's Comm. 528; Weld v. Acton, 2 Eq. Cas. Ab. 777.

If several testamentary papers of the same decedent executed at different dates, should be presented to the court of probat at the same time, and the one of the date most proximate to the death of the testator contain an express clause of revocation of former wills, the court, if it admit it to probat, may properly reject those of prior date thereby revoked. So if, after a will of later date containing an express clause of revocation shall have been admitted to probat, a will of prior date be propounded, it may properly be rejected by the court of probat. But a will of later date may well revoke all former wills, though it contain no express clause of revocation; and 375 whether in any given *case it so operates, depends upon the general theory and the frame and structure of the later will, and the nature and character of the respective provisions contained in the different wills. And in any case, it seems to me, the question whether a former will is revoked by one of later date, whether because the latter contains an express clause of revocation of all former wills, or because, from its general frame and structure, it was intended to be a new and perfect will, and to replace any that might have been previously made, or because its provisions are incompatible with those of the previous will, is one proper to be submitted to the judgment of the court of probat. Nor can it be any good or sufficient reason why that court should be deprived of its authority to pass upon a subsequent paper, that it may have already admitted to probat a paper of previous date which, from the lights then before the court, appeared to be the true and only last will and testament of the deceased. If the paper produced be but supplemental to the former will, or if its provisions are only in part inconsistent with those of the former, which contains some plainly not affected by the later will, there can be no doubt that the court of probat may and should receive probat of the later will: And so, as it seems to me, if the later will contains an express clause of revocation of former wills, or contains a disposition of the estate incompatible with the provisions of the former, or from its general character may be inferred to be an entire new instrument intended to supersede the former, the court of probat should receive and admit it to probat, leaving it to have such effect as the law would necessarily attach to it. And I can scarcely think that it is necessary, in such a case, first to file a bill under the statute to set aside the former will; if indeed such a proceeding could be sustained. The 376 *function of a bill to set aside a will that has been admitted to probat, is rather to institute an enquiry as to the due execution of the instrument and the competency of the testator to make a will, than to institute before the jury a comparison between that paper and another and competing instrument claimed to be the true last will of the testator, though not yet admitted to probat as such; and thus convert the court of chancery into a court of probat. For if its decree setting aside the former will upon the ground that a later will has been proved before the jury, have not the effect per se of setting up and establishing the latter, then after the verdict and decree it must be carried into the probat court and proof of its execution given there; and if admitted to probat it must be subject to the right of a party interested to contest it by bill, I presume, under the statute, and thus again to raise the same questions as to its due execution and the competency of the testator, that must have been discussed upon the trial of the validity of the former paper. And on the trial of this issue a testamentary paper of still later date (if one had chanced to be found), might be introduced and made the means to overthrow, in turn, the second paper which had served to set aside that first admitted to probat. Great injustice too might follow, if the probat of a given paper, as the last will of a testator, were to have the effect of exhausting the jurisdiction of the court over the subject until that will should be first set aside by bill. For if no such bill be filed within seven years, (under the act of 1819,) that probat becomes forever conclusive not only in favor of that particular paper, but against all others whatsoever: And if a will of later date should be afterwards discovered, it would be utterly unavailing, though in fact the true last will of the testator, because it could not be admitted to probat 377 *pending the probat of the former; and that could not be gotten out of the way, because no bill could then lie to set it aside.

The jurisdiction of the courts of probat in Virginia, is a general jurisdiction conferred by statute, to hear and determine all causes, matters, suits and controversies testamentary, arising within their respective jurisdictions: And to examine and take the proof of wills, (as well of realty as of personalty,) and to grant certificates thereof. 1 Rev. Code 1819, ch. 104, § 12, p. 377. The same section prescribes a "method and rule" by which the court in which a will is to be proven, is determined. If the testator have a mansion or known place of residence, the will is to be proved in the Superior court of the county or in the court of the county or corporation in which such mansion house or place of residence shall be. If he have no such place of residence, but lands be devised by the will, it shall be proved in the Superior court of the county or in the court of the county or corporation, wherein the lands lie, or in one of them where there shall be lands in several counties; or if there be no such known place of residence and there be no lands devised, then the will may be proved either in the Superior court of the county or in the court

of the county or corporation where the testator died or that wherein his estate or the greater part thereof shall be; or such will might in any case be proved in the General court. The thirteenth section provides that where any will shall be exhibited to be proved, the court having jurisdiction as aforesaid, may proceed immediately to receive the probat thereof and grant a certificate of such probat. The thirty-second section, p. 382, provides that the General court and the several courts respectively, shall have the like jurisdiction to hear and determine the right of administration of the estate of persons dying intestate as was before mentioned (in the twelfth section), *as to the proof of wills, in respect to the intestate's place of residence or death, or where the estate shall lie. Under these provisions the General court has decided that a grant of administration by the court of a county or corporation not authorized to grant it according to the "method and rule" prescribed in the act, (as where the decedent had neither a residence nor any estate real or personal in the county or corporation in which the administration was granted,) was the act of a court without jurisdiction, and was void; and that the first grant being thus a mere nullity, the court which might properly have granted administration in the first instance might proceed to grant it in the same manner as if there had been no previous grant. Ex parte Barker, 2 Leigh 719. Case of administration of Robert Robinson's estate, November term 1828, cited in Barker's Case. This doctrine, taken from the English law in relation to grants of administration by a bishop, is supported by the cases of Cutts v. Haskins, 9 Mass. R. 543, and Holyoke v. Haskins, 5 Pick. R. 20; but it cannot now be sustained as sound law. The contrary has been decided in the case of Fishwick's adm'r v. Sewell, 4 Har. & John. 393; and after full consideration in Raborg's adm'r v. Hammond's adm'r, 2 Har. & Gill 42. In Virginia, the grant of administration by a court of probat does not stand on the footing of such a grant by a bishop in England; and I regard the doctrine of Barker's Case as entirely repudiated by this court. In Fisher v. Bassett, 9 Leigh 119, it is decided that a grant of administration by the court of a county or corporation that was not authorized to grant it according to the provisions of the statute, (the decedent in that case having been a foreigner, and having died abroad, and who had no residence in the corporation by the court of which the administration was granted, and no estate of any kind there,) is not void, but voidable only: And it was accordingly held in that *case that acts of and dealings with such administrator consummated before the letters granted to him were revoked or superseded, could not be called in question. The doctrine of this case is repeated and affirmed by the case of Burnley's representatives v. Duke, &c., 2 Rob. R. 102; and is in accordance with the opinion of the Supreme court in the case of Carter's heirs v. Cutting et ux., 8 Cranch R. 251. It grows out of the well settled principle that if a court have general jurisdiction over a given subject matter, a party effected by its action in any particular case cannot be permitted in any collateral proceeding, to show that the court had come to an erroneous conclusion. Brittain v. Kinnaird, 1 Brod. & Bingh. 432, 5 Eng. C. L. R. 137; 3 Stark. Ev. 802.

In delivering his opinion in the case of Fisher v. Bassett, Judge Tucker says, "I do not consider a County or Hustings court in relation to the grant of administration as standing on the same footing with the ordinary in England. The County court is a court of record, and its judgments or sentences cannot be questioned, collaterally, in other actions, provided it has jurisdiction of the cause. [He cites 6 Bac. Ab. Sheriff, M 2, p. 166; 3 Wils. 345.] And this is to be understood as having reference to jurisdiction over the subject matter; for though it may be that the facts do not give jurisdiction over the particular case, yet if the jurisdiction extend over that class of cases, the judgment cannot be questioned; for then the question of jurisdiction enters into and becomes an essential part of the judgment of the court. Thus if a County court were to give judgment of death against a white man, the sheriff would have no lawful authority to execute him; or if a Court of chancery were to grant probat of a will, it would be ipso facto void, since that court has no jurisdiction in any case of probat. It is held void ipso facto because no enquiry is necessary to ascertain its *invalidity. But where the court has jurisdiction of cases ejusdem generis, its judgment in any case is not merely void, because its invalidity cannot appear without an enquiry into the facts; an enquiry which the court itself must be presumed to have made and which will not therefore be permitted to be revived collaterally." He cites Prigg v. Adams, 2 Salk. R. 674, in illustration of his views. Judge Parker in the same case, after stating that he agreed with Judge Tucker in the opinion that the grant of administration to Scott by the Hustings court, was not a void act but voidable only, proceeds: "The distinction between the acts of a court having jurisdiction over the subject matter under some circumstances and those of one which in no possible state of things can take jurisdiction over the subject, is a sound and sufficiently intelligible one to guide our judgments in the present case. If under any circumstances the Hustings court could grant administration to Scott, it had jurisdiction of the subject and must judge of those circumstances. If it erred in determining that the facts upon which its power to grant administration in the particular case depended, were proved, it was an error to be corrected by some competent authority; but until so corrected it conferred upon Scott all the powers of a rightful administrator." Judge Allen in

delivering the opinion of the court in the case of Burnley's representatives v. Duke, &c., says: "As the court of Orange county had general jurisdiction to grant administration when a proper state of facts existed, whether the court erred or not in determining that the facts were proved upon which the power to grant administration in the particular case depended, is not to be enquired into collaterally. Until such orders or grants were reversed or revoked, they conferred on the grantees all the powers of rightful administrators."—"Whether the particular state of facts existed which would have authorized the court to 381 *grant administration originally, was a matter to be enquired into and decided by the court, and the decision if erroneous would be voidable only and not void."

These views apply as it seems to me, in all their force to the case now under consideration. The provision in the statute for the probat of wills and that for the grant of administrations in reference to the method and rule by which the particular court that is authorized to act, is to be determined, are, as we have seen, exactly the same. When the will of 1828 was propounded for probat by Michael Schultz in 1845, and the probat was contested by Mrs. Schultz, the case was certainly a matter, suit or controversy testamentary arising within the county of Wood; and of all such the County court of Wood possessed a general jurisdiction by the express provisions of the act. Assuredly it was not a case in which "under no possible state of things" could the court take jurisdiction over the subject. If the will of 1818 had been set aside, undoubtedly according to the pretensions of the appellees themselves, it had full authority to admit that of 1828 to probat. So, as we have seen, if the will previously admitted to probat contained provisions not incompatible with those of the will of 1828, so that in the opinion of the court both might stand together, in whole or in part, the two papers constituted but one will, and both might be legally and properly admitted to probat, though propounded at different times. And as the court had a general jurisdiction over cases ejusdem generis under certain circumstances, it must be taken for granted that the court did make enquiry and did judge of those circumstances. So that the question of jurisdiction entered into and became an essential part of the judgment of the court, and if it erred in its judgment in this respect or otherwise, the error was one which must be corrected by some competent authority upon a proper proceeding. 382 The judgment *cannot be held void ipso facto because an enquiry is necessary to ascertain its invalidity; and this enquiry will not be permitted to be made collaterally; and being voidable only and not void, it must remain in full force and effect as evidence or otherwise until reversed or in some way annulled by a proper proceeding.

In the cases of Fisher v. Bassett, and Burnley's representatives v. Duke, &c., the action of the court was the grant of administration. But the effect of a judgment of a court refusing to grant administration when applied for, as a bar, is just the same: Until reversed a resort to any other tribunal or to the same tribunal, for its judgment on the same controversy is inadmissible. Cottom v. Cottom, 4 Rand. 194. And so the rejection of a paper propounded as a will, by the court of probat, must equally preclude a resort to the same or any other tribunal to set up the same paper while that sentence remains in force and unreversed.

But it is argued that even if the decision of the County court rejecting the will of 1828 be considered as having been on the merits, and if that court had jurisdiction of the subject, yet as it appears from the reasons of the Circuit court contained in the written opinion filed at the time of the rendition of its judgment affirming that of the County court, that that court was of opinion that the County court had no jurisdiction, its judgment is to be taken and considered with the reasons annexed; and that the effect of so considering it is to change its character from that of a judgment on the merits to that of one for want of jurisdiction, so that it is no bar to a new proceeding. The Circuit court it is said, had original jurisdiction concurrently with the County court over the subject of probat of wills: It had also an appellate jurisdiction both upon the law and upon the facts, and its judgment therefore, and the grounds and reasons for it, are to be looked to to determine the character of 383 *the judgment of the County court and its operation and effect as evidence or otherwise.

The judgment of the Circuit court was that there was no error in the judgment of the County court, and that the same should be affirmed with costs; and whatever may have been the reasons which led the Circuit court to pronounce it, I am at a loss to perceive how they can either enlarge, or restrain, or in any way modify the operation and effect of the judgment of the County court. It is a direct, general affirmance of the judgment of the County court because there was no error in the same: It left that judgment just as it was when it was pronounced, with the same force and effect which it then had. Let the reasoning of the court be what it might, it could stamp no new character nor impress any new feature upon the judgment which was thus fully and formally affirmed. Nor does this judgment of the Circuit court derive any new import or any special virtue from the fact that that court had concurrent original jurisdiction with the County court over the subject, and appellate jurisdiction as well upon the facts as upon the law of the case. When it pronounced its judgment it was not exercising its original jurisdiction; nor had its appellate supervision over the facts of the case been in any wise invoked. It was called on to review the case solely upon the questions of law arising

upon the record; and it was in the performance of this duty that this its judgment was pronounced. Undoubtedly the Circuit court might have rendered a judgment which would have changed the character of the judgment of the County court, and taken from it its finality and conclusiveness as a judgment upon the merits. To attain this object it should have reversed the judgment of the County court, and in lieu of it, rendered judgment overruling the application to admit the will of 1828 to probat for want of jurisdiction
384 *in the County court to entertain it. But it has not done so; it has affirmed the judgment of the County court, and its original operation and effect must, as it seems to me, remain unchanged.

That the reasons of the Circuit court for its judgment cannot affect the force and operation of the judgment of the County court seems obvious from another consideration. If they could have the effect of so totally changing the character of that judgment as to convert it from a judgment final and conclusive against all the world into one that was conclusive against nobody for want of jurisdiction in the court to act upon the subject, if it chanced that the Circuit court was wrong, how is the error to be corrected? Mrs. Schultz, the party contesting, would be seriously aggrieved if the Circuit court had improperly deprived her of the benefit of the judgment of the County court as conclusive evidence against the will of 1828; yet from what is she to appeal? The judgment of the Circuit court affirming that of the County court was right; and she cannot appeal from the reasons of the court; for it is the settled rule that how erroneous soever may be the reasons of the court for its judgment upon the face of the judgment itself, if the judgment be right, it will not be disturbed on account of the reasons.

I forbear going into the enquiry whether there are not certain provisions in the will of 1818 not inconsistent with those of the will of 1828, and whether therefore as to them the two wills may not consist and stand together? In the view I take of the case, this enquiry is unnecessary; but considering the theory of the will of 1828 and its general frame and structure as connected with the circumstances disclosed by the record, much might be said to show that it must have been intended as a perfect and complete testamentary disposition of his estate by the testator, and to super-
385 sede *and replace any former will or wills that he might have made.

I am of opinion to reverse the decree of the Court of chancery of the 24th of March 1848 setting aside the will of 1818; to set aside the verdict of the jury and the order directing the issue, and to dismiss the bill: And in the probat case, to reverse the judgment of the Circuit court of the 25th of April 1849, affirming the sentence of the County court of the 17th of April 1848, admitting to probat the will of 1828; and to reverse the said sentence and reject the said paper.

DANIEL and SAMUELS, Js., concurred in the opinion of Lee, J.

ALLEN and MONCURE, Js., dissented.

Decree and judgment reversed.

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386 *Anderson v. Harvey's Heirs.

July Term, 1853, Lewisburg.

Adversary Possession—Interlock—Case at Bar.—R held a patent for 1200 acres of land, and H held a junior patent for 2100 acres, which covered a part of the land included in R's patent. By a decree made in 1807, R was directed to convey to H that part of the land covered by his patent which was included in the patent of H. No deed was executed, but in 1805 H entered upon this tract and cultivated and improved a part of it, though not the part included in the patent of R. He held possession of his land until his death in 1831 and his heirs continued to hold possession. There was no actual occupancy of the interlock until 1836 when a purchaser under R cut the timber upon it and converted it into coal. R died in 1817 and in 1834 his executor and devisees conveyed the 1200 acre tract except so much as was decreed to H by the decree of 1807. R held several other tracts adjoining the tract of 1200 acres, one of which of junior date to that covered the same interlock, and his executor and devisees by deed of the same date as the other, conveyed to the same parties these several tracts of land without any reference to the decree of 1807. The subsequent conveyances of this property either referred to these deeds or referred to subsequent deeds which referred to them. In 1849 A the then owner of the land under R took iron ore from the interlock aforesaid, and the heirs of H filed a bill to enjoin him. HELD:

1. **Same—Same—Actual Possession of Patent by Claimant—Effect.**—H having entered upon his land and improved it and held possession, under his patent and decree of 1807, his possession and that of his heirs gave them perfect title to the extent of the limits of his patent.
2. **Same—Temporary Possession of Interlock—Effect.**—The temporary occupancy of the purchaser under R and the cutting and taking off the wood from the interlock was not a disseizin of the heirs of H.
3. **Two Deeds—Considered as Part of Same Transaction*—Case at Bar.**—The two deeds of the ex'or and devisees of R having been made at the same time and to the same parties, must be considered as parts of one transaction and as constituting in law one entire deed; and therefore

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***Two Deeds—Construed as Part of Same Transaction.**—In Osborne v. Cabell, 77 Va. 465, it is said: "The circumstance that the deed to the lot in Richmond, the deed of trust on the Lancaster plantation, and the agreement, were all executed in the same city, on the same day, and acknowledged before the same magistrates, when taken in connection with the fact that the agreement contemplates the execution of those deeds, to fully effectuate its objects, clearly shows that these writings are but parts of one transaction, and should be construed as one entire

though one of the deeds makes no exception of the part of the land embraced within the bounds of H's tract of land, yet as the other does, the effect of the two deeds taken together is to except out of the grant in each the land in the interlock as fully as if the exception had been in both deeds.

387 *4. **Adversary Possession—Interlock—Exclusive Possession by Claimant—Effect.**†—The purchasers from the ex'or and devisees of R had no possession either actual or constructive of this interlock; but it was in the exclusive adversary possession of the heirs of H claiming and holding by a perfect title; and the deed of these purchasers could convey no shadow of right to the interlock as against the heirs of H.

5. **Injunctions—Against Trespass—Injury to Mines.**‡—Though the heirs of H might have maintained trespass against A, yet equity had jurisdiction to enjoin A from taking ore from the interlock.

On the 12th of December 1785, a patent was issued to David Ross for twelve hundred acres of land lying on Catawba creek in the county of Botetourt; and on the 13th of May 1786 another patent issued to Ross for four hundred and eighty acres of land lying on the same creek. The boundaries of these two tracts interlocked, and both covered the piece of land which was the subject of controversy in this case.

On the 9th of June 1787 a patent issued to Robert Harvey assignee of Jacob Little, for three hundred and eighty-four acres of land on Catawba creek: And on the 11th of June 1787 another patent issued to Harvey for twenty-one hundred acres of land lying on the same creek. This patent was founded on an inclusive survey which embraced two tracts, one of three hundred and ninety acres granted to Dennis Getty in 1772, and the other of three hundred acres assigned to Harvey by James McGavock; and the residue of the tract was never before granted. Harvey seems to have entered upon this land prior to 1807, and to have cleared a part of it and built a furnace upon it for making iron.

In 1803 Harvey filed his bill in the County court of Botetourt against Ross, in which he charged that his patents were founded on older entries and surveys than Ross' patent for twelve hundred acres, and that Ross with full knowledge of the plaintiff's claims had fraudulently procured that patent, which comprehended a large portion of the tracts of three hundred and
388 *eighty-four acres, embraced in his patent. And he prayed that Ross might be compelled to convey to him the land included in his patent for twelve hundred acres, which was covered by the plaintiff's patents.

Ross answered the bill stating that in making his entries and surveys he relied entirely on the surveyor of the county; that there was no attempt to hurry through the proceeding; and that he knew nothing of the claims of the plaintiff set up in the bill. The cause came on to be heard on the bill, answer, and exhibits, the latter of which were Harvey's patents and copies of entries; when the court made a decree that Ross should convey to the plaintiff with special warranty all the lands comprehended within the bounds of the plaintiff's patents for three hundred and eighty-four and twenty-one hundred acres, that were comprehended within the bounds of Ross' patent for twelve hundred acres; and that the plaintiff be quieted in the possession thereof. Nothing seems to have been done under this decree. Harvey continued in possession of his tract of twenty-one hundred acres, up to the time of his death in 1831, and there is some evidence, though it is rather doubtful, that he at one time, took some iron ore from the land in controversy.

Ross acquired several other tracts of land adjoining the tract of twelve hundred

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instrument. *Anderson v. Harvey's Heirs, 10 Gratt. 396;* French v. Townes *et als.*, 10 Gratt. 522."

See also, principal case cited in *foot-note* to Walden v. Walden, 33 Gratt. 88.

†**Adversary Possession—Statute of Limitations.**—In Va. Mining & I. Co. v. Hoover, 82 Va. 454, 4 S. E. Rep. 689, it is said: "The statutes of limitation are to be enforced by the courts like any other statute. It has been often said by this court that they are statutes of repose, and are dictated by a wise policy founded upon the presumption against him who has unreasonably delayed the assertion of his demand, and in favor of him who has long exercised the dominion of owner. Taylor v. Burnsides, 1 Gratt. 187; Flanagan v. Grimmet, 10 Gratt. 421; Smith v. Chapman, *Id.* 445; *Anderson v. Harvey, Id. 386.*"

See also, on the subject of "Adversary Possession," Taylor v. Philippi, 35 W. Va. 560, 14 S. E. Rep. 132, citing the principal case.

‡**Equity Practice—Injunctions—Trespass—Waste.**—In Bettman v. Harness, 42 W. Va. 438, 26 S. E. Rep. 272, it is said: "We know but little of petroleum oil and gas hidden far in the bowels of the earth, but from that little we can say they are of great value, and are exhaustible, and, when exhausted in a locality, cannot be restored by the art of man, and perhaps never even by the mysterious alchemy of nature. Surely, they fall under the rule which considers the subtraction of precious things from under the soil as working irreparable injury, as much as iron ore in *Anderson v. Harvey's Heirs, 10 Gratt. 386,* to which I refer as decisive and binding under this branch of this case. We know that these substances are the sole property and value of the plaintiff's estate under that lease,—the only object of the lease. In Williamson v. Jones, 39 W. Va. 231, 19 S. E. Rep. 436, we decided that petroleum oil in place is a part of the realty, and its unlawful removal a disherison which equity will enjoin."

See, in accord, citing the principal case, Woods v. Early, 95 Va. 314, 28 S. E. Rep. 374; Miller v. Wills, 95 Va. 340, 28 S. E. Rep. 337; Rakes v. Rustin Land, etc., Co., 2 Va. Dec. 160; Wood v. Braxton, 54 Fed. Rep. 1008; 6 Va. Law Reg. 192; Mason City, etc., Co. v. Town of Mason, 23 W. Va. 220.

In Cresap v. Kemble, 26 W. Va. 607, the principal case is distinguished, the court holding that an injunction would not lie to restrain the taking of coal from an open mine when the proof did not show that the coal constituted the chief value of the land.

See generally, monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

acres, making in all between seven and ten thousand acres; but the precise boundaries or location of these several tracts do not seem to have been known with any certainty. He died in 1817.

Previous to July 1834 William Ross seems to have acquired a right to the tract of twelve hundred acres patented as before stated to David Ross, and he had purchased of McDonald and wife, one of the heirs of Robert Harvey, a small tract of one hundred and sixty-four acres adjoining thereto; and on the 16th of July 1834 he conveyed these lands to the Catawba iron 389 *works company. In this deed the twelve hundred acre tract is conveyed as follows: "So much of a tract of twelve hundred acres of land, originally patented to David Ross by patent bearing date the 12th day of December 1785, as is now owned by the said William Ross, being all that part of the said tract not decreed to Robert Harvey by a decree rendered by the County court of Botetourt in the year 1807, in a cause therein depending between the said Robert Harvey as plaintiff and the said David Ross defendant:" And then the boundaries of the whole tract are given. William Ross did not have the legal title to this land: And by deed bearing date the 12th day of August 1834, Frederick A. Ross as executor and devisee of David Ross, and the other devisees of David Ross conveyed this tract of land to the Catawba iron works company, by the same description as that contained in the deed from William Ross. By deed of the same date the executor and devisees of Ross conveyed to the same company all the lands on Catawba creek and its branches which they derived from David Ross. These tracts are enumerated in the deed and described by the quantity and date of the survey, with a general reference for a more particular description of the several tracts to the records in the surveyor's office. The number of tracts was twenty-two; and the whole quantity as stated in the deed, eight thousand five hundred and twenty-nine acres.

The Catawba iron works company having become very much embarrassed, by deed bearing date the 14th of August 1840 conveyed all its property in trust for its creditors. This deed described the lands of the company as "one tract in the county of Botetourt on the waters of Catawba creek containing twelve hundred acres, be the same more or less, it being the same land purchased in part by William Ross from the representatives of David Ross, 390 and conveyed by *Frederick A. Ross executor of David Ross to the company, and in part of the land purchased by William Ross of McDonald one of the devisees of Harvey. Also one other tract lying, &c., made up of several smaller tracts formerly owned by David Ross and conveyed by Frederick A. Ross executor, &c., to the company, containing between seven and ten thousand acres."

A suit in equity having arisen out of the last mentioned deed, in the Circuit court of Botetourt, the land was sold under a decree of that court; and the commissioners by their deed bearing date the 10th of December 1847, conveyed the land to the purchasers William S. Triplett executor of John R. Triplett, and Peachy R. Grattan executor of D. I. Burr; they being the creditors entitled to the proceeds of the sale. This deed recites the decree directing the sale, and conveys all the real estate which belonged to the Catawba iron works company, and which was conveyed by that company to trustees as aforesaid: and the land is described as in that deed. By another deed bearing date the 11th day of January 1848 these executors and the devisees of David I. Burr and John R. Triplett conveyed to Joseph R. Anderson, John T. Anderson and William N. Anderson these same lands as embraced in the deed from the Catawba iron works company to trustees as aforesaid, and which were afterwards sold by commissioners under the decree of the Circuit court of Botetourt, and conveyed by them to the said executors. And John T. and William N. Anderson in December 1848 conveyed their interest in these lands to Joseph R. Anderson.

In 1849 Joseph R. Anderson being engaged in making iron at the furnace on the lands aforesaid, commenced to raise ore from a mine situated on a part of the land included within the boundaries of the patents for twelve hundred and four 391 hundred and *eighty acres which had been issued to David Ross as before stated, and which was also included within the boundaries of the patent to Harvey for twenty-one hundred acres: And thereupon the devisees of Harvey applied to the Circuit court of Botetourt county for an injunction to restrain him from raising ore within the boundaries of their said tract of land. In their bill they set out their original title to the land and the decree of the County court of Botetourt of 1807. They charge that soon after said decree Harvey took possession of the land covered by his patent and that of Ross for twelve hundred acres, and took ore from thence for the supply of his furnace; and that he held peaceable possession of it until his death in the year 1831. They say that it does not appear that Ross ever executed the deed directed by the decree of 1807; but that in all the conveyances of the tract of twelve hundred acres by the hires of Ross and those claiming under them, the rights of Harvey under his patent and the decree aforesaid are expressly recognized and reserved. They therefore pray for an injunction to restrain Anderson and his agents from raising ore on said land until the rights of the parties may be determined by proper legal proceedings; and for general relief. The injunction was granted.

Anderson demurrer to the bill; and also answered. He said that he received a conveyance for the land with general warranty, and deemed it unnecessary therefore to make any particular examination of the

title. That by the conveyances to him, he was invested with the legal title to the lands, and ore bank claimed by the plaintiffs; and that in these deeds there was no reference to the decree of 1807. That he had never heard of that decree, or that Harvey or his devisees had ever set up a claim to any portion of the lands which he had purchased, and which had been conveyed to him as hereinbefore mentioned, until 392 *shortly before the institution of this suit. That he had never seen the deeds in which this decree is referred to until this suit was commenced; and he denies that the grantors in these deeds recognize any right in Harvey under said decree: They only recognize the existence of the decree. That he holds the ore bank and lands in controversy under the other deed executed by the executor and devisees of David Ross, which conveys the tract of four hundred and eighty acres, and which includes the ore bank. He denies that Harvey took possession of the land in controversy, shortly after the rendition of the decree; and he believes he never did take possession of it, or that he took any ore from the mines within the interlock at any time previous to 1829. That probably after 1828, his furnace was supplied in part with ore taken from thence in 1829 and 1830, but he had ceased to take it for more than a year before his death in 1831. That this was not raised by Harvey or persons under his direction, but by persons from whom he bought the ore by the load, and who raised the ore wherever they chose to get it, whether on Harvey's or the adjoining lands; and that in fact a large portion of the ore used by Harvey at his furnace was taken from lands of Ross to which Harvey never pretended to have any title. That the Catawba iron works company took possession of the land in controversy under the patent to David Ross and the conveyance to them; that they cut a large portion of the timber off the land and coaled it upon the land within the bounds of the interlock and within a few yards of the ore bank in controversy.

The defendant further answering insisted that the decree of 1807 conferred no title on the plaintiffs to the land in controversy: That unless it could be carried into execution it was a mere nullity; and whether it could be executed could 393 only be ascertained *by the plaintiffs filing a bill against the representatives of Ross to enforce it. That the decree was illegal and erroneous and ought never to have been pronounced, as was apparent from the record of the cause; which he exhibited. That he was a bona fide purchaser without notice of the plaintiffs' claim; and having the legal title and at least equal equity, his was the better right; and ought not now to be disturbed after the plaintiffs had slept upon their rights, if they had any, for more than forty years.

By a survey made in the progress of the cause, it appeared that the line of Harvey's tract of twenty-one hundred acres, includes the ore bank in which the defendant had raised ore by a few feet. And it appeared from the testimony, which was voluminous, that ore had been raised at this place by persons who sold ore to Harvey, and probably, though this is somewhat uncertain, that at one time persons in the employment of Harvey raised some ore at the same place. It was proved that in 1836 or 1837 the Catawba iron works company cut the wood off the land in the interlock and there converted it into coal. No person in the neighborhood seems ever to have heard of the decree of 1807.

The cause came on to be heard in April 1850, when the court held that the rights of Harvey and Ross to the land in controversy were settled by the decree of 1807. That this decree equally affected any rights to this land which Ross may have had under his patent for four hundred and eighty acres. That as Harvey and those claiming under him, had been in possession of the tract of twenty-one hundred acres ever since said decree, operating a furnace situated upon it, during a large portion of the time, they must be regarded as in possession of the interlock as part of the said tract, even if it was not proved that they had actual possession at any time, of the said interlock, until an adverse 394 *possession of Ross or those claiming under him was proved. That the acts relied on by the defendant to prove adverse possession, did not amount to an ouster of the heirs of Harvey; and that they must be considered as in possession when the defendant entered upon the land; and that they were entitled to the protection of the court to avoid the injury complained of in the bill. It was therefore decreed that the injunction be perpetuated with costs. From this decree Anderson applied to this court for an appeal, which was allowed.

J. T. Anderson and Michie, for the appellant.

Baxter, for the appellees.

DANIEL, J. The bank or mine of iron ore, to restrain an alleged trespass in which the injunction in this case was allowed, is, according to the surveys and other testimony in the cause, situated in the interlock caused by the interference of the bounds of Harvey's patent for twenty-one hundred acres, granted on the 11th day of June 1787, with those of Ross' patent for twelve hundred acres, granted on the 12th day of December 1785; and is therefore clearly embraced by the terms of the decree pronounced on the 10th of February 1807, by the County court of Botetourt in the case of Harvey v. Ross. That decree has never been reversed, and, so far as the proofs in the cause show, its force and validity were never denied by Ross in his life time. Indeed no question as to the correctness of the decree or as to the right of the County court of Botetourt to make it, ever seems to have been made before the commencement of this suit. On the contrary, in the deed of the 12th August 1834, made by

F. A. Ross, executor and devisee, and Myers and others also devisees, of David Ross, and also in the deed of William
395 Ross and wife of the 16th July *1834, to the Catawba iron works company, (under whom the appellant claims,) conveying the several interests of the parties in the twelve hundred acre tract, express reference is had to the decree: And each deed purports to convey only so much of the tract as was not decreed to Robert Harvey by said decree.

On the same day on which F. A. Ross, executor, &c., and others executed the deed above mentioned, to wit: the 12th August 1834, they also made another deed to the Catawba iron works company, conveying with special warranty, "all their lands on the Catawba creek, &c., being the lands which David Ross had title to at his death, and of which his heirs or executors were seized at his death," &c. In the description of the lands intended to be conveyed is embraced "four hundred and eighty acres surveyed March 25th, 1785."

A patent founded on this survey, was issued to Ross on the 13th of May 1786. The interlock before mentioned, as appears from the survey and other proofs in the case, is also covered by this patent. No mention, however, of this patent is made in the decree of 1807; nor in any of the proceedings in the suit in the County court of Botetourt.

Still as the decree directed Ross to convey to Harvey all the lands comprehended within the twenty-one hundred acre patent, that were also comprehended in the twelve hundred acre patent, it is difficult to conceive how he could ever have made any opposition to the decree, or to any rights claimed under it, by showing that he held at the time the decree was rendered, another patent covering the interlock, subsequent in date and consequently necessarily inferior as an evidence of title, to the one which the court had declared insufficient to protect him against Harvey's superior equity. The decree directed the interlock to be conveyed and whatever effect the decree
396 had to deprive *Ross of, or render inoperative, the title he had disclosed and relied on, a fortiori, it had in respect to a younger and inferior title which he had not thought proper to disclose.

The two deeds of the 12th August 1834 made between the same parties and cotemporaneous in date, must be regarded as parts of one transaction, and as constituting in law one entire deed. Though therefore the deed in which the four hundred and eighty acre survey is conveyed makes no exception of the part thereof which was embraced within the bounds of the twenty-one hundred acre patent; yet as the deed conveying the twelve hundred acre tract does make the exception of it in excepting all which had been decreed to be conveyed to Harvey, the effect of the two deeds taken together, is to except out of the grants, in each, the land in question, as fully as if the exception had been expressed in terms, in each deed.

It is in proof that Harvey took possession of a portion of his tract of twenty-one hundred acres as early as in the year 1805, and that he continued to occupy, cultivate and otherwise enjoy it as owner till his death in 1831: And this possession has been continued by his representatives ever since. It is also proved that in the years 1828 and 1829 he obtained ore from the land in question for the purpose of operating his furnace. Apart from this latter proof, the occupation of a portion of his tract by Harvey and those claiming under him, and the continued use and enjoyment thereof, accompanied by the notice which his suit in the County court of Botetourt gave of the extent of his claim, constituted, in the absence of any proof of an adversary possession by Ross and those claiming under him, of the portion of land in dispute, an adversary possession of all the land within the limits of his patent. And this possession, without calling in the aid of any presumption that Ross had executed a
397 *deed for the land which the decree had directed him to convey, had ripened into a full and perfect title long before the year 1836, when the Catawba iron works company commenced converting into coal, wood upon a portion of the interlock. Taylor v. Burnsides, 1 Gratt. 165; Overton's heirs v. Davisson, Ibid. 211.

This temporary possession by the company for the purpose above mentioned, commenced in 1836 and abandoned in 1837 or 1838, could not operate to disseize Harvey's representatives of the land in question. Pasley v. English, 5 Gratt. 141. When therefore the deed of trust of the 14th August 1840 was executed by the company, they had no possession actual or constructive of the ore bank in controversy. But the said bank was in the exclusive adversary possession of the appellees claiming and holding it by a perfect title. The deed of the company therefore could convey no shadow of right to the ore bank in a dispute as against the appellees. The only effect it can have on their rights is, on the contrary, one of a beneficial character; in as much as it served to notify all claiming under it that the right to the land in controversy was never in the company, but resided with the Harveys: The description of the land intended to be conveyed, expressly referring to the deed of the Rosses, heretofore mentioned, in which the exception in favor of Harvey is made. The deed from Francis T. Anderson and A. P. Eskridge, commissioners, &c., of the 10th December 1847, has a like reference to the deed executed by F. A. Ross, &c., for the twelve hundred acres: And though the deed from Grattan and Triplett, &c., the purchasers at the commissioners' sale, to the appellant and John T. and William N. Anderson, has no such reference; yet it has a reference to the deed executed by the commissioners and also to the decree under which they sold.

398 *I think it is clear that, at the time of the alleged trespass on the ore bank by the appellant, the appellees must be regarded as in possession of it with a clear and incontestible title. They might have instituted their action of trespass against the appellant; but were they bound to do so before, or instead of applying to a court of equity to restrain the appellant from committing further trespasses on the property in dispute? Were they bound to litigate and discuss in a court of law rights which had not only been adjudicated as far back as 1807, but which had been solemnly recognized in the conveyances to which the appellant must necessarily refer as the sources of any title which he could assert? I think not. The practice of courts of equity of interfering in such cases by way of injunction, is one comparatively of recent origin; but the jurisdiction is now fully recognized and well established by cases both in England and America. Mitchell v. Dors, 6 Ves. R. 147; Hanson v. Gardner, 7 Ves. R. 305; Thomas v. Oakley, 18 Ves. R. 184; 3 Daniel's Ch. Pr. 1852-3; Stevens v. Beekman, 1 John. Ch. R. 318; Jerome v. Ross, 7 John. Ch. R. 315; Smith v. Pettingill, 15 Verm. R. 84.

The land upon which the trespass is alleged to be committed is proved to be of little or no value except for the iron ore found on it, which is proved to be of an excellent quality. The trespass is one which goes to the change of the very substance of the inheritance, to the destruction of all that gives value to it. The fact proved by the appellant that the value of the ore per load could be readily estimated, does not deprive a court of equity of its rights to interfere in the case by way of injunction. The same might be shown in most cases of the kind. The products of most mines have a value already fixed or easy of ascertainment by proof; yet it was in prevention of like trespasses to this very species of property, mines of ore, coal, &c., that 399 the *jurisdiction in question had its origin, and still continues to be most frequently exercised.

I see no error in the decree of the Circuit court, and think it should be affirmed.

ALLEN, MONCURE and LEE, Js., concurred in the opinion of Daniel, J.

SAMUELS, J., dissented.

Decree affirmed.

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400 *Staats v. Board.

July Term, 1853, Lewisburg.

1. **Forfeited Land—Statute—When Forfeiture Complete.***—Land having been forfeited under the act of the 27th of February 1835, Sess. Acts, p. 11, for the failure to enter them on the commissioners' books, that forfeiture was complete on the 1st of November 1836, the period limited in which the forfeiture might be saved by complying with the provisions of the act of March 23d, 1836, Sess. Acts 1835-6, p. 7.

2. **Same—Same—Redemption—Effect on Forfeiture.**—The act of March 30th, 1837, Sess. Acts, p. 9, giving time for redemption until the 15th of January 1838, did not release the forfeiture which had accrued, except in cases where the owner or proprietor availed himself of the privilege of redemption.

3. **Same—Completion of Forfeiture—Judicial Proceedings Unnecessary.**—The forfeiture in such case became absolute and complete by the failure to enter and pay the taxes due on the land and the damages, in the manner prescribed by the act of the 27th of February 1835: And no inquisition, or judicial proceeding, or inquest or finding of any kind was required to consummate such forfeiture.

4. **Same—Tempus Regi Non Occurrit.**†—After the forfeiture of the land to the commonwealth no possession thereof adverse to the proprietor in whose name it was forfeited, can run against the commonwealth.

5. **Same.**—QUÆRE: Whether after the lien of the commonwealth for taxes attaches to lands, any possession adverse to the proprietor can operate so as to impede the right of the commonwealth to subject said lands to sale or forfeiture for such taxes: and as a consequence to transfer to a purchaser, or vest in an actual occupant, or subject to re-entry and grant, such forfeited lands.

This was an action of ejectment in the Circuit court of Jackson, brought in April 1844, by Jacob Staats' lessee against John Board and Charles Board, to recover a tract of fifteen hundred acres of land. On the trial the plaintiff introduced in evidence a patent from the commonwealth bearing date the 10th day of February 1786 to Savary De Valcoulon for fifteen hundred acres of land, being the land sued for; and also the will of said Savary duly admitted to probat, by which he devised all his 401 real estate to Robert Alexander *of Kentucky. The plaintiff also introduced the report of the commissioner of delinquent lands for the county of Jackson, and the proceedings thereupon; by which it appeared that this land had been forfeited for the failure to enter it upon the commissioners' books; and that in 1841 the same had been decreed to be sold and was sold as forfeited land, and was purchased by Daniel G. Morrill, who afterwards conveyed it to the plaintiff.

The defendants on their part introduced a title bond bearing date the 1st of October 1833, by which James T. Watson, reciting that he had sold to John Board a tract of one hundred and twenty acres of land in the county of Jackson, lying as therein described, bound himself to make to Board a

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*Forfeiture of Lands—Statute—Effect—When Forfeiture Complete.—Upon this subject, see *foot-notes* to Levasser v. Washburn, 11 Gratt. 572; Ushers v. Pride, 15 Gratt. 190; Atkins v. Lewis, 14 Gratt. 30; Martin v. Snowden, 18 Gratt. 100, where there is a collection of the authorities which cite the principal case. In addition to those there collected, see, citing the principal case, Van Grinden v. Va. Coal & Iron Co., 52 Fed. Rep. 851; Silliman v. Fredericksburg, Orange, etc., R. R. Co., 27 Gratt. 132.

†Same—Tempus Regi Non Occurrit.—See *foot-note* to Levasser v. Washburn, 11 Gratt. 572.

valid conveyance for the same when the purchase money was paid. And they proved that in 1833 John Board took possession of the land described in the bond, erected houses and cleared portions of the land, and had resided thereon continually with his son, the other defendant Charles Board, claiming and using said land as his own under and in pursuance of said bond. And it was proved that the land so claimed and occupied by the defendants, is embraced within the boundaries of the grant aforesaid to Savary. And this being all the evidence introduced by the defendants, the court upon their motion, instructed the jury, "That if they believed from the evidence that the defendants entered upon said land and took possession thereof under said title bond, claiming and using it as their own, and have continually held such possession for more than seven years prior to the institution of this suit, that they are entitled to the benefit of the protection of the statute of limitations, notwithstanding the grant to the said Savary and the forfeiture, sale and purchase thereof, as disclosed by the evidence adduced by the plaintiffs." To the giving of this instruction the plaintiff ex-
402 cepted; *and there being a verdict and judgment for the defendants, he applied to this court for a supersedeas, which was awarded.

Fisher, for the appellant.
B. H. Smith, for the appellees.

ALLEN, J., delivered the opinion of the court:

It seems to the court here that as by the 52d section of the act of February 9th, 1814, 2 Rev. Code, p. 546, all previous laws forfeiting lands for the failure to enter them on the books of the commissioners of the revenue, were repealed, and no provision was made by subsequent laws forfeiting lands for such failure prior to the act of the 27th February 1835, Sess. Acts, p. 11, no such forfeiture occurred prior to that time.

It further seems to the court, that as by the act of March 23, 1836, Sess. Acts, p. 7, time was allowed until the 1st day of November 1836, for all persons to cause their omitted lands to be entered with the commissioner of the revenue, and to pay the taxes thereon in the manner prescribed in the 2d section of the act of February 27th, 1835, the forfeiture became absolute from and after the 1st of November 1836. That the provision of the act of March 30th, 1837, giving time for redemption until the 15th of January 1838, did not release the forfeitures which had accrued, except in such cases where the owner or proprietor availed himself of the privilege of redeeming.

And it further seems to the court, that such forfeiture became absolute and complete by the failure to enter and pay the taxes thereon in the manner prescribed by the act of 27th of February 1835: And no inquisition, or judicial proceedings, or inquest, or finding of any kind was required to consummate such forfeiture. And without deciding in this cause, whether, after the lien of the commonwealth attaches
403 to *lands, any possession adverse to the proprietor could operate so as to impede the right of the commonwealth to subject said lands to sale or forfeiture for such taxes, and as a consequence to transfer to a purchaser, or vest in an actual occupant, or subject to re-entry and grant, such forfeited lands, it seems to the court that from and after such forfeiture no such adverse possession can run against the commonwealth.

And it appearing from the facts set forth in the bill of exceptions, that the grant to Savary De Valcoulon issued on the 10th of February 1786; that the same had never been entered on the commissioners' books for taxation, and had therefore been omitted prior to 1831, the forfeiture thereof was complete from and after the 1st of November 1836; and the adverse possession relied on by the defendant, if it could have availed for any purpose as against the commonwealth, ceased to run from that day.

And it further appearing that the title bond under which the defendants entered and took and thereafter held possession of the land described in said title bond, was dated the 1st of October 1833; that said land so claimed and occupied by the defendants was embraced within the boundaries of the grant to Savary De Valcoulon, it seems to the court here that such possession so held, did not entitle the defendants to the protection of the bar of the statute of limitations, as the time which intervened between the date of said title bond and the forfeiture was but three years and one month; and even if it were proper to add thereto the time which intervened between the decree confirming the sale made by the commissioner of delinquent and forfeited lands, which was entered on the 14th of April 1842, or the time from the date of the deed from the commissioner the 19th of April 1843, and the 1st of April 1844, the time of instituting this suit, there would not have been, in any view of
404 the facts set *forth, an adverse possession for a sufficient length of time to entitle the defendants to the protection of the bar of the statute of limitations.

It seems therefore to the court here, that the said Circuit superior court erred in giving the instruction in the said bill of exceptions contained. It is therefore considered that the said judgment be reversed and annulled, and the verdict be set aside; and the cause be remanded for a new trial to be had; upon which said instruction is not to be given: And that the plaintiff in error recover of the defendants in error his costs.

Judgment reversed.

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405 *Wild's Lessee v. Serpell.

July Term, 1853. Lewisburg.

1. **Forfeiture of Land—Statute—Constitutionality.***—The statutes of Virginia forfeiting lands to the

*Forfeiture of Land—Statute—Constitutionality—When Forfeiture Complete.—See *foot-note* to Staats v.

commonwealth for the failure of the owners to enter them upon the commissioners' books and pay the taxes due thereon, are constitutional.

2. **Same—Title Divested by Operation of Statute.**—The forfeiture under these statutes is perfected without a judgment, decree or other matter of record, or an inquest of office; but by the operation of the statutes the title is divested out of the owner and is vested in the commonwealth.

3. **Same—To Benefit of Third Person Claiming under Commonwealth—Effect.**—In such cases where the title is vested in the commonwealth, and the forfeiture enures to the benefit of a third person claiming under the commonwealth by virtue of another and distinct right, the transfer of the title to such person is, in like manner, perfect and complete without any new grant from the commonwealth, or any proceeding to manifest the transfer, by matter of record or otherwise.

4. **Same—Statute—When Forfeiture Complete.**—Land omitted to be entered by the owner on the commissioners' books, were forfeited under § 2 of the act of February 27th, 1835, Sessions Acts 1834-5, p. 12; and the forfeiture became perfect and consummate on the 1st of November 1836, the period limited in which the forfeiture might be saved by complying with the provisions of the act of March 23, 1836. Sessions Acts 1835-6, p. 7.

5. **Grant by Commonwealth—Party Claiming under—Case at Bar.**—A party claiming under a grant from the commonwealth issued in August 1836, cannot claim the benefit of an older title forfeited to the commonwealth, under the act of the 27th of February 1835, because by that act a forfeiture only enured to the benefit of those who claimed title under a grant from the commonwealth bearing date before April 1st, 1831.

6. **Same—Same—Same.**—Nor can such a party sustain such a claim under the provisions of the act of March 30th, 1837, unless he is a *bona fide* occupant of the land.

7. **Same—Statute—Possession—Case at Bar.**—To sustain such a claim under § 16 of the act of March 16, 1838, Sessions Acts 1837-8, p. 21, the party must have been at the date of the act in the actual possession and occupancy of the land forfeited or parcel thereof, with title *bona fide* claimed or derived under grants from the commonwealth which issued subsequent to the 31st of March 1831 and prior to the 15th of January 1838.

8. **Forfeiture of Land—Statute—To Whom Title Enures.**—By the act of March 18th, 1841, Sessions Acts 1840-41, p. 31, the forfeiture of title to the commonwealth only enures to the benefit of those then in actual possession of the forfeited land under
406 claim *of title through a grant from the commonwealth. Though at that time a party held a patent for the land, yet if he was in actual possession under a lease from another person claiming the elder title, that is not the actual possession contemplated by the statute.

9. **Same—Same—Possession—Case at Bar**—By the act of March 22d, 1842, Sessions Acts 1841-2, p. 13, § 8, the title to forfeited lands is transferred to and vested in such persons, other than those for whose default the same may have been forfeited, as had title or claim legal or equitable, derived under a grant from the commonwealth bearing date prior to the 1st of January 1843; without making either actual occupancy or possession of the land, or a *bona fide* claim of title, any part of the condition on which the transfer of the title takes effect.

10. **Same—Same—Effect—Case at Bar.**—Though the land had been reported to the court as forfeited land, and an order had been made for the sale thereof, yet if not actually sold before the passage of the act, the title is transferred under the statute.

11. **Statute—Retrospective.**—The act of March 22d, 1842, is retrospective in its operation.

12. **Landlord and Tenant—Surrender of Possession by Tenant—Not Estopped to Deny Title of Owner.**†—A tenant who surrenders possession at the end of his term, or from whom possession is recovered, is not concluded by the existence of such tenancy at one time, or by the deed of lease which he executed, from contesting the title of his former landlord.

This was an action of ejectment in the Circuit court of Preston county by Henry Wild's lessee against Richard Serpell.

The case is stated by Judge Lee in his opinion.

Price, for the appellant.

There was no counsel for the appellee.

LEE, J. This is an action of ejectment by the plaintiff in error against the defendant, brought in the Circuit court of Preston county.

The plaintiff claimed under a grant from the commonwealth to his lessor Henry Wild, for seventy-nine acres of land in Preston county, bearing date the 31st of August 1836. The defendant claimed under a grant to Francis and William Deakins for three hundred acres of land, bearing date on the 2d day of December 1785. This grant embraced within its boundary sixty-nine and a half acres of the land covered
407 *by the grant subsequently issued to the lessor of the plaintiff.

The defendant deduced title to the three hundred acre tract by a regular succession of conveyances from the patentees down to himself. He also proved that on the 23d of June 1840 the lessor of the plaintiff executed a written instrument, under seal, by which he acknowledged that he had on that day rented of John Hoye and William Deakins (who then claimed the land under the Deakins grant), the said tract of three hundred acres, for one year ending on the 1st of April 1841, at which time he thereby bound himself to surrender possession, or rent or purchase the land.

It was also shown that in 1841 the lessor of the plaintiff having failed to surrender possession of the land, a writ of unlawful detainer was sued out against him, and possession recovered by the defendant; and that the defendant held the possession at the institution of this suit.

The plaintiff claimed, however, that all title under the grant of the three hundred acre tract to the Deakinses had been forfeited to the commonwealth by the failure of the owners to comply with the provisions of the statutes concerning delinquent and

Board, 10 Gratt. 400; Lennig v. White, 1 Va. Dec. 897.

†**Landlord and Tenant.**—See *foot-note* to Miller v. Williams, 15 Gratt. 213.

omitted lands; and that by virtue of the same statutes this forfeiture enured to his benefit, and the title had become transferred to and vested in him, for so much of the land forfeited as was embraced within the boundary of his patent for seventy-nine acres.

He accordingly shewed that he had had his land regularly entered on the books of the commissioners of the revenue and charged with taxes, and that he had paid all taxes properly chargeable upon it; but that the tract of three hundred acres granted to the Deakinses had never been entered on the books nor charged with taxes, till the year 1839, when the same was entered upon said books, but was not charged 408 *either with any arrears of taxes or with any damages; and that the same had been subsequently by a decree of the Circuit court of Preston county, pronounced on the 7th day of September 1841, directed to be sold as land forfeited to the commonwealth under the provisions of the laws then in force. A sale took place under this decree in June 1842, and John Hoye became the purchaser; and this sale was subsequently confirmed by the court.

The facts having been submitted to the court for its judgment in the form of a case agreed, the court was of opinion that the law was for the defendant, and judgment was rendered accordingly. And to this judgment a supersedeas from this court has been allowed.

That the provisions of our statutes passed from time to time, making it the duty of the owners of lands to pay all taxes properly chargeable thereon, and where they have been omitted from the books of the commissioners of the revenue, to cause them to be entered thereon in the proper counties, and to be charged with all arrearages of taxes and damages, and to pay all such arrearages as shall be found not to be released by law; and in case of failure so to do, forfeiting to the commonwealth all right and title whatever of the parties in default, (under the modifications and restrictions provided by the acts), are within the constitutional competency of the legislature, has been sufficiently affirmed in decisions which have been made during the present term of this court in cases arising under these several statutes. Staats' lessee v. Board, supra 400; Smith's lessee v. Chapman, infra; Hale v. Branscum, infra. The same cases also sufficiently establish that in order to consummate and perfect a forfeiture in such a case, no judgment or decree or other matter of record, nor any inquest of office, is necessary; but that the statutes themselves, of their own force 409 and by their *own energy, work out their own purpose, and operate effectually to divest the title out of the defaulting owner, and perfectly to vest it in the commonwealth without the machinery of any proceeding of record, or anything in the nature of an inquest of office. And as the title is thus in a proper case divested out of the owner and vested in the commonwealth by the operation of the statutes, so where the forfeiture enures to the benefit of a third person claiming under the commonwealth by virtue of another and distinct right, the transfer of the title to such person is in like manner perfect and complete without any new grant from the commonwealth, or any proceeding to manifest the transfer by matter of record or otherwise. Upon these subjects I have nothing therefore to say upon this occasion, except that considering the peculiar condition of things in that part of the state lying west of the Alleghany mountains, and the serious check to population and the improvement of the country and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional power of the legislature to enact them was clear and unquestionable.

In this case, the tract of three hundred acres granted to Francis and William Deakins in December 1785, having never been entered upon the books of the commissioners of the revenue in any county, nor charged with taxes according to law prior to the year 1839, was therefore clearly forfeited to the commonwealth under the second section of the act of February 27th, 1835. Sess. Acts 1834-5, p. 12. And this forfeiture became perfect and consummate on the 1st of November 1836, at which period the further time given by the act of March 23d, 1836, Sess. Acts 1835-6, p. 7, within which the owners of delinquent and omitted lands might save a forfeiture by complying 410 with the *provisions of the act, expired by express limitation. For although by subsequent acts, the owner might have redeemed any forfeited land by complying with the provisions of the act at any time prior to the 1st of July 1838, (at which the ultimate period of redemption provided by law expired,) yet that day was suffered to pass by without any effort to redeem this land on the part of those claiming title to it. The only questions then to be considered are, 1st, whether the plaintiff was at any time before the institution of his suit, in a condition to claim the benefit of the forfeiture of the Deakins title, and so to weld the same to the junior and defective title conferred by the commonwealth's grant to him in 1836, as to enable him to recover against the purchaser (or those claiming under him), at the sale of the land, as forfeited, by the commissioner under the decree of the Circuit court of Preston; and 2dly, whether if under the provisions of the several acts concerning delinquent and forfeited lands, or of any of them, he could show himself entitled to claim the benefit of the forfeiture of the Deakins title, there is anything in the circumstances of this case, especially the fact of the decree for the sale of the land as forfeited by the Circuit court of Preston in September 1841, or that of his renting the land of Hoye who claimed under the Deakins title, for the year ending in April 1841,

that can deprive him of the right to set up such claim and to recover against the defendant in this action.

It is clear that under the provisions of the act of February 27th, 1835, the plaintiff can claim no benefit of the forfeiture of the Deakins title; because by the express terms of that act a forfeiture only enured to the benefit of those who claimed title under a grant from the commonwealth bearing date previous to the 1st of April 1831. Neither can he sustain such a claim under the provisions of the act of March 30th, 1837; 411 *because the saving clause in the first section of that act only provides for bona fide occupants claiming under prior grants, whose rights were protected and secured under the provisions of the several acts theretofore passed on the same subject and then still in force. Nor could the plaintiff make good his claim under the sixteenth section of the act of March 16th, 1838, Sess. Acts 1837-8, p. 21; because the transfers of title vested in the commonwealth by forfeiture, declared and provided by that act, are confined to the cases of persons at the date of the act in the actual possession and occupancy of the lands forfeited or parcel thereof, with title bona fide claimed or derived under grants from the commonwealth which issued subsequent to the 31st day of March 1831 and prior to the 15th of January 1838; and the case agreed here is silent as to the bona fides of the plaintiff's claim. It may be doubted too, perhaps, whether under the particular terms of that section the right to set up such a transfer of title is not restricted to the purpose of defence by the occupant against whom an action might be brought for the recovery of the land then in his possession. And I think the plaintiff cannot bring himself within the provisions of the act of March 18th, 1841, Sess. Acts 1840-41, p. 31, because under them the forfeiture is made to enure to the benefit of those then in actual possession of the forfeited land under claim of title through a grant from the commonwealth: And although the lessor of the plaintiff was in fact in possession of this land at the date of the act last mentioned, yet his possession was not under his own grant but as the tenant of Hoye; and thus he was not within the condition of the transfer prescribed by the act. But I think the act of March 22d, 1842, Sess. Acts 1841-2, p. 13, fully covers the case. By the third section of that act the title to forfeited lands is transferred to and vested in such persons (other than those for whose 412 default the *same may have been forfeited), as had title or claim legal or equitable derived under a grant from the commonwealth bearing date prior to the 1st of January 1843, without making actual occupancy or possession of the land any part of the condition on which the transfer of title takes effect; and the qualification of a bona fide claim of title is in like manner omitted. At the date of this act the lessor of the plaintiff was clearly in the category which it described. The Deakins title had been forfeited and was then vested in the commonwealth, and he had a junior grant for a portion of the land, and had had it duly assessed, and had paid all taxes charged and properly chargeable on the same. There was nothing then to prevent this act from transferring to him the Deakins title to the land embraced within his grant, (or to so much of it as lay within the Deakins grant,) unless it be that before the passage of that act, the land granted by the patent to Deakins had been reported to the Circuit court as forfeited, and an order made, (on the 7th of September 1841,) directing it to be sold as such by the commissioner of delinquent and forfeited lands. But I do not see why this should prevent the operation of the act. No sale had yet taken place under the order; no right had been acquired by any other person; and the title was still in the commonwealth and fully within the control of the legislature. It was as competent to that body to transfer the title to forfeited land from the commonwealth to a claimant under a distinct grant from her, as well after an order of sale as before, provided it were done before any new right was acquired by an actual sale being made under it. And every reason which could operate with the legislature to induce it to make such a transfer before the land had been directed to be sold, would apply with equal force, though it might have chanced that such an order had been made. The order created no new 413 rights, made no *change in the subject, and was but a step in the process of carrying out the purpose of the legislature previously entertained, but which it could, at any time before consummated by a sale, alter, modify or revoke at pleasure; and the passage of the act of March 22d, 1842, must be regarded as a revocation of the purpose of the legislature to make sale of the lands intended to be thereby transferred to claimants under other rights, whether they had been ordered by the court to be sold under the provisions of previous laws, or whether it chanced that no step had been taken to bring them before the court with a view to subject them to sale. The terms of the act are sufficiently broad and comprehensive to embrace all lands not actually sold, and I can perceive no reason whatever for restricting their operation to those cases in which no steps had been taken by the commissioners of delinquent and forfeited lands to subject them to sale, or if any, they had not progressed to the point of the rendition of a decree.

But it is supposed that the terms of this act are prospective in their operation, and apply only to lands thereafter to become forfeited. The language used, it is true, is "that all the right, title and interest which shall be vested in the commonwealth," &c.; but I think it very clear that it intended to embrace forfeitures theretofore accrued as well as such as might thereafter accrue; and that it should be construed as if it read "all the right, title and interest which now is or hereafter shall be vested

in the commonwealth," &c. That this is the true construction of the act is, I think, conclusively shown by the fact that in its very terms it applies to forfeitures accruing by reason of the failure of the owners of "omitted" lands to comply with the provisions of the second section of the act of February 27th, 1835, and the subsequent acts in pari materia, giving further time for the performance of that duty. Now under the provisions of the laws in
414 force at the *time of the passage of the act of March 22d, 1842, no forfeitures could thereafter accrue of "omitted" lands for failure to cause them to be entered and charged with taxes, &c., and to pay such taxes, because by the fifty-second section of the act of February 9th, 1814, 2 Rev. Code 1819, p. 555, all laws whatsoever, declaring lands to be forfeited for failure to enter them on the books of the commissioners of the revenue, were expressly repealed, and all forfeitures of "omitted" lands for failure so to enter them, were remitted; and no act was again passed to forfeit "omitted" lands until the act of February 27th, 1835, the second section of which however (that declaring the forfeiture of omitted lands for failure to enter them, &c., as therein provided), is expressly restricted by the first section of the act of March 23d, 1836, Sess. Acts 1835-6, p. 7, to lands and lots omitted prior to 1831, and declared not to apply to any lands or lots omitted since that year. Nor up to the time of the passage of the act of March 22d, 1842, had there been any other law enacted declaring forfeitures of lands omitted after the year 1831. So that the forfeitures of "omitted" lands referred to and embraced by the act of March 22d, 1842, must necessarily have been forfeitures which had accrued and been consummated upon the 1st of November 1836, and of which the parties concerned had failed to relieve themselves by complying with the provisions of the law prior to the 1st of July 1838, the ultimate period of redemption which had been provided. I think therefore that the act of March 22d, 1842, does cover this case, and that the lessor of the plaintiff was in respect of the forfeited Deakins title, fully embraced by its provisions.

The remaining question to be considered is as to the effect of the acknowledgment of tenancy under seal, executed by Wild to Hoye in June 1840, upon the right of the plaintiff to recover in this action. It
415 is *suggested that by the execution of that instrument, or by the relation of landlord and tenant which it sets up and recognizes, or by both, Wild is estopped from now questioning Hoye's title or that of the defendant claiming under him, and that he cannot be permitted to allege his right against it in this action. If this be the effect of that instrument, it will be giving to it a force and meaning never contemplated by the parties at the time of its execution: For I apprehend, that all that was expected or intended to be accomplished by it was to arrest the further running of the statute of limitations, and to convert Wild's previous adversary possession into the friendly holding of a tenant.

It is admitted that a tenant will not be permitted to dispute his landlord's title during the continuance of the tenancy or until he shall have restored the possession, or at least (as would seem to be intimated in some of the cases) until he shall have made a formal disclaimer to hold further as tenant with full notice to the landlord that he will claim to hold in adversary possession for the future. But after the term of the tenancy has expired by its own limitation and the possession has been restored to or regained by the landlord, and both parties thus placed in statu quo, there can be no reason why the tenant should be debarred from setting up, in an action brought by himself against the landlord, any title he may have to the premises wholly unaffected by the temporary relation of landlord and tenant which had subsisted between them for a term now past and ended. Nor do I think any authority can be shown supporting such a proposition, while there are many to be found, full and clear to the contrary. Co. Litt. 47 b; England v. Slade, 4 T. R. 682; Jackson v. Davis, 5 Cow. R. 135; Jackson v. McLeod, 12 John. R. 182; Camp v. Camp, 5 Conn. R. 291; Galloway's lessee v. Ogle, 2 Binn. R. 468.

And as to the supposed estoppel cre-
416 ated by the acknowledgment *under seal of Hoye's title, that at the utmost could only be held to affect such right and title as Wild had at the time it was executed. It cannot preclude him from setting up a title he may have subsequently acquired. Wynn v. Harman, 5 Gratt. 157. Estoppels are deservedly odious in the law; they frequently conclude a man from alleging the truth and thereby often work injustice, and their operation and effects will not be extended beyond the narrow limits to which they have been properly restricted. At the time of the execution of this paper, Hoye claimed paramount title to the land under the grant to Deakins in 1785. Wild then had no title because nothing passed under his junior grant which bore date in August 1836. At the date of his patent no forfeiture had taken place under the grant to Deakins; and when he executed the paper in question in 1840, no act of assembly had been passed under which he could claim any benefit from the forfeiture which had taken place under the Deakins grant on the 1st of November 1836. But upon the passage of the act of March 22d, 1842, his condition was, as we have seen, most materially altered and improved. In fact he thereby acquired a new and distinct title, being by the operation of that act, fully invested with the very title which passed by the grant to Deakins. Why then should he be estopped from setting up this subsequently acquired title against the defendant here, or against Hoye himself, or any body else? If Hoye and the defendant had had title and had actually conveyed the land by formal deed to Wild in 1842, can it be

doubted that he might set up the title thus acquired, and recover the land from them upon the strength of it, if they afterwards withheld the possession, without being in the slightest degree embarrassed or impeded by his having executed the acknowledgment of tenancy in 1840? I think not; and regarding the transfer of the Deakins title
417 to Wild *under the act of March 1842 as being as perfect and complete an investiture of that title in Wild as if instead, it had been conveyed to him by Hoye or the defendant or both of them (they having title), by the most formal and solemn deed, I can perceive no reason why the paper of 1840 should, for a single moment, interpose an obstacle in the way of the plaintiff's recovery by force of the new rights and distinct title thus cast upon him by law. To give this paper the operation and effect contended for would be to make it amount to even more than a solemn deed of conveyance from Wild to Hoye for his whole interest in the premises, with covenants of general warranty; for it would not only divest Wild of all title which he then had, but would also utterly disable him (so far as Hoye was concerned) from afterwards acquiring any title to the land even from Hoye himself.

With these views, I think that the law arising upon the case agreed was for the plaintiff, and that the Circuit court erred in rendering judgment for the defendant. I am of opinion therefore to reverse the judgment of the Circuit court and to render judgment for the plaintiff.

DANIEL and SAMUELS, Js., concurred in the opinion of Lee, J.

ALLEN, J., was of opinion that the act of March 22d, 1842, did not apply where there had been a decree of a Circuit court directing a tract of land reported as forfeited, to be sold as such.

MONCURE, J., was of opinion that Wild was estopped by the instrument executed by him on the 23d of June 1840, from setting up a claim adverse to Hoye's title.

Judgment reversed.

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418 *Hale v. Branscum.

July Term, 1853, Lewisburg.

1. **Forfeiture of Lands—Statute—When Complete.***—Land having been forfeited under the act of 1835, Sess. Acts, p. 11, for failure to enter them on the commissioners' books, that forfeiture was complete on the 1st day of November 1836. Sess. Acts 1835-6, p. 7.
2. **Same—Tempus Regi Non Occurrit.**—From the time of the forfeiture time will not run in favor of a party in possession against the commonwealth or those claiming under her by patent.
3. **Same—Statute—Title.**—By the operation of the act of March 5th, 1836, Sess. Acts, p. 7, the title acquired by the commonwealth by such forfeiture vested in the party obtaining a patent for the land in June 1846.

*See *foot-note* to Staats v. Board, 10 Gratt. 400.

This was a writ of right in the Circuit court of Carroll county, brought in August 1846, by Fielden L. Hale against James Branscum, to recover a tract of seven hundred and ninety acres of land. The mise was joined on the mere right; and on the trial which took place in August 1848, the jury found a special verdict. In this verdict it was found that the tenant had been in possession of the land in controversy for about twenty years. That this land was covered by a patent to Nathaniel Anderson for one thousand acres of land bearing date on the 5th of July 1798. That the land had not been on the commissioners' books of the county of Grayson before the county of Carroll was established, for the last twenty years, and had not been on the commissioners' books of the county of Carroll since its establishment, in the name of the said Nathaniel Anderson or any person holding title under him. That seven hundred and ninety acres of the land embraced in the patent to Anderson, were granted to the demandant Hale by patent bearing date the 30th day of June 1846, and were
419 duly entered upon *the commissioners' books in his name, and the taxes had been regularly paid by him. Upon this special verdict, the court rendered a judgment for the tenant. Whereupon Hale applied to this court for a supersedeas to the judgment, which was awarded.

Floyd, for the appellant, submitted the case.

There was no counsel for the appellee.

ALLEN, J., delivered the opinion of the court:

It appearing from the facts found in the special verdict, that a patent issued to Nathaniel Anderson on the 25th July 1798, for 1000 acres of land lying and being in the county of Grayson; that by virtue of the acts of February 27th, 1835, Sess. Acts, p. 11, and of March 23d, 1836, Sess. Acts, p. 7, said tract of land became forfeited for the failure to enter the same with the commissioner of the revenue, and to pay the taxes thereon, in the manner prescribed in the second section of the first recited act; the court, for the reasons assigned in the case of Staats v. Board, supra 400, is of opinion, that the forfeiture was complete on the first day of November 1836. That even if any adverse possession could be set up to impede the collection of taxes which were a lien on the land, in this case no such possession is shown; as the period which intervened between the commencement of such possession and the 1st of November 1836 would not have operated as a bar to a recovery by the original proprietor in a writ of right; and from and after the forfeiture the adverse possession did not run against the commonwealth. And the court is further of opinion that such title so vested in the commonwealth by the said forfeiture, was by the operation of the act of March 5th, 1846, transferred to and vested in the demandant, for so much thereof as

was embraced within the boundaries
420 of his patent for seven *hundred and ninety acres, dated the 30th June 1846. The court is therefore of opinion that the law, upon the facts found by the jury in their special verdict, is for the demandant. Judgment reversed; and this court proceeding, &c.

Judgment reversed.

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421 *Flanagan v. Grimmet & als.

July Term, 1853, Lewisburg.

Tax Sales—Statute—Advertisement—Deed—Case at Bar.—The act of February 9th, 1814, 2 Rev. Code 542, concerning taxes on lands, § 24, 25, directs the sheriff to advertise a sale of delinquent lands at the May, June and July terms of the court of his county, and to publish the advertisement at least once every week for two months preceding the time of the sale, in some newspaper published in the city of Richmond. Section 28 directs him to execute a deed to the purchaser at such sale, reciting the circumstances thereof, and setting forth particularly and truly the amount of the purchase money. Section 38 provides that after the time of redemption allowed has elapsed, the regularity of the proceedings under which the purchaser at the sale claims title shall not be questioned, unless such irregularity appear on the face of the proceedings. HELD:

1. **Same—Deed—Recitals—Construction.***—That by the circumstances of the sale which are to be recited in the deed, is not meant all the steps to be taken by the various officers, which preceded the sale; but the circumstances attending the sale itself, viz: That the sale was made at the time and place prescribed for the sale of lands, returned delinquent; if less than the whole lot or tract was sold how much was sold; who was the purchaser and the amount of the purchase money.
2. **Same—Same—Same—Same.**†—It is not necessary that the deed shall recite that the land had been advertised.
3. **Same—Same—Same—Same.**—If the deed recites that the land was advertised at the courthouse door of the county for two months, but does not state that it was at the May, June and July terms of the court for the county or in a Richmond paper; yet as it was not necessary to recite in the deed that the land had been advertised, the recital in the deed of an insufficient advertisement is not an irregularity on the face of the proceedings, which will avoid the deed.
4. **Same—Same—Parol Proof to Set Aside.**—The deed cannot be questioned by parol proof of a failure to advertise the sale as the law prescribes.
5. **Same—Same—Defective—Competent to Show Entry‡—Case at Bar.**—If the deed is defective, it is competent evidence to show with other evidence an actual entry under a claim of title, and continued holding thereunder, so as to make out a title or right of entry by actual possession. Possession so taken and continued for the time prescribed might ripen into a right of possession, and so bar the right of entry of the opposing party.

422 *This was an action of ejectment in the Circuit court of Monroe county, by George P. Flanagan and others, heirs of Oliver Beirne, against Joseph Grimmet and others. On the trial of the cause the plaintiffs offered in evidence a deed from Michael Erskine, deputy for William Haynes, S. M. C., which was objected to, and excluded by the court. They then offered parol evidence for the purpose of removing the objections to the deed which appeared upon its face; but this was also

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***Tax Titles—Deed—Effect—Burden of Proof to Show Irregularity of Deed.**—Flanagan v. Grimmet reversed the rule so long established and enforced by repeated decisions of this court; and, instead of making it incumbent upon the claimant under a sale of delinquent land to show that every prerequisite to the sale had been complied with, it made the deed itself, *prima facie* evidence of such compliance, and sufficient to pass the title of the former owner, until it was successfully impeached by proof of irregularity coming from the contesting party. Bond v. Pettit, 89 Va. 482, 16 S. E. Rep. 666.

See, in accord, citing the principal case, Hutchings v. Gilmer, 1 Va. Dec. 503; Hobbs v. Shumates, 11 Gratt. 518, and *note*; Sulphur Mines Co. v. Thompson, 93 Va. 316, 25 S. E. Rep. 232; Dequasie v. Harris, 16 W. Va. 352, 354; Hays v. Heatherly, 36 W. Va. 621, 15 S. E. Rep. 229. The principal case is also cited in Burlew v. Quarrier, 16 W. Va. 162; Forqueran v. Donnally, 7 W. Va. 123, 147.

†**Tax Titles—Deed from Deputy Sheriff—What Party Claiming under Must Show—Recital of Insufficient Advertisement—Effect**—In Hobbs v. Shumates, 11 Gratt. 518, and *note*, citing the principal case, it is held that, a party claiming under a deed from a deputy sheriff for land sold for nonpayment of taxes, under the act of February 9, 1814, must show that the person described as high sheriff was such, and the grantor in the deed was his deputy; and that though such deed recites an insufficient advertisement of the property it is not vitiated, but is valid to convey such title as by law the sheriff was authorized to convey.

See also, for the proposition that the officer who is appointed to make the sale must make the deed, Rockbold v. Barnes, 3 Rand. 474; Chapman v. Bennett, 2 Leigh 329; Wilsons v. Doe, 7 Leigh 23; Miller v. Williams, 15 Gratt. 226, the last case citing the principal case.

‡**Same—Same—Defective—Color of Title—Adverse Possession.**—In the fifth headnote of the principal case it is held that, though the deed is defective, it is competent evidence to show with other evidence an actual entry under claim of title, and continued holding thereunder, so as to make out a title or right of entry by actual possession; and possession so taken and continued for the time prescribed might ripen into a right of possession, and so bar the right of entry of the opposing party.

For this proposition, see the principal case cited and approved in Olinger v. Shepherd, 12 Gratt. 476; Lennig v. White, 1 Va. Dec. 905; Davis v. Living, 32 W. Va. 176, 9 S. E. Rep. 85; Mullan v. Carper, 37 W. Va. 229, 16 S. E. Rep. 582; Virginia Mining, etc., Co. v. Hoover, 82 Va. 454, 4 S. E. Rep. 689; Taylor v. Philippi, 35 W. Va. 560, 14 S. E. Rep. 132.

Forfeiture.—See Martin v. Snowden, 18 Gratt. 132, and *note*; Holly River, etc., Co. v. Howell, 36 W. Va. 509, 15 S. E. Rep. 218.

excluded; and the plaintiffs excepted. The deed is recited and the evidence stated in the opinion of Judge Allen.

The plaintiffs having proved that the land in controversy had been granted in 1787 to William Whitcroft, then offered in evidence the before mentioned deed; and offered in connection with it, evidence to prove that after said deed was made, the purchasers and those claiming under them had entered into possession of the land in controversy, and held possession until turned out by the defendants; which was a period of more than fifteen years. But the court excluded the deed; and the plaintiffs excepted. There was a verdict and judgment for the defendants. Whereupon Flanagan applied to this court for a supersedeas, which was awarded.

Harrison and Price, for the appellant.

Caperton and Wm. Smith, for the appellees.

ALLEN, J. Upon the trial of this cause the lessors of the plaintiff offered as evidence a deed purporting to have been executed by Michael Erskine, deputy of William Haynes, sheriff of Monroe county, conveying a tract of land returned delinquent for the nonpayment of taxes. The deed recites, that whereas agreeable to an act of the general assembly, passed the 9th of February 1814, entitled an act to 423 amend and explain *the act entitled an act concerning taxes on land, the said Michael Erskine, sheriff as aforesaid, after having given notice, by advertisement on the court-house door of the said county, for two months, did commence on the 15th day of August 1815, (being the first day of the August court for said county,) to expose to public sale the lands theretofore returned delinquent for the nonpayment of the taxes due thereon in the county of Monroe aforesaid. Whereupon the said John Fennel and Hillary Mosely became the purchasers of eight hundred and fifty-one acres, part of one thousand acres, lying in said county, which formerly belonged to and was returned delinquent in the name of R. Wethered, for the amount of the taxes, damages and costs due on the land returned as aforesaid. Now this indenture witnesseth, that the said Michael Erskine, deputy sheriff as aforesaid, for and in consideration of the sum of six dollars and five cents, and in pursuance of said act of assembly, hath sold unto the said John Fennel and Hillary Mosely, &c., &c.

The deed was duly acknowledged and recorded on the 30th of August 1815. To the introduction and reading of this deed as evidence, the defendants objected and the court sustained the objection, and refused to permit the same to be read to the jury.

The plaintiff then, with the object of removing the objections to the deed which appeared on the face thereof, offered to prove by a witness that the sale of delinquent lands recited in said deed to have been made on the first day of the August county court held for said county in the year 1815, had been advertised at the front door of the court-house for said county at the May, June and July terms 1815 of the County court, and also for the space of two months, according to law, in a newspaper then published in the city of Richmond. To the introduction of this 424 evidence the *defendants also objected; and the court excluded the testimony: And the first bill of exceptions taken by the plaintiff at the trial brings up for review the correctness of these two decisions. They must be considered in the order in which the questions arose and were decided; for if the deed should have been permitted to be read in evidence, without any proof of the regularity of the advertisements, there would have been no necessity for the plaintiff to introduce the proof of such regularity which he offered to do, and the second question would not have been raised.

The bill of exceptions does not purport to set out all the testimony; and it does not appear in what stage of the trial or proof the plaintiff offered to introduce the deed from the sheriff to show title in himself. Before he could have availed himself of the deed for such purpose, he must have exhibited proof that the sheriff and deputy sheriff were such officers as in the deed they were recited to be; and that the person in whose name the land was returned delinquent, his heir, devisee, or other person claiming by, through or under him, had title to the land; for such title alone was given to the purchaser by the sheriff's sale and conveyance. Such proof may have been offered, or its production dispensed with; or the deed may have been first tendered with the understanding that such proof would be offered provided the deed was not rejected on other grounds. The bill of exceptions shows that the deed, when first offered, was rejected for objections appearing on the face thereof, and also what the objections were. The deed did not show that the sale had been advertised according to law. The court, proceeding upon the ground, either that it should appear by the recital in the deed, that the sale was regularly advertised, or that it did appear by the recitals that the sale had 425 not been regularly advertised, *held the deed to be void as a deed made under the statute; and being void, it could not be aided by parol proof that the sale had been regularly advertised.

The propriety of this decision depends upon the provisions of the act of February 9th, 1814, 2 Rev. Code 542; and more especially upon the construction to be given to that portion of the act embraced within the sections extending from the 24th to the 38th sections inclusive.

Some of the provisions of this act, particularly the important provisions contained in the 38th section, intended for the protection of the purchaser of lands sold for taxes, have to some extent been adopted in the subsequent act of April 1st, 1831, concerning lands returned delinquent for non-

payment of taxes, Sess. Acts, 90, § 7; the act of March 10th, 1832, concerning delinquent and forfeited lands, and providing for the sale of lands returned delinquent thereafter for the nonpayment of taxes, Sess. Acts, 65, § 22; Code 204, ch. 37, § 22, the general law providing for sales of land for taxes. By virtue of these laws and other acts intended to carry out the policy of the first two recited acts, the great mass of delinquent lands in the country west of the Alleghany mountains, has been disposed of. The lands have passed into the hands of purchasers and actual occupants under junior patents; have been placed in a condition for settlement and improvement, and again become a subject of productive revenue; and under the general law for the sales of land for taxes, titles have been acquired through all parts of the state, the validity of which may in a great measure depend upon the construction of the law under consideration.

When the act of February 9th, 1814, was enacted, the legislature was fully aware of the construction which had uniformly been put on laws of this description. Few principles of law were more firmly settled, 426 *and from their influence on the transactions of others, more widely known than that where the validity of a deed depends upon an act in pais, the party claiming under it is bound to prove the performance of the act; that in the case of a naked power not coupled with an interest, the law requires that every prerequisite to the exercise of such power should precede it; that the claimant under a sale made to enforce a forfeiture, must show that the law has been strictly complied with; that the recitals in a deed of an officer selling for taxes, were not even prima facie evidence of the regularity of his proceedings; and that these facts must be proved by evidence aliunde. Yancey v. Hopkins, 1 Munf. 419; Christy v. Minor, 4 Munf. 431; Nalle v. Fenwick, 4 Rand. 585; Steed v. Course, 4 Cranch R. 402; Parker v. Rule's lessee, 9 Cranch R. 64; Williams v. Peyton, 4 Wheat. R. 77; Allen v. Smith, 1 Leigh 231; Ronkendorf v. Taylor, 4 Peters' R. 349.

As the various directions contained in laws for the sale of lands for taxes were frequently disregarded by the officers charged with the duty of making such sales; and whether complied with or not by the officers, purchasers had but seldom preserved the evidence of such compliance, even if considering the number of such sales, it would have been practicable for each purchaser to procure and preserve that evidence, it followed that but few titles claimed under such sales were sustained by the courts. Confidence in such titles was greatly impaired, and almost destroyed; and though in the language of the preamble to an act entitled an act more effectually to provide for the payment of taxes upon lands within this commonwealth, passed January 29th, 1803, it is declared to be "a principle in well organized governments, that property should be holden subservient to the purposes thereof," it was manifest 427 that unless some assurance *could be held out to purchasers at sales for taxes that a good title could be acquired, the commonwealth would continue to meet with embarrassment for the want of an adequate mode for the subjection of lands to the payment of taxes. Such being the law and public sentiment, the legislature, by an act passed February 6th, 1809, 2 Rev. Code of 1819, 531, provided for the sale of all lands theretofore forfeited or thereafter to be forfeited to the commonwealth for nonpayment of taxes; but before the time for sale had arrived, a law passed extending the period for redemption; and by successive laws such period was extended up to the passage of the act of February 9th, 1814; under which the sale of the land in controversy in this suit as made. An examination of this act found in 2 Rev. Code of 1819, p. 542, shows that it was passed with reference to the rules of law and the state of public opinion before adverted to. It was necessary on the one hand to protect the owner who had paid his taxes; and on the other, to give to those who were invited to purchase lands sold by the officer of the law, something like a reasonable assurance of acquiring a good title; something to justify him in paying taxes thereafter and in improving the land. Both objects were carefully regarded by the legislature. Minute directions to the officers are prescribed, forms are furnished for the list of the land tax to be made out by the commissioner of the revenue; the certificate of the clerk verifying its correctness; the return of the delinquent list by the sheriff, and the form of his advertisement of sale; and penalties are imposed on the officers for a failure to perform their respective duties. By the 36th section the former owner of the land was allowed one year after the sale to redeem by the payment of the original purchase money, the costs and charges of executing the deed, together with fifty per cent. per annum 428 interest thereon, and the taxes *which may have been charged to the purchaser after the sale. Or he might under the 38th section institute proceedings before the expiration of the time for redemption, to show that the taxes were not in arrear, or that the proceedings were not regular, although such arrearage or irregularity did not appear on the face of the proceedings.

Having thus prescribed the duties of the different officers, and made such provision for the benefit of the party in whose name the land was returned delinquent, as seemed just, the interest and security of the purchaser was next to be attended to. The 28th section directs the sheriff, on behalf of the commonwealth, to execute a deed to the purchaser at such sale, reciting the circumstances thereof, and setting forth particularly and truly, the amount of the purchase money. The 36th section ascertains his indemnity in case of redemption within the time limited; the 37th provides that the sales made and titles vested in the

literary fund, shall give only such estate and such right as, at the time the land was returned delinquent, was vested in the person in whose name it was returned, his heir, devisee or other person claiming under him: And the 38th section declares that after the time for redemption, thereby allowed, had elapsed, the regularity of the proceedings under which the purchaser at the sale, or the literary fund, claims title, shall not be questioned, nor shall the arrearage of the taxes, for the nonpayment of which such sale was made or such title was vested, be denied, so as to affect such sale or title, unless such irregularity, or the fact that such arrearage did not exist, appear on the face of the proceedings, or be made to appear by proceedings in court, duly commenced before the expiration of the time for redemption and duly prosecuted to a judgment or decree.

The substantial provisions of this section have been incorporated into the sub-
429 sequent acts before referred to *and the Code; and it becomes therefore a question of general interest to determine what change, if any, these provisions, together with the provision contained in the 8th section of the act of February 6th, 1809, 2 Rev. Code, 532, have made in the condition of the purchaser of land sold for the nonpayment of taxes. That section of the act of 1809 declared that it should be the duty of the collector of taxes to make and execute to the purchaser a deed in fee simple for the lands purchased, reciting the cause of sale; and in every action or suit at law or in equity, in which the former owner, &c., &c., shall contest the validity of the sale so made, the onus probandi shall lie on the party so contesting.

Some cases arising under the act of February 9th, 1814, have been decided by this court, which must be adverted to. In Rockbold v. Barnes, 3 Rand. 473, lands had been sold by the deputy sheriff, who made a deed to the purchaser, reciting that he was deputy of his principal. The court decided that in such case it was indispensably necessary to prove that the one was sheriff and the other deputy; and that without proof of those facts, the deed was not sufficient evidence that the title of the party in whose name the land was returned delinquent, had vested in the purchaser. Wilson v. Bell, 7 Leigh 22, is referred to as having decided that although under the act of the 9th February 1814 the sheriff or any of his deputies may sell, yet that whichever officer makes sale, that officer alone is competent to convey the land to the purchaser. Chapman v. Bennett, 2 Leigh 329. In this case there were three bills of exceptions. The first related to a matter having no bearing on the question now under consideration.

The second bill of exceptions set forth in substance that the defendant claimed under a sale made by the sheriff under the act of 1814, for taxes in arrear, and
430 *showed the return of the land as delinquent, and proved the sale made by the sheriff; and without offering any proof that the particular provisions of the act of February 9th, 1814, preparatory to such sales, had been complied with, prayed for an instruction that the title of the person in whose name the land was returned delinquent was divested by the act of February 9th, 1814, and the sheriff's sale.

By the third bill of exceptions, it appeared that the land was sold and a conveyance made by the deputy sheriff; but the court would not permit the deed to be read in evidence to the jury, on the ground that the deputy sheriff was not authorized by law to make such conveyance.

The counsel for the appellant made no objections to the decisions of the court on the points stated in the first and second bills of exception. No counsel appeared for the appellee. Judge Green, as to the first two bills of exceptions, remarked that the opinions of the court below stated therein, were unquestionably correct; and then proceeded to show that the rejection of the deed upon the ground stated in the third bill of exceptions, was erroneous. For that error, the other judges concurring with Green, the judgment was reversed.

It is observable that no reference seems to have been made in argument or by the court in any of these cases, to the provisions contained in the 8th section of the act of February 6th, 1809, or to the 38th section of the act of February 9th, 1814. The cases did not present any question calling for the consideration of these sections, but from some remarks of Judges Carr and Tucker in the case of Wilson v. Bell, it may be inferred that these sections were not adverted to, or were supposed not to have produced any change in the construction of the law. Judge Carr observed that sales and purchases founded on for-
431 feitures, deserve no *indulgence from the court. And Judge Tucker says these laws of forfeiture should be strictly construed, and there should be no leaning in favor of a transaction by which a tract of thirty acres of land is sacrificed to a purchaser for forty-eight cents.

The case of Rockbold v. Barnes merely decides that there must be proof that the person who professes to sell and convey as sheriff, was sheriff: As the validity of the act done depends upon the official character of the agent, that character must be proved; and his own recital in the deed is not evidence of the fact.

In Wilson v. Bell the court decided that where the deed recited that the sale was made by the sheriff, but the deed was made and acknowledged by the deputy as his the deputy's own act, it was ineffectual to convey title. Both Carr and Tucker, judges, rely on the fact that he acknowledged the deed, not as the act of the sheriff, but as the act of the deputy himself.

In Chapman v. Bennett the second bill of exceptions did not show that any deed had been made by the sheriff. In fact, as appeared by the third bill of exceptions, the deed actually made had been excluded on the ground that it had been executed by a

deputy sheriff. The defendant, unable to rest upon his deed as evidence of title, relied upon the return of the land as delinquent, and parol proof of a sale by the sheriff to him: And then asked the court to instruct the jury that by these acts, and the operation of the act of 1814, the former owner's title was divested. It could only be divested by vesting elsewhere. The sheriff's deed was necessary to vest it in the purchaser; and the court below may properly have refused the instruction asked for. The judgment, however, in the appellate court was reversed on a different ground. By that reversal the deed was to be let in as evidence; but it would have been premature to have pronounced any opinion as to the effect thereof as the case then stood.

432 *Another case, that of Keezee v. Leece, arising under this statute, was decided at Lewisburg, but not reported, either because the case had not been argued, or was decided by a majority of a bare court; or for some other reason not now remembered. In that case it appeared that the sale was made by a deputy, but the deed was executed by the sheriff himself; and the objection was made to the deeds being read in evidence until it was proved that all the proceedings prior to the said deed relating both to the delinquency for taxes and the sale and conveyances were regular and pursuant to law. The objections to the deed and to its being read in evidence without this further proof, were overruled; and this court affirmed the judgment. The case differed from Wilson v. Bell in this, that it did not appear on the face of the deed that the sale was made by a deputy, though it did so appear on the return of sales; and the deed purported to be and was the actual deed of the sheriff. In Wilson v. Bell, the recital showed that the sale was made by the principal; and it was questionable whether it was the deed of either the sheriff or his deputy; for the principal did not execute it; and though it purported to be the deed of the principal, it was signed and acknowledged by the deputy, not as the act of the sheriff, but as the act of the deputy himself. The other proposition in effect decided in Keezee v. Leece was that the deed appearing to have been executed by a duly qualified officer, authorized to sell for taxes and convey, was itself prima facie evidence of the transfer of such title as was vested in the person, in whose name the land was returned delinquent, liable to be impeached by proof of irregularity appearing on the face of the proceedings, according to the 38th section of the act of February 9th, 1814. As the case, however, was for some reason directed not to be reported, it cannot be relied on as a binding authority, and is referred to as showing that the ques-

433 tions arising upon *the construction of the acts aforesaid are still open and unsettled: and the attention of a full court has after argument, been directly called to the consideration of the operation of these laws upon the previous doctrines of the courts; and especially to the effect of the 8th section of the act of 1809, and the 38th section of the act of 1814. The 8th section of the first act makes it the duty of the collector selling lands for taxes, to make and execute to the purchaser, a deed in fee simple, reciting the cause of sale; and provides that in every suit at law or in equity where the former owner contests the validity of such sale, the onus probandi shall lie on the party so contesting. This provision reversed the rule established and so long enforced by the repeated decisions of this and other courts. Instead of throwing on the claimant the burthen of showing that every prerequisite to the sale had been complied with, it made the deed itself prima facie evidence of such compliance, and sufficient to pass the title of the former owner, until it was successfully impeached by proof of irregularity coming from the contesting party.

By an act passed February 5th, 1810, 2 Rev. Code, p. 533, § 13, the deeds to be made by virtue of the 8th section of the act of February 6th, 1809, were directed to be made by the commissioners appointed by the last act; and further time to redeem was allowed. The act of January 23d, 1812, declared that the taxes due or to become due, should be and remain a lien on the lands; gave further time to redeem; and by the 18th section directed that the sheriff and the agent of the literary fund should make deeds to the purchasers: And the subsequent acts extended the time for redemption of lands returned delinquent, until the passage of the act of February 9th, 1814. That act was a compilation of previous acts, with certain changes and altera-

434 tions; and by the 52d section *repealed all acts and parts of acts coming within its purview. It is, in the view I take of the 38th section of this act, unnecessary to determine whether the 8th section of the act of February 6th, 1809, came within the purview of the act of 1814; and was repealed, or not. The 38th section of the act of 1814 embraced all that was covered by the previous act, and more. The law contemplated the execution of a deed to the purchaser before the expiration of the year after the sale allowed for redemption: For the 36th section required the owner redeeming, to refund to the purchaser the costs and charges of executing and recording the deed. The 37th section defined the title to be vested in the purchaser and literary fund, under the proceedings before referred to, including the deed which the 28th section had directed the sheriff to execute; and then the 38th section provided that after the time for redemption allowed by the act had expired, the regularity of the proceedings under which the purchaser at the sale claims title shall not be questioned, &c., unless the irregularity, &c., appear on the face of the proceedings, or be made to appear by proceedings commenced before the time of redemption had expired. The deed was part of the proceedings, that part

which vested the title in the purchaser at the sale; and as its regularity could not be questioned except in the mode designated by the law, it furnished prima facie evidence of title when accompanied with proof of the official character of the sheriff, and of title in the party, &c., in whose name the land was returned delinquent. The 38th section of this act not only embraced the provisions of the 8th section of the act of 1809, but did more. The act of 1809 merely threw the onus probandi on the party contesting, to show irregularity; but did not restrict the party as to the kind of irregularity or the mode of proving it. The 435 38th section of the act of *1814, restricted the party to irregularities appearing on the face of the proceedings; not even permitting the contesting party to look beyond the proceedings and prove by evidence aliunde, though that might be the sheriff's receipt for the taxes, that the taxes had been regularly paid; for it is expressly provided that after the expiration of the time for redemption, the arrearage of taxes for the nonpayment of which the land was sold should not be denied.

If the 8th section of the act of 1809 was not embraced by these provisions of the act of 1814, then it did not come within the purview of the latter act; and being in pari materia, and not inconsistent with any portion thereof, it continued in full force. But as the latter act, in my view, contains substantially the same provision, the question ceases to be of much interest. Being part of a system originating in 1809 and carried out more fully in subsequent acts, one may reflect light on the other, and serve to remove any doubt as to the legislative intent in provisions of the more recent laws. That intent was to obviate the difficulties which had followed from the application of the principles of law and construction before referred to in cases of this description. So far as it respects sales under this law, it was designed to abrogate the rule which required the claimant to prove that all the prerequisites of the law had been complied with. His deed furnished prima facie evidence of title when made by the officer of the law. Upon this he could rest unless its irregularity was shown by the contesting party; and after the time limited it could be questioned for such irregularities only as appeared on the face of the proceedings.

If the burthen of showing irregularity lies on the party contesting the validity of the deed, and the time for redemption having expired, such irregularity must appear on the face of the proceedings, the 436 question is *presented, whether such irregularity appears on the face of the deed. No other part of the proceedings under which the purchaser claimed title is set forth in the bill of exceptions. The 8th section of the act of February 6th, 1809, directs the collector to make a deed in fee simple to the purchaser, reciting the cause of sale. By the 28th section of the act of February 9th, 1814, the sheriff is directed to make a deed to the purchaser at such sale, reciting the circumstances thereof, and setting forth particularly and truly, the amount of the purchase money. By the provision in the first act the cause of sale was to be recited in the deed. The cause of sale was the nonpayment of taxes for which it was returned delinquent. The last act was more specific, and required the circumstances of the sale, and the amount of the purchase money to be recited. By the circumstances of the sale, I do not understand that the deed is to recite all the steps to be taken by the various officers which preceded the sale, but the circumstances attending the sale itself: That is to say, that the sale was made at the time and place prescribed for the sale of lands returned as delinquent; that the subject of sale was land so returned as delinquent; if less than the whole lot or tract was sold, how much was sold, who was the purchaser, and the amount of the purchase money: The latter provision being for the benefit of the former owner who was allowed a year after the sale to redeem upon paying the purchase money. These are the circumstances attending the sale; they show the cause of it; and the deed need contain no other recitals. If more were required, it would be difficult to say where should be the limit. If the deed must recite how the sale was advertised, it must recite it was advertised at the times specified at the court-house and the city of Richmond, as both are required; and the omission of either would be fatal. As the law prescribes the form of the advertise- 437 ment, *and a mere naked power should be strictly pursued, it would be necessary to proceed a step further, and the deed should recite not only that it was advertised, but advertised the time, and at the places, and in the form prescribed. And what reason would there be for stopping at the advertisement? It is no more a circumstance attending the actual sale than the sheriff's return that the land is delinquent. He is to set forth distinctly in his return, that he could find no property in his bailiwick; the form of the return is given, showing the name of the person in whose name it was charged, a description of the land, amount of tax, and why returned delinquent. This was to be verified by an affidavit; and the sheriff is made liable to heavy damages to the injured party if he makes an untrue return. This return is a much more important fact in the circumstances leading to and preceding the sale than the advertisement: And must it be recited? And so we may revert to the duties required of the commissioner of the revenue, and of the clerk of the County court, all of which should have been regularly performed before the sale. If the deed is to show by recitals a strict compliance with the law, all these matters should be detailed at length. Such an amplitude of recitation could never have been intended in requiring the deed to recite the circumstances of the sale, and set forth the

amount of purchase money. It seems to me that the validity of the deed does not depend upon its containing a recital that the land was advertised; or if it recites generally that it was advertised, the failure to set forth the mode in which it was so advertised should not vitiate it.

Nor do I conceive that such deed could be questioned by parol proof of a failure to advertise the sale as the law prescribes. It is unnecessary to determine in this case what are the proceedings referred to in the 38th section of the act of 1814, upon 438 the face of which *the irregularity must appear. Suppose the sheriff's return of his delinquent list, or the clerk's certificate, or the assessment of the commissioner of the revenue, or the sheriff's statement of sales, separately or all combined, to constitute these proceedings; the term proceedings on the face of which certain matters are supposed to appear, cannot be applied to mere acts in pais. Of this nature is the advertisement of sale. The law does not require any return to be made showing that the sale was advertised, or any record to be made of the fact. The posting and publishing the advertisement are facts to be proved by evidence aliunde; the face of the proceedings can disclose nothing in relation to them. To recite in the deed that the land was duly advertised could amount to nothing. The recitals would be no evidence of the facts recited against a stranger contesting the deed. Wiley v. Givens, 6 Gratt. 277, and cases there cited. If the claimant be required to produce proof to show the recitals are true, then the deed would not be prima facie evidence of title; and the burthen of proving its irregularity would not be cast on the contesting party, as provided by the acts of 1809 and 1814: And if the contesting party be permitted to controvert the truth of the recitals, he must do so by parol proof, by facts not appearing on the face of the proceedings. For the law not requiring any return of the advertisement, or record to be made of it, or of the evidence that it was advertised, it is a matter to be proved or disproved by evidence aliunde: And no matter to be made to appear by such evidence, can be received to question the regularity of the proceedings.

To require proof of the advertising after the time for redemption had expired, would destroy most of the titles claimed under such sales; and subject the claimants to the evils which this law was intended to remedy. It contemplated a disposition of 439 the immense *mass of delinquent lands which in the western part of the state had been accumulating almost from the revolution. The difficulty of preserving the evidence of such acts in pais had impaired all confidence in such titles; and as numerous sales would be made in every county, it would be difficult, if not impracticable, for each purchaser to preserve evidence of an advertisement posted at the court-house, of which perhaps no copy was ever made. If proceedings were instituted to set aside the sale within the period allowed for redemption, the proof might be produced; but if the owner permitted the time to elapse, the door was not only closed upon such evidence, but he was not even permitted to deny that the taxes were in arrear for which the land was sold, so as to question the purchaser's title; whatever might have been his remedy against the officer who made the false return.

Other provisions of the act of February 9th, 1814, tend to confirm the construction placed upon it in regard to advertisements and other acts to be proved by parol evidence. The 30th section provides, that if at the sale no person shall agree to give for any tract of land so exposed to sale, the amount of taxes and damages in arrear, the title of such tract shall thereupon be vested in the president and directors of the literary fund, in the same manner as if they had been purchasers at the sale, and as if the sheriff had executed to the literary fund a deed therefor. The 38th section, as we have seen, declares that the regularity of the proceedings under which the purchaser at the sale or the literary fund claims title shall not be questioned. The lands thus acquired by the literary fund as purchasers at the price of the taxes and damages in arrear, formed a class by themselves; and though subsequent laws permitted the former owner to redeem, they ceased to be a subject of taxation, and were not included in the class of delinquent lands. 440 The act of *1831 before referred to, keeps up the distinction; and by the provisions of that and other acts, the title thus vested in the literary fund was transferred to the actual occupant claiming under a junior patent, if there was such occupant, or the land was to be sold by the commissioner in the mode prescribed. If it were held that the individual purchaser at a sale for taxes, must show either by the recitals of his deed or by proof aliunde, that the sale was duly advertised, the same rule would apply to lands acquired by the literary fund. They were purchased at the same sale; the title vests by the same proceedings with the exception of a deed, which is not required where the literary fund becomes by operation of law the purchaser. The 38th section extends to both the same protection. Yet it cannot be supposed that the legislature contemplated that the literary fund should seek and preserve parol evidence of transactions in pais; or that the literary fund or those claiming under it by transfer or purchase, should be required to look elsewhere than in the office to which the proceedings were returned to be preserved or recorded, for the evidence of the regularity of the proceedings by which the title of the former owner had been transferred: Conforming in this with the whole system of law respecting real estate, by which every purchaser is enabled by a diligent examination of the records, to ascertain with reasonable certainty, the condition of the title.

If no recital in regard to the advertise-

ment was necessary, the recital so far as it goes was surplusage; and the omission to recite that it was duly advertised did not affect the deed. The recital that it was advertised at the court-house for two months, may well stand with the fact that it was advertised at the May, June and July courts and in some public newspaper in Richmond. The face of the deed is no evidence to the contrary; and if not, then no evidence of irregularity
441 *appeared on the face of the proceedings. The proof which the plaintiff offered to show that the sale had been regularly advertised, was unnecessary. I think the deed was improperly excluded from the jury upon the ground of any objection appearing on the face thereof. The deed, if proved to have been executed by a duly qualified sheriff, should have been permitted to go to the jury as prima facie evidence of such title, as according to the 37th section of the act of February 9th, 1814, it purported to vest in the purchaser at such sale, liable to be questioned according to the 38th section of said act for any irregularity appearing on the face of the proceedings.

On the second bill of exceptions, I think the deed should have been admitted to go in evidence to the jury, for the purpose therein mentioned; though it might have been ineffectual to pass title. It was competent to show, by the deed and other evidence, an actual entry under a claim of title, and a continued holding thereunder, so as to make out a title or right of entry by actual possession. Shanks v. Lancaster, 5 Gratt. 110. Possession so taken and continued for the time prescribed, might ripen into a right of possession, and so bar the defendant's right of entry. For these reasons I think the judgment was erroneous, and should be reversed.

MONCURE, LEE and SAMUELS, Js., concurred in the opinion of Allen, J.

DANIEL, J., was of opinion that the deed was defective as a statutory deed, for irregularities apparent on its face; and that it was not competent to introduce the evidence offered to cure those irregularities: And therefore that the first bill of exceptions showed no ground of error. But he was also of opinion, that the deed was proper evidence for the purpose of
442 showing, *together with the other evidence, an entry and holding under claim of title: And therefore that the court below erred in refusing permission to the plaintiff to introduce it for such purpose.

The judgment of the court was as follows: It seems to the court here, that the fact that a sale of delinquent lands was duly advertised in the mode prescribed by the 24th section of the act of February 9th, 1814, 2 Rev. Code of 1819, p. 548, was not one of the circumstances of such sale, which by the 28th section of said act was to be recited and set forth in the deed executed by the sheriff to the purchaser at such sale; that such deed is not vitiated by the failure to recite that a sale was advertised, or if it recites generally that the sale was advertised, by the failure to set forth particularly the mode in which it was so advertised; that after the time for redemption allowed by the 36th section of said act shall have elapsed, it would not be competent by parol testimony, to impeach such deed for such failure; the advertisement being a mere act in pais, and no part of the proceedings in regard to sales under said act, of which any return or record was required to be made. It seems to the court therefore that the recital contained in the deed set forth in the bill of exceptions, was surplusage; and so far as it goes, is not inconsistent with the fact that the sale was also advertised in the mode and at the times and places prescribed by the act. And if both facts might be true, then no such irregularity appears on the face of the proceedings for which the title acquired by the purchaser at such sale, could be questioned according to the provisions of the 38th section of said act.

It further seems to the court, that although it would have been incumbent on the plaintiff claiming title under such deed, before he could have availed himself thereof for such purpose, to have shown in some
443 stage *of the trial that the sheriff and deputy sheriff were such officers as the deed recited, and that the person in whose name the same was returned delinquent, his heir, devisee or other person claiming by, through or under him, had title; yet it does not appear from the bill of exceptions that such testimony had not been offered previously, or had not been waived; and if not, the decision of the court complained of in said bill of exceptions, precluded the introduction thereof, if in the power of the plaintiff to produce such proof. It appears from the bill of exceptions taken altogether, that the court rejected said deed for the supposed irregularity on its face; for the bill of exceptions sets forth that after such rejection the plaintiff then, with the object of removing the objections to the deed which appeared on the face thereof, offered to prove by a witness that the sale had been regularly advertised; which evidence the court refused to permit to be given; showing thereby, that the only questions decided by the court, and which were intended by the bill of exceptions to be presented for revision, were whether said deed was void for irregularity appearing on its face; and if not, whether the irregularity could be cured by proof. And the court considering said deed as void for such supposed irregularity, rejected said deed and all parol proof in aid of it. Regarding the decision of the said Circuit court as going to the validity of the deed for the supposed irregularity which appeared on the face thereof, it seems to the court here, that said Circuit court erred in rejecting the same for the cause aforesaid; and that said deed, if proved to have been executed by a duly qualified sheriff, should have been permitted to go to the

jury as prima facie evidence of such title as, according to the 37th section of said act, it purported to vest in the purchaser at such sale, liable to be impeached according to the 38th section of *said act for any irregularity appearing on the face of the proceedings.

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It further seems to the court here, that said Circuit court erred in the decisions set forth in the second bill of exceptions. The said deed, even if invalid as a conveyance of title, was in connection with other evidence, proper evidence to show an entry under a claim of title, and a continued holding thereunder, so as to make out a title or right of entry by actual possession.

It is therefore considered that said judgment be reversed, that the verdict be set aside, and a new trial awarded, in which said deed, if again offered in connection with evidence showing that said William Haynes was sheriff and said M. Erskine was deputy, as in said deed is cited, is not to be rejected as invalid for the alleged irregularity appearing on the face thereof. And also with instructions that if said deeds should be rejected for any other cause as invalid as a conveyance of the title which it purports to convey, it would still be proper evidence in connection with other proof tending to show an entry and holding under a claim title, so as to make out a title or right of entry under the statute of limitations.

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445 *Smith & al. v. Chapman.

July Term, 1853, Lewisburg.

1. **Deeds—Admission to Record—Proof of Execution*—Case at Bar.**—A deed executed in Boston in December 1798, by parties living there, conveying land in Virginia, is properly admitted to record upon a certificate of the proof of its execution, by the subscribing witnesses before the court of Suffolk county, signed by a person describing himself as clerk of the court, though no seal is attached to it.

2. **Evidence—Ejectment—Plaintiff Claiming under Deed of Commissioners of Delinquent Lands—Record.†**—In ejectment plaintiff claims under a deed from the commissioners of delinquent lands; the record of the proceedings, including the exhibits, in which the sale and conveyance of the lands were directed, is competent evidence, though there be irregularities in the proceedings apparent on its face.

3. **Same—Survey—Case at Bar.**—On a survey directed in a cause some of the lines are run when one of the parties acts as chainman. Upon a second order of survey another chainman is employed and all but one of these lines is again run. The line not run the surveyor says he ascertains to be correct by other lines run, and the line is submitted to the jury not as a line run but as a protracted line. This is not error.

4. **Same—Same—Corner and Line Trees—Statements of Dead Chainman—Admissibility.‡**—Statements of a chainman who is dead as to the corner and line trees of a survey are admitted as evidence; but statements as to the locality of the land and the streams the lines would cross, are not admissible evidence to fix the locality of a survey.

5. **Same—Ejectment—Land Patents—Case at Bar.**—Defendant in ejectment having introduced the patent under which he claimed, and also evidence to prove that it should be located as he claimed so as to cover the land in controversy, to do which it was necessary that all the courses in the patent should be reversed, to rebut this testimony, the entry on which the patent was founded, and the survey thereon in which the courses were the same as in the patent, and five other large surveys bearing the same date and made by the same surveyor as that under which the defendant claimed, are competent evidence for the purpose of showing that the survey under which the defendant claimed had never been made upon the land; and thus to repel his claim to reverse the courses of his patent.

6. **Surveys—Calls—Mistake—Case at Bar.**—Owners of a large tract of land convey a part of it. The call of the deed is, beginning on the line of a survey made for S about six hundred and ninety poles from its northerly corner, running thence with S's line a given course and distance to two white oaks, etc. Though there is an obvious mistake in some one or other of the *calls of the survey, yet the beginning corner must be made at the point on the line of S, six hundred and ninety poles from his northerly corner.

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7. **Same—Same—Same—Same.**—In such case the action of the court or the commissioner of delinquent lands in the proceeding for the sale of the land, could not alter the beginning corner called for by the deed.

***Deeds—Admission to Record—Proof of Execution.**—In Reusens v. Staples, 52 Fed. Rep. 94, it is said: "A deed executed in Boston in December, 1798, by parties living there conveying land in Virginia, is properly admitted to record upon a certificate of the proof of its execution by the subscribing witnesses before the court of Suffolk county, signed by a person describing himself as clerk of the court, though no seal is attached to it. *Smith v. Chapman, 10 Gratt. 445.* The instructions asking the court to construe these deeds as conveying only equitable interests must be refused."

†**Evidence—Ejectment—Record of Proceedings for Sale of Delinquent Land.**—For the proposition that, in an action of ejectment, where the plaintiff claims under a deed from the commissioner of delinquent lands, the record of the proceedings in which the sale and conveyance of the lands were directed is competent evidence, though there are irregularities apparent on the face of the proceedings, the principal case is cited and followed in Hitchcox v. Rawson, 14 Gratt. 534, 535, and *note*; Waggoner v. Wolf, 28 W. Va. 825.

See, in accord, Baylor v. Dejarnette, 13 Gratt. 152, and *note*; Cales v. Miller, 8 Gratt. 6.

‡**Evidence—Ancient Boundaries—Declarations—Whose Admissible.**—See, upon this subject, principal case cited and approved in *foot-note* to Clements v. Kyles, 18 Gratt. 468, where there is a collection of authorities.

See also, citing the principal case, High v. Pancake, 42 W. Va. 608, 26 S. E. Rep. 538, where the declarations of a former owner of land, now dead, are held to be admissible to show the identity of a particular corner tree, or other corner or marked boundary line; but not a mere general statement or claim that a certain land was in his boundary.

8. **Sale of Delinquent Lands—Ascertaining Boundaries—Case at Bar.**—In ascertaining the boundaries of the land claimed by the plaintiff who claimed as purchaser of a part of a large tract sold by the commissioner of delinquent lands, no regard is to be had to any private arrangements or divisions by the plaintiff and the other purchasers of parts of the same tract of land at the same sales.

9 **Same—Adversary Possession—Effect upon Commissioner's Deed Conveying Commonwealth's Title.***—An actual possession of land claiming the same adversely does not prevent the operation of the deed made by the commissioner of delinquent lands, conveying to a purchaser the commonwealth's right to the land.

10. **Same—Purchasers—Not Necessary to Prove Regularity of Proceedings—Effect of Decree of Court.**†—A purchaser at a sale of lands made by a commissioner of delinquent lands, is not bound to prove that all the previous proceedings of the commissioner and the court were regular. The proceeding is one in the nature of a judicial proceeding, and the orders and decree of the court made in it are conclusive, at least upon strangers.

11. **Forfeiture of Land—Distinct Titles—Sale of the Land—Effect.**‡—Land is forfeited to the commonwealth under distinct titles. Upon a proceeding to have the land sold under either title, the sale and conveyance passes all the title vested in the commonwealth under both titles.

12. **Same—Same—Same—Same—Case at Bar.**—Land is forfeited under one title in one county, and under another title in another county, the land in one patent extending into both counties. The court in which the proceeding is first commenced for the sale of the land has jurisdiction of the subject, and the sale and conveyance under its decree passes all the title of the commonwealth, though the conveyance under the decree of the court of the other county is first executed.

This was an action of ejectment in the Circuit court of Kanawha county, by Chapman's lessee against Augustine J. Smith and Joseph Hamrick. The plaintiffs claimed under a patent to George Keith Taylor for ninety-four thousand six hundred acres of land, situate in the county of Kanawha. This land was conveyed by Taylor to Douthat and Chambers. They conveyed to Joseph Blake and four others of the state of Massachusetts: And Blake and his partners conveyed
447 to *Elias H. Derby also of Massachusetts, sixty-one thousand and forty-eight acres of this tract. This deed, in describing the boundaries of the land conveyed, called to commence upon the line of the survey upon which the patent issued about six hundred and ninety poles from the northerly corner. The whole tract was in November 1841 reported by the commissioners of delinquent lands for the county of Kanawha as forfeited to the commonwealth for the failure of all the parties to put it on the commissioners' books; one part of it in the name of Derby and the remainder in the name of Blake and others. Upon this report of the commissioners the court on the 4th of November 1841, made decrees directing them to sell the land; and in May 1842 the commissioners reported that they had divided the tracts into lots; the remainder of the tract not sold to Derby being divided into lots numbered 1, 2 and 3; and the part conveyed to Derby into lots numbered 4, 5, 6, 7 and 8; and of these Hiram Chapman was the purchaser of lots numbered 1, 2, 5 and 8. In May 1842 this report was confirmed, and the commissioners were directed to convey the land to the purchasers: And they conveyed to Chapman by deed bearing date the 11th day of July 1842.

The defendants claimed under a patent to Boies and Fally as assignees of Porter, for fifty thousand acres of land. This land was in October 1840 reported by the commissioner of delinquent lands for the county of Jackson as forfeited for nonpayment of taxes: And on the 14th of October in vaca-

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***Adversary Possession—Statute of Limitations.**—See, citing the principal case, Taylor v. Philippi, 35 W. Va. 560, 14 S. E. Rep. 132; Virginia Mining, etc., Co. v. Hoover, 82 Va. 454, 14 S. E. Rep. 689.

†**Forfeiture of Lands—Purchasers—Not Necessary to Prove Regularity of Proceedings—Effect of Decree of Court.**—For the proposition that, a purchaser at a sale of lands made by a commissioner of delinquent lands is not bound to prove that all the previous proceedings of the commissioner and the court were regular, such proceeding being in its nature judicial and the orders and decree of the court are conclusive, at least upon strangers, the principal case is cited and approved in Holly River Coal Co. v. Howell, 36 W. Va. 515, 15 S. E. Rep. 218; Strader v. Goff, 6 W. Va. 267; Hays v. Heatherly, 36 W. Va. 623, 15 S. E. Rep. 227; Carberry v. W. Va., etc., R. R. Co., 44 W. Va. 262, 28 S. E. Rep. 695.

In Twiggs v. Chevallie, 4 W. Va. 487, in reference to the first part of the rule above laid down, it is said: "It may be conceded that in such a case the purchaser (from the commission of forfeited lands), Weirick, and those claiming under him, would not be required to show the regularity of the proceedings under which the sale was made, according to the authority of the case of *Smith and Others v. Chapman, 10 Gratt. 445.*"

‡**Forfeiture of Lands—Sale of the Land by Commissioner—Effect.**—In Bowman v. Dewing, 37 W. Va. 122, 16 S. E. Rep. 442, it is said: "It is apparent, therefore, that the sale of 1842, made under and by virtue of the laws above cited, and the deed of the commissioner, conveyed to the purchaser all the title which the commonwealth had acquired by forfeiture, no matter under what title or in whose name the forfeiture occurred. If the land was forfeited under the Bowyer and Breckinbridge title for failure to enter on the land books, nevertheless the title passed to the purchaser. This construction of the law is not new, either in Virginia or in this state, but it is well settled in both states. *Smith v. Chapman, 10 Gratt. 445;* Strader v. Goff, 6 W. Va. 257; Holly River Coal Co. v. Howell, 36 W. Va. 489, 15 S. E. Rep. 214."

Forfeiture of Lands—Statute—Effect.—Upon this subject, see the principal case cited and approved in Levasser v. Washburn, 11 Gratt. 581, and *note; foot-note* to Martin v. Snowden, 18 Gratt. 100; State v. Sponaugle, 45 W. Va. 426, 32 S. E. Rep. 288, upon the question of the constitutionality of the forfeiture statutes.

See also, citing the principal case, King v. Mullins, 18 Sup. Ct. Rep. 928, 929.

tion, the judge of the Circuit court of Jackson made a decree for the sale of the land. The commissioner reported that he sold the land on the 23d of November 1840 to Augustine J. Smith; and on the 12th of November 1841 the court made a decree confirming the sale and directing a conveyance to Smith upon the payment of the deferred installments of the purchase
448 money. There seems to *have been some delay in the payment of the purchase money; and the commissioner did not execute the conveyance until the 16th of September 1843. The defendant Hamrick claimed a small tract of land under Smith.

On the trial the plaintiff offered in evidence an office copy of the deed from Blake and others to Derby, which was objected to by the defendants. The deed had been admitted to record in the General court in 1800, upon a certificate purporting to be made by the clerk of the Court of general sessions of the peace for the county of Suffolk in the state of Massachusetts. He certified that at a term of that court held on the 2d day of December 1799, the three subscribing witnesses to the deed, naming them, proved that they were present and saw Blake and the other parties sign and deliver the instrument as their act and deed, and that they at the same time subscribed their names as witnesses to the execution thereof. This was attested by Ezekiel Price, describing himself "C. of said court," but without a seal. This copy of the deed was filed with and made a part of the record of the proceedings of the Circuit court of Kanawha county in relation to the forfeiture and sale of the land patented to George Keith Taylor, and was offered in evidence in connection with said proceedings. The court admitted the evidence; and the defendants excepted. This is the defendants' first exception.

The plaintiffs having introduced in evidence the patent to Taylor and the mesne conveyances from Taylor to Blake and others and to Derby, then offered to introduce the record of the proceedings in the Circuit court of Kanawha county for the sale of the land as forfeited to the commonwealth. This record contained the report of the commissioners of delinquent lands, which was the foundation of the proceedings in the court; and it also con-
449 tained the deeds executed by *these commissioners to the purchasers. The defendants objected to the introduction of this record on the ground of errors and irregularities apparent on its face. One of these irregularities was that in the deed made by the commissioners they misdescribed the boundaries of the tract number 1, conveyed to the plaintiff: And afterwards they executed a second deed to correct this error. But the court overruled the objection and admitted the evidence: And the defendants again excepted. This is the defendants' second exception.

The plaintiffs further offered in evidence a plat and two reports of the surveyor made under orders in this cause. It appeared that when the first survey was made, Chapman the lessor of the plaintiff, acted as one of the chainmen in running seven of the lines. But when the plat and report was recommitted six of these lines were run by the aid of other chainmen; leaving only the line FH on said plat, which had not been run again; and the surveyor stated that he had run other lines which he considered as equivalent to running that line, and from which in his opinion the line FH was correctly laid down. And the plaintiff disclaimed any benefit from the line FH, as a measured line; but claimed it as a line laid down by protraction, and ascertained by the surveyor to be correctly laid down. The defendants objected to so much of said plat as lays down the said line FH as evidence. But the court overruled the objection: And the defendants again excepted. This is the defendants' third exception.

After the plaintiff had introduced his evidence as aforesaid and also parol evidence to show the localities of the land called for in his title papers, the defendants introduced the patent to Boies and Falley and the mesne conveyances, and also the proceedings in the Circuit court of Jack-
450 son as herein before stated. *They also introduced parol evidence to show that the land embraced in the patent to Boies and Falley lay in both the counties of Jackson and Kanawha, and included the land in controversy. For this purpose they introduced as a witness Jasper Butcher, a son of Paulser Butcher who had carried the chain on a survey of the land upon which the patent issued. He stated a conversation with his father in 1810 or 1811 in relation to the corner tree of this survey and two marked trees which witness saw when they were on the ground, and which his father said were line trees of said survey. The defendants then proposed to prove by said witness, that when he was at said corner in 1810 or 1811 with his father, that said Paulser Butcher pointed out to the witness the waters upon which the survey under which the defendants claim lay, and also stated to witness the waters which said survey would cross, and that the land embraced by it lay to the left and south of a certain line on the plat of the surveyor made in this cause. But the plaintiff objected to the evidence, and his objection was sustained by the court. But in rejecting the evidence the court said the defendants might prove by the witness anything said by Paulser Butcher in relation to the running of the lines of said survey, or what natural objects they passed or run to, or any other act done by the surveyor at the time the survey was made, showing where it lay. To the opinion of the court excluding the evidence, the defendants again excepted. This is numbered the defendants' fifth exception.

After the plaintiff and defendants had introduced their evidence as before stated, the plaintiff, as rebutting testimony, offered in evidence a copy of the entry upon

which the patent to Boies and Falley was based, and also the surveys of five large tracts, all bearing the same date, and made by the same surveyor. The calls of the patent under which the defend-
451 ants claimed, *if literally followed, would not locate the land where they insisted it was; but to do this it was necessary to reverse all the courses: And the object of the plaintiff in introducing the entry and surveys, was to show that the courses in the patent conformed to the courses in the entry; and that there had not been an actual survey of the Porter entry. The defendants objected to the evidence; but the court overruled the objection: And the defendants excepted. This is their sixth exception.

The seventh and eight exceptions of the defendants are in relation to instructions given or refused by the court, and are sufficiently stated in the opinion of Judge Lee. The fourth exception was for the refusal of the court to grant a new trial; and as this court did not consider that question, it is not necessary to state the facts.

There was a verdict and judgment for the plaintiff; and the defendants applied to this court for a supersedeas, which was awarded.

The case was argued by Grattan and Patton, for the appellants, and Fry and B. H. Smith, for the appellees; but an abstract of the argument would be unintelligible.

LEE, J. Upon the trial of this cause numerous questions were raised, and various exceptions taken by the plaintiffs in error, all of which are made grounds of assignment of error here. The bills of exceptions are numbered from one to eight inclusive, and I propose to consider them in the order in which they are numbered, excepting the fourth, which will be again referred to after the others shall have been disposed of.

The first exception was to the opinion of the court permitting the deed from
452 Joseph Blake and others to *Elias H. Derby, dated 31st of December 1798, to be read in evidence to the jury. This deed was recorded in the General court on the 12th of November 1800, upon a certificate under the hand of the clerk of the court of general session for the county of Suffolk in the state of Massachusetts, that the execution of it by the grantors had been duly proven in said court on the 3d of December 1799, by the three subscribing witnesses; and all the said grantors are described as being of Boston in said county of Suffolk. By the act for regulating conveyances, passed 12th December 1792, 1 Rev. Code, Pleasants' ed. 1814, p. 218, as amended by the act of the 26th of December 1794, Ibid. 462, it is provided that where a party who shall sign and seal any deed for the conveyance of lands, shall not reside in Virginia, the acknowledgment by such party, or the proof by three witnesses, of the sealing and delivery thereof, before any court of law, certified by such court in the manner such acts are usually authenticated by them, and offered to the proper court to be recorded within two years after the sealing and delivery, shall be as effectual as if done in the last mentioned court. But it is objected that the authentication of this deed was not such as to render it admissible to record, because the certificate of the clerk of the court in Massachusetts is not under the seal of the court, and that there is nothing to show that it was in the usual form for such acts, and nothing to verify the fact that the party signing himself clerk of the court was in fact such clerk. There is nothing in the act of assembly expressly requiring the certificate in such a case to be under the seal of the court, nor any verification of the character of the officer by whom it shall be given or attested. Non constat that there is a seal, because though a usual, yet it is not an indispensable incident to a court. And in the absence of any express requirement,
453 that the official character *of the party certifying should be verified, his certificate that he is such officer should be deemed sufficient, just as the certificate of a justice of the peace before whom a deposition is taken or a deed acknowledged in another state, that he is such justice, is itself sufficient, without any verification or proof aliunde of his official character. So, as the acts of a court are usually and properly certified by its clerk, the certificate itself is prima facie evidence that the usual form for acts of the kind has been observed. But there is another answer to this objection. This deed is referred to and recited by the commissioners of forfeited lands for the county of Kanawha, in their report to the court; and it is recognized in the decree of the court directing the same to be sold as forfeited. It is thus made a part of the record of the proceeding had for the sale of the land, and as such was properly admissible in evidence to have such legal effect as it might be entitled to, if the record itself were so admissible. So that the objection resolves itself into the objection to the whole record which constitutes the subject of

The second bill of exceptions. It is alleged that such defects and irregularities appeared on the face of this record as should exclude it from going in evidence for any purpose. Whether the supposed irregularities do or do not in fact exist, I think it not very material to enquire; because the record being properly authenticated, and being the proceeding of a court possessing competent jurisdiction over the subject to which it related, it is not for a stranger in a collateral proceeding to make such an objection. What might be its effect is another matter; but it was premature to raise this question at that point. It was part of the plaintiff's claim of title, and of his evidence in support of his claim. Whether it constituted a complete title in itself, or was only a link in the chain, and whether he could connect himself with it, were
454 all questions for *subsequent consid-

eration by the court or jury. I think, therefore, the objection to its introduction was properly overruled.

The third bill of exceptions was to the opinion of the court permitting a part of the plats of survey offered by the plaintiff which was objected to by the defendants, to go in evidence to the jury. It appears that when the first survey was made in the cause, Hiram Chapman one of the lessors of the plaintiff had acted as a chainman in running seven of the lines, and which were accordingly so laid down in the surveyor's first report from such running. But this report was recommitted, and all these lines, excepting that designated on the plat as the line FH, were run over again with the aid of other and disinterested chainmen; and the surveyor also did other running which he stated he regarded as equivalent to the line FH on said plat, and from which he stated that that line was correctly laid down. And as the plaintiff disclaimed any benefit from the line FH as a measured line, and contented himself with treating it as a line laid down by protraction; and as the court in permitting the plat to go in evidence to the jury, restricted the use of the line FH in any other way than as a protracted line merely, the objection growing out of the irregularity in the first instance in permitting one of the lessors of the plaintiff to act as one of the chainmen in making the survey, was I think successfully answered and overcome. The six lines in question (other than the line FH) were to be regarded as measured lines in respect of their having been run by the disinterested chainmen employed on the second occasion, and without regard to the running when Chapman was one of the chainmen, and the line FH was not to be regarded as a line actually run, but as a line laid down by protraction; of the correctness of which the jury were to judge.

Passing by the fourth bill of exceptions, we come to *the fifth, which 455 was to the refusal of the court to permit certain statements of one Paulser Butcher, one of the chain carriers when the original survey under which the defendants claimed was made, to be given in evidence to the jury. Paulser Butcher, it was proven, was dead, and the defendants had been permitted to prove by one Jasper Butcher, his son, what he had heard his father say in regard to the making of that survey, what running had been done, where one of the lines ran and where a corner would be found. But the defendants also desired to prove that the said Paulser Butcher in 1810 or 1811 (the Porter survey under which they claimed being dated on the 2d of September 1796,) pointed out to the witness the waters on which the Porter survey should lie, stating what waters the lines would cross, and that the land embraced by said survey lay to the left or south of the line AB, as designated on the plat. To this evidence the plaintiff objected, and it was excluded by the court; but in rejecting it, the court stated that the defendants would be permitted to prove anything the said Paulser Butcher had stated in relation to the running of the said lines, what water courses they crossed in making the survey, or what natural objects they passed or run to, or any other act done by the surveyor at the time the survey was made, tending to show where it lay. In this ruling of the court, I cannot perceive that any error was committed to the prejudice of the defendants. The rule touching the admissibility of hearsay evidence was laid down as broadly as they could claim it should be; and the case of Overton v. Davisson, 1 Gratt. 211, relied upon by the plaintiffs in error, furnishes no authority for admitting the rejected evidence. In that case the evidence which the court held to be admissible was the declarations of the surveyor and of one of the chain carriers, (both of whom were dead,) as to the execution of the sur- 456 veys themselves, *and where they had marked a poplar as the beginning corner of the survey number 1. And the rule is stated to be that in a controversy touching the boundary or locality of a tract of land granted by the commonwealth upon a survey made by an authorized surveyor, the declarations of such surveyor, or of a chain carrier or other person who was present at such survey, as to the acts done by or under the authority of such surveyor in making the survey, are properly admissible unless plainly irrelevant; provided they were not made post litem motam, and are not in contradiction of the surveyor's official report. Here the declarations of the chain carrier that were rejected were not in relation to any act done by the surveyor or under his authority at the time of making the survey, but were rather in the nature of opinions or deductions of the chain carrier from facts which he supposed to be within his knowledge, but which he failed to state. They are clearly not within the rule propounded in Overton v. Davisson, and were I think properly rejected by the court.

The defendants having given in evidence the patent under which they claimed title, and also adduced testimony tending to prove that it should be located as they claimed, so as to embrace the land in controversy, the plaintiffs by way of rebutting testimony, offered to give in evidence a copy of the entry on which the defendants' survey and grant were founded; also a copy of the survey made on said entry, and copies of several other surveys purporting to have been made for Joseph Porter by the same surveyor on the same 2d of September 1796, to wit: A survey of twenty-five thousand acres on the waters of Elk river and Gauley river; a survey of fifty thousand acres on Cole river, on the east side of the main forks and above the Spruce fork; a survey of twenty thousand acres on the waters of Cole river, and a survey of thirty thousand 457 *acres on the waters of Cole, Guyandotte and Sandy rivers. To this evidence the defendants objected; but the court permitted it to go to the jury; and this constitutes the subject of the defendants' sixth bill of exceptions.

It is easy to see that one of the questions strongly contested between the parties at the trial, was as to the identity or locality of the Porter survey of fifty thousand acres under which the defendants claimed. In order to give locality to that survey as the defendants claimed, it was necessary to reverse the course of every call which it contained. This upon the proofs they claimed the right to do. They insisted that the evidence proved an actual survey upon the ground as claimed by them to an extent sufficient to enable the jury to correct what they said were the mistaken calls in their survey and grant. On the other hand the plaintiff sought to repel the exercise of the right of changing and reversing the calls of the defendants' grant, upon any notion of an actual survey having been made. He sought to make out that none such had in fact been made; that the defendants' pretended survey was what is known in the familiar phrase of that part of the state as "a chimney corner survey," made by the surveyor in his office, without planting his instrument or stretching a chain upon the ground. As one item of proof conducing to this purpose, he offered the entry on which the survey was founded, which being supposed to precede the survey, yet called for the same identical courses and distances found in the latter; and for the same timber at three of the corners, and for a stake at a fourth. So he offered the surveys as showing that the same surveyor had reported five large surveys, two of fifty thousand acres each, one of twenty-five thousand, and one of twenty thousand acres, as all made by him on the same 458 2d of September 1796, in *different and remote sections within the wide limits of the then large county of Kanawha. Now what might be the weight due to this testimony, or whether the doubts and difficulties which it might serve to cast upon the theory of an actual survey might be satisfactorily resolved and explained or the contrary, were matters not for the determination of the court. It tended in a certain degree to disprove the actual survey, and thus to repel the right to shift the survey from its calls upon the notion of such actual survey having been made. Certainly, the court could not say that it was so totally irrelevant that it should be excluded from the jury. That it might be susceptible of misconstruction, or that it might be used for an improper purpose, would furnish no reason for its exclusion; because it was the province and the duty of the court to guard against any such misconstruction or improper use, in the proper way, upon a proper application.

The seventh bill of exception taken by the defendants, was to the refusal of the court to give certain instructions asked for by them; and also to certain instructions which the court did give in lieu of some asked for.

The first of these instructions asked for by the defendants, related to the manner which the sixty-one thousand and forty-eight acres conveyed by Joseph Blake and others to Elias H. Derby, was to be located and its boundary ascertained. It was parcel of the tract of ninety-four thousand six hundred acres originally patented to George K. Taylor; by him conveyed to Douthat and Chambers; and by them to the said Blake and the other grantors in the deed to Derby. And the question was as to where the division line should be run between that part of the ninety-four thousand six hundred acres conveyed to Derby and the part retained by Blake and the other 459 grantors. In *the deed to Derby the land conveyed is described as beginning on the line of a survey made for one Samuel Smith, about six hundred and ninety poles from its northerly corner; running thence with Smith's line a given course and distance to two white oaks; thence by another course and distance given, crossing certain waters to a beech on the Harrison county line; thence with said line a given distance; and from the termination of that distance by another course and distance given, to the place of beginning. And the instruction asked for was, that in locating the land the jury should begin at a stake six hundred and ninety poles from the northern corner of Smith's survey upon his line, if that could be ascertained. To this instruction I can perceive no sufficient objection. The term "about" must be disregarded, no corner having been in fact made, and the call being not for any object but for a mathematical point only. Cutts v. King, 5 Greenl. R. 482; Purinton v. Sedgley, 4 Greenl. R. 283; and it must be regarded as a special call for a stake at the termination of six hundred and ninety poles from Smith's corner. In the absence of anything to control the call for course and distance, they must be conformed to; and I can perceive no sufficient reason for varying the distance from Smith's corner, at the end of which the beginning corner of the tract conveyed to Derby is to be placed. It is true the distance or length of the opposite line will have to be increased, or the course of the closing line of the survey varied. But this will not be sufficient to vary a call so specific as for a given distance upon a given course from a known corner of another survey. To say that distance shall yield to course or vice versa, where there is a conflict between the distance of one line and the course of another, would be entirely arbitrary; and the true rule seems to be that the one or the other shall be preferred according to the 460 manifest intent of the parties *and the circumstances of the case. Preston's heirs v. Bowman, 2 Bibb. R. 493; Loring v. Norton, 8 Greenl. R. 61; Scamman v. Sawyer, 4 Greenl. R. 429. The distance at the end of which that portion of the entire tract granted to Taylor, that was conveyed by Blake and others to Derby was to begin, is the base line of the part retained; and knowing the length of the entire line, it must be supposed the grantors intended all the remainder to be the

base line of the tract conveyed to Derby, reserving a base line of six hundred and ninety poles for the part retained; and if we are to say in which of the calls a mistake has been made, it would seem much more likely to have been in some other rather than that for a given distance from Smith's corner, and which must necessarily constitute a distinct and complete line of the part retained by the grantors. And if we look to the comparative quantities of the part intended to be conveyed to Derby and that retained, it would seem that they must have intended to fix the beginning corner of the former at the place specified in the deed; and that any other course or distance should be varied rather than its distance from Smith's corner should be increased. See Preston's heirs v. Bowman, 2 Bibb. R. 493, and Calvert v. Fitzgerald, Lit. Sel. Cases, p. 388; both cases in which course was made to yield to distance. I think too this question was unaffected by what had been done by the commissioners of forfeited lands in bringing these lands to sale, or by the action of the court upon their report, and other proceedings. Certainly both those commissioners and the court intended to have regard to the true and proper division line between the tract conveyed to Derby and that retained. They did not intend, nor were they authorized, to create and set up a new and different line from that which had been fixed by the parties. It is true that in the plat made by the commissioners to illustrate the subject of their 461 *sale, they fell into an error by locating the red oak corner where they did, and running from that point seven hundred poles on the course S. 37 degrees E. for the post corner of the sixty-one thousand and forty-eight acres conveyed to Derby; but their report to the court and the description of that corner given in it, and in the deed to Chapman, sufficiently showed what corner was intended, and furnished the means of correcting the error by fixing the red oak corner where it properly stood at letter F on the plat, and running thence (not sixteen hundred poles as proposed by their second deed to Chapman,) but seven hundred poles, or perhaps six hundred and ninety, for the post corner of the tract conveyed to Derby. I think, therefore, that the Circuit court erred in refusing to give this instruction; and that it also erred in giving the instruction which it did give in lieu of it. What was the operation and effect of the record of the proceedings of the commissioners was not a matter of fact to be left to the jury in the form submitted to them by this instruction, but a question of law to be passed on by the court; and if this record were introduced at all in this connection, the court should have instructed the jury that it did not affect the question as to where the division line referred to ought to be run. At the least the instruction which the court did give might serve to lead the jury to an erroneous conclusion.

The second instruction asked for by the defendants was that in fixing the boundaries of lot number 1, (purchased by Hiram Chapman at the commissioners' sales,) as claimed by the plaintiff, no regard was to be had to any prior interfering claims of others not involved in the pending issue, nor to any private arrangements and divisions between the lessors of the plaintiff and Smith, Miller and others, who had become the purchasers of coterminous tracts (other parcels of the George K. Taylor grant of ninety-four thousand six 462 *hundred acres,) at the same sales.

It is difficult to understand precisely what was meant by the first branch of this instruction, or what prior interfering claims were in contemplation. And for the uncertainty and obscurity in which this part of the instruction was involved, the court might, as it did, very properly refuse to give it. If it was intended to exclude from the consideration of the jury prior surveys, which, though conflicting with the Chambers survey, might yet, by proper references and connections, serve to identify it, and thus give location to lot number 1, which was parcel of it, it was clearly erroneous. But I do not perceive why the court refused the other part of the instruction. Lot number 1 was to be located by the title papers exhibited by the plaintiff, including the record of the sale by the commissioners of forfeited lands, and by the evidence given in connection therewith, explanatory of the various calls and references which they contained. Any private arrangements and divisions between the purchasers of the different lots after the sales, to which the defendants were no parties nor in any form privy or consenting, were res inter alios actae as to them; and evidence of such private arrangements and divisions should not have been received as against them, to show how that lot was to be considered as bounded.

The third instruction asked by the defendants proposed to apply the rule as to the effect of an existing adversary possession at the time of the execution of a conveyance intended to operate under the statute of uses, in rendering the conveyance inoperative, to the case of a deed made by a commissioner of forfeited lands for lands sold by him under the provisions of the statute; it being propounded upon the hypothesis that the jury should find that at the time of the conveyance by the commissioners to the said Hiram Chapman, the defendant Hamrick was in the actual 463 adversary *possession of the land in controversy, claiming title to the same. The court however refused to give the instruction; and in lieu thereof, instructed the jury that Hamrick's possession could not prevent the title of the commonwealth from passing to Chapman by the deed of the commissioners, unless Hamrick was in a condition at the time of the forfeiture to claim the benefit thereof under the acts of assembly then in force for the protection of claimants under grants from the commonwealth of lands forfeited under other and different grants, or unless he had

held possession adversely previous to the forfeiture, under claim of title, a sufficient length of time to bar a recovery by those in whose names the same had been forfeited or those claiming under them. The doctrine in relation to the effect of an existing adversary possession in a third person upon a conveyance of the land intended to operate under the statute of uses, can have no application to a conveyance of the commonwealth's right made under authority of law, in the appointed mode, whether by grant under her seal, or by a deed duly executed by the commissioners of forfeited lands, or by any other officer whose duty it may be to execute the same. By the eighth section of the act of 30th March 1837, concerning western land titles, Sess. Acts, p. 11, where the purchaser of forfeited land has paid the purchase money, provision is made for the conveyance by the commissioners of all the commonwealth's interest in the same, by deed; and it constitutes no part of the condition of such deed's having due operation and effect that there should be no third person in possession at the time under claim of title. Its validity is wholly irrespective of any such possession unless it had continued long enough to bar a recovery at the suit of those in whose names or for whose default it had been so forfeited, or unless it were under such circumstances as, under the laws in force at the 464 time, *would have caused the forfeiture to enure to the benefit of the party so in possession. There can be no disseizin nor adversary possession as against the commonwealth, in the legal acceptation of those terms as applied between individual citizens; and the possession that will render a conveyance under the statute of uses inoperative must be a possession adversary to the grantor, amounting to a disseizin. If at the time of the forfeiture or afterwards, the forfeiture is declared by law to enure to the benefit of the party in possession, a deed subsequently made by the commissioners would of course pass nothing to the purchaser. And so if at the time of the forfeiture, the claimants of the title so forfeited had been barred of their right to recover by the long continued adversary possession of the party holding, under the statute of limitations, the commonwealth would only take the title in the same plight and condition in which the claimants held it, and the commissioners' deed would be inoperative to convey to the purchaser any other or better right to recover. But if the party in possession had acquired no such rights at the time of the forfeiture, from that time his adversary possession and the statute of limitations must cease to run as against the commonwealth, and the commissioners' deed would pass her title thus acquired unaffected by the continued possession of the party holding with whatever claim of title. I think therefore the court properly refused to give this third instruction, and that there was no error in the instruction which it did give in lieu thereof.

By the fourth instruction asked for by the defendants, the court was called on to say to the jury that the record of the sale of the ninety-four thousand six hundred acres patented to George K. Taylor, was not sufficient to authorize a recovery on the demise in the name of Hiram Chapman; but that the plaintiff must show that the provisions of the law under which 465 the *sale was made had been fully complied with. It is not very clear what is meant by this instruction. I suppose, however, it is that the plaintiff was bound to show that all the proceedings of the commissioners and of the court from the report of the forfeiture by the former down to the deed of conveyance to the purchaser, inclusive, were regular and in due course. I think there is no foundation for this proposition. The proceeding was one in the nature of a judicial proceeding, and the orders and decree of the court made on it were conclusive at least upon strangers. As against them those claiming under it could not be called on to show its regularity. It is manifest from the whole scope and tenor of the acts on this subject, that the regularity of the sale of forfeited lands under the decree of a court was never intended to be drawn in question in any collateral proceeding. The fourth section of the act of 1837, Sess. Acts, p. 10, places the sales of these lands on the same footing as those of other lands directed to be sold by a decree of a court; and where such a sale has been made and confirmed, and a deed executed to the purchaser, he certainly cannot be called on to show that the proceedings in the suit which resulted in the decree of sale under which he purchased, and its confirmation, were regular, or if irregularities were shown, would he be affected. I think the instruction was properly refused.

The fifth instruction asked for related to the effect of two successive sales of the same land, under decrees of two different courts, by virtue of the forfeiture of two different titles supposed to have been vested under and by virtue of successive grants from the commonwealth for the same land. The sale under which the plaintiff claimed was made under a decree of the Circuit court of Kanawha, on the report of the commissioners for that county, that the tract of ninety-four thousand six hundred 466 acres granted to George K. *Taylor by patent dated 4th November 1796, was forfeited to the commonwealth. The defendants claimed under a sale made by the commissioners of Jackson county of a tract of fifty thousand acres granted to Samuel Boies and Frederick Fally on the 1st of April 1797. The order for the sale of this latter tract was made by the judge of the Jackson court in vacation on the 14th of October 1840, and the sale was reported to the court and confirmed by an order made on the 12th day of April 1841, by which also the commissioner was directed to make a deed to the purchaser, (the defendant Smith,) on the payment of the deferred installment. The proceeding for the sale of

the ninety-four thousand six hundred acres under the forfeiture of the Taylor title, was not commenced till the 3d of November 1841, after the sale under the Boies and Fally grant had been confirmed. But the deed to Chapman, the purchaser of the land in controversy, at the sale under the order of the Kanawha court, was executed on the 11th of July 1842, while that to Smith the purchaser at the sale under the order of the Jackson court, for the Boies and Fally land, was not made till the 16th of September 1843. The defendants insisted that if the land in controversy was embraced both by the Taylor grant and by the Boies and Fally grant, and if both those titles had become forfeited to the commonwealth, Smith the purchaser at the first sale under the decree of the Jackson court, thereby acquired all the interest and title vested in the commonwealth by both forfeitures, notwithstanding his deed was executed after that made to Chapman under the Kanawha sale; and they moved the court to instruct the jury accordingly. The court, however, refused to give the instruction so asked for.

It cannot be doubted that the policy of the legislature, in the various acts concerning delinquent and forfeited lands, was not only to secure to the commonwealth 467 *her just dues, but also to quiet titles in the western part of the state; and to remove the check to population, and the settlement and improvement of the country which their unsettled condition served to create. This latter feature of the legislative policy is distinctly avowed in the preamble to the second section of the act of 1835, Sess. Acts, p. 12, and is plainly manifested by the general scope and tenor of the whole legislation upon the subject. And although there is no express declaration to that effect, yet it can scarcely be supposed that at the time of the passage of the act providing for the sale of forfeited lands, the fact so universally notorious in the western portion of the state, that the same lands had been in many instances forfeited to the commonwealth under several different titles, was unknown to the legislature. Indeed we see that one of the duties assigned to the commissioners of delinquent and forfeited lands by the third section of the act of 1837, Sess. Acts, p. 10, was to report to the court all the information they could procure in relation to the state of the title to such lands as had become forfeited; and no matter concerning the title to land supposed to be forfeited could be more pertinent or important than the fact in any given case that the land in question had been forfeited under several different rights. Now where in any given case the commissioners should report that a tract had been so forfeited under several and distinct titles, it can hardly be supposed that any court would direct two several sales of the same land, putting several titles into market at the different sales. So if after a decree for the sale of a tract of land ascertained to be forfeited under one title, the commissioners were to report the same land as also forfeited under another and different title, no court would have thought it right to direct a second sale of the same land under the latter. The policy of the laws on the subject was to quiet titles as far as pos- 468 sible, *and to convey a good title under these sales as far as the commonwealth had the means of so doing. Certainly nothing could tend more directly to thwart this policy than to give these laws the construction contended for by the defendant in error. If there could be several successive sales of the same land because it had been granted to several distinct patentees, all of whom, or those claiming under them, had suffered it to become forfeited by failing to comply with the revenue laws, and these sales but served to transfer to the different purchasers the several different titles of the parties so in default, the effect would only be to stir up the smouldering embers of litigation with all the new born zeal which the different purchasers might be supposed to bring to the subject of their speculation. It "would but serve to make confusion worse confounded," and to aggravate all the evils which it was the purpose of the legislature to remove.

There is a plain difference between the sales authorized by the act of February 9th, 1814, 2 Rev. Code 1819, p. 542, and those to be made under the act of February 27th, 1837. By the express provisions of the former act, the sales were of the title and interest of the parties in default only. The commonwealth claimed not to be invested with the title to the lands, but only to assert a lien upon them for the taxes due her; the title remaining in the owner till the sale was made. The thirty-seventh section of that act accordingly expressly limits the operation of the deed made to the purchaser to the conveyance of such interest and estate as was vested in the person in whose name the land was returned delinquent, and the extinguishment of any use, trust or equity of redemption. The latter act presupposes that the title to the land sold is vested in the commonwealth at the time of the sale. It did not design to provide a means for creating or declaring forfeitures, but a convenient mode for 469 ascertaining what *forfeitures had accrued, and of disposing of the lands thus acquired by the commonwealth. It assumed that the acts declaring the forfeiture of lands for the failure of the owners to comply with the revenue laws, were sufficient proprio vigore to work out their own purpose, and to transfer the title perfectly and effectually to the commonwealth, and in the proper cases, through her to those claiming under another grant, who were in a condition to avail themselves of the provisions for their benefit. Hence it directs the lands to be sold as the property of the commonwealth, in all respects as in the case of other lands directed to be sold under decrees of the court; and directs the commissioner to convey to the purchaser all the interest of the commonwealth in the lands so sold. No discrimination is made be-

tween different titles that may have become vested in the commonwealth by virtue of several forfeitures; but the whole, constituting the entire estate and interest of the commonwealth, is transferred to the purchaser. The deed to be made is to be a conveyance in fee simple of the commonwealth's whole right derived to her by forfeiture, without regard to whatever delinquencies may have occasioned it, or to the different sources from which the several forfeitures, if more than one, may have accrued. It is true the commonwealth gives no warranty of the title conveyed; and if there be a better outstanding than that of the commonwealth, the purchaser takes no indemnity against it. But whatever right is in the commonwealth, derived by forfeiture under the revenue laws, must pass, and the deed conveying her interest must stand as an estoppel to the commonwealth to set up any other title by forfeiture existing in her at the time of the sale. The effect of the deed, so far as title acquired by forfeiture is involved, would be the same as that of a grant obtained under the thirty-fifth section of the act of December 13th, 1792, 2 Rev. Code 1819, p. 525, 470 which *made forfeited lands subject to entry and patent. If the same land had been forfeited under two several titles and a grant were obtained under the provisions of this section, it can scarcely be doubted, I apprehend, that the whole of the commonwealth's interest acquired by both forfeitures would pass to the grantee.

I deem it unnecessary to follow the counsel in the elaborate examination which they have made of the doctrine of forfeitures at common law; as I think it will afford but little aid in elucidating the nature and effects of a forfeiture of land under our revenue laws. These rest upon grounds peculiar to themselves, and differ very materially in many respects, from forfeitures at the common law. They are declared for a special purpose to meet the exigency of the occasion which demanded them; and they are so moulded as to carry out the particular policy of the legislature. And moreover the point at issue is not what the commonwealth takes or holds under any or all of the different forfeitures, but what passes by her conveyance to her vendee after the different titles shall have been united in her by the respective forfeitures.

It is true the act of 22d March 1842, Sess. Acts, p. 13, provides in terms that all the commonwealth's interest in land forfeited in different names shall be vested in the first purchaser, and any further sale of the same land is prohibited. It also provides that the court shall on a proper report from the commissioners in any such case, make an order quieting the title; and it is limited in its operation so as not to impair the rights of purchasers at different sales made before the passage of the act; in all which cases the rights of the parties were to be determined by the previous laws. And it is insisted that these provisions would have been unnecessary if under the previous laws, the whole of the commonwealth's interest passed to the purchaser at the first 471 sale. I think however this act *is to be regarded rather as a legislative interpretation of previous laws though to take effect in the future only and to remove any doubt or ambiguity which might be supposed to attend their construction, than as the enactment of a new provision. It was no doubt thought that it might be questioned whether under previous laws, the first sale passed the whole of the commonwealth's title; and the legislature thought proper to put an end to all difficulty on that subject in future; but as the rights of previous purchasers must of course depend on the construction placed by the courts on the previous laws, it very properly excepted such cases from the operation of that act, leaving them to be settled under the laws in force at the time such previous purchases were made.

But it is insisted that as Chapman got the first deed from the commissioners of forfeited lands, the legal title thereby passed to him, whatever might be the equitable rights of Smith under his prior purchase; and that in this action Chapman being the holder of the legal title, must prevail. This renders it necessary to consider the precise effect of the sale made by the commissioners of Kanawha county, as to so much of the land as is embraced both within the boundaries of the Chambers survey and those of the Porter survey, if part thereof be embraced by both. The Chambers survey lies, as we have seen, in the county of Kanawha, and was sold by the commissioners for that court. The Porter survey, according to the pretensions of the plaintiffs in error, lies partly in the county of Jackson, and partly in the county of Kanawha, embracing a portion of the land covered by the Chambers survey; and it was sold, as we have seen, by the commissioner of Jackson county. By the 8th section of the act of March 15th, 1838, which is amendatory of the act of 1837, Sess. Acts 1838, p. 19, where a tract of land 472 liable to be sold as forfeited, *lay partly in more than one county, it was to be reported and sold by the commissioner of that county in which the greater part lay; but the validity of the sale was not to be in anywise affected if it turned out that the greater part did not lie in the county where so sold. So that if any part lay in that county, the sale would be good. Thus the court of Jackson county had jurisdiction to decree a sale of the Porter tract, though part might be in the county of Kanawha; and if it embraced a part of the tract covered by the Chambers survey, to that extent the exercise of jurisdiction by the Jackson court, on familiar principles, served to appropriate the subject and to oust the jurisdiction which the Kanawha court might otherwise properly have exercised. So that if the plaintiffs in error had in the opinion of the jury, sustained their pretensions as to the locality of the Porter survey, the Kanawha court had no jurisdic-

tion over that portion of the land common to both surveys; and nothing therefore passed to the purchaser under its decree as to so much of the land as is embraced by both. In this view I think the fifth instruction asked for propounded the law in substance correctly, and that the court erred in refusing to give it.

The last instruction asked for by the defendants, embraced in their seventh bill of exceptions, related to the manner of identifying or giving locality to the Porter survey of fifty thousand acres under which they claimed. They asked the court to tell the jury, that if necessary they should vary the magnetic calls and locate it from the natural objects called for; and in so doing that they should, if necessary for the purpose of preserving the form of the survey, disregard the call to cross Mill creek, and locate the land by the other natural objects called for. The court declined to give the instruction in the form proposed; but
473 told the *jury that if they were satisfied from the evidence the survey had been run without crossing Mill creek, they had the right to disregard that call and to locate the land by the other calls in the grant; and if necessary, to reverse and change every call of the grant. The court thus in terms did instruct the jury as desired in relation to the right to vary the magnetic calls, and the only question is as to disregarding the call to cross Mill creek. The patent call is not for "Mill creek" but for "waters of Mill creek;" and there is a vagueness and want of precision in the reference to the form of the survey. It is not very clear whether the "form of the survey" which the instruction affirms must be preserved, is that given by the plat of the surveyor which he is required to return with his certificate of the survey, or that obtained by platting according to the courses and distances given, or in some other mode. And I am by no means prepared to agree that to preserve any particular supposed form of survey would per se constitute a sufficient reason in every case to reject a call for a natural object, or an actually marked corner. On the contrary I apprehend cases have been of not unfrequent occurrence in which a call for a natural object, as a creek or even a marked tree, has been held sufficient to control and materially vary the form which the survey would assume if such call had been omitted. The case of Newsom v. Pryor, 7 Wheat. R. 7, is of that character: And, indeed, most of the numerous cases in which natural objects found upon the ground have served to control both course and distance, will be found to be of the same class. I think the court might properly refuse, as it did, to give this instruction in the form proposed. But on the other hand, while the instruction which it did give was correct as far as it went if properly understood and applied, yet the terms in which it is couched are such as might perhaps lead the jury to
474 infer that *proof of an actual survey was the necessary condition of the exercise of the right to disregard the call for the waters of Mill creek, and locate the land by the other calls. It is true the law providing the means of acquiring title to waste and unappropriated lands requires the surveyor to make an actual survey, and to mark and bound it with proper abuttals either made for the purpose or adopted at the execution of the survey. And when a grant issues the legal presumption is that this duty has been performed. But if it be shown that in fact it has been wholly omitted, yet as this is the fault of the officer of the government, and not of the owner of the survey, his rights should not be lost when the omission can be supplied by any rational means and description furnished by the certificate of survey. And it is now well settled that a grant may be valid if the land granted can be identified though no actual survey had ever been made. Newsom v. Pryor, 7 Wheat. R. 7; Alexander v. Lively, 5 Monr. R. 159; Baxter v. Evett's lessee, 7 Monr. R. 329; Bockley v. Bryan, cited 1 Pirt. Dig. 113. The description given of the land intended to be granted and which is copied into the grant from the certificate of the survey, must be such as with the aid of proper parol testimony, will serve to identify and separate it from the land surrounding. But in no case is it necessary that every call shall be satisfied. Cases of grants having conflicting calls are of not uncommon occurrence, but such a grant is not therefore necessarily void. If the conflict be irreconcilable, one or the other of the conflicting calls may be rejected, and locality given to the survey by the rest; and in determining which call shall be disregarded, the rule is that the one less material and less certain shall yield to the one more material and more certain. Newsom v. Pryor, 7 Wheat. R. 7; Massie v. Watts, 6 Cranch R. 148; Benedict v. Gaylord, 11 Conn. R. 335. And if
475 there be *found one call incongruous and irreconcilable with the other calls of the grant, but it appear that the survey can be located by those others, and it is shown by whatever evidence, that this incongruous and incompatible call had been inserted in the certificate of survey by mistake, it would seem that there certainly could be no less reason and propriety in rejecting it than if the mistake were demonstrated by proof that the lines had been actually run when the original survey purported to have been made, and that no such object as that constituting the call in question any where occurred upon them.

The defendants' eighth bill of exceptions related to the manner of running the line from the beginning corner of the Chambers survey (on which the patent to Taylor was founded,) at letter F on the plat to the next corner called for. The call was to run with Samuel Smith's line S. 37 degrees E. three thousand seven hundred and thirty-two poles to two white oaks, without naming them as a corner to any other survey: And the defendants insisted that the call must stop at the end of the three thousand seven

hundred and thirty-two poles on Smith's line, unless the jury were satisfied that the two white oaks named in the Chambers survey were made (marked as a corner I presume is intended,) for that survey at a different place, and that they were not authorized to extend that line beyond the distance called for, by proof that Smith's corner was at a greater distance from the red oak at F. The court, however, refused to give an instruction in the form proposed; but told the jury that in the absence of proof fixing the corner elsewhere, it must be placed at the end of the distance called for: But if they were satisfied from the evidence that the corner stood at the same place as Gallatin's or Smith's corner, then they should extend the line without regard to distance to that corner; and if its position was denoted by letter G on the plat, they should extend it to that point.

476 *The mere coincidence in the calls of the surveys for two white oaks as a corner might not per se be sufficient to fix the identity of the corners intended; but that the call in the Porter survey does not describe the white oaks as a corner of Gallatin's or Smith's survey, is no sufficient reason why proof should be required that the two white oaks were actually marked as a corner to the former, or to exclude proof that the corner intended was that made for the latter. The surveyor, in making the Porter survey, might have adopted the corner marked for the Gallatin or Smith survey; and although he may have omitted by mistake to describe it as such in his certificate, yet the fact was open to proof aliunde, and if the evidence was sufficient to satisfy the jury of the identity of the corners intended, the effect was the same as if the Porter survey had called for the white oaks as being a corner of the Gallatin or Smith survey. I think, therefore, the instruction which the court gave was all that the defendants had a right to require, and that it was substantially correct.

The fourth bill of exceptions, which was passed by in the order of enumeration, is to the refusal of the court to grant a new trial; and it purports to set out all the facts proved in the cause. As, however, in the view I take, a new trial must be had, I deem it unnecessary to say anything further on the subject of this exception.

I am of opinion to reverse the judgment, and to direct a new trial on the principles herein before indicated.

ALLEN, DANIEL and SAMUELS, Js., concurred in the opinion of Lee, J.

MONCURE, J., dissented.

Judgment reversed.

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477 *Millers v. Catlett.

October Term, 1853, Richmond.

Executors and Administrators—Action on Administration Bond—Evidence*—Case at Bar.—In an action for a *devastavit* by a creditor of a testator against the executor and his sureties, the settled account of the executor was introduced, which showed a credit to the executor of money paid a legatee. The executor proposed to show by parol proof, that the legatee paid was not the legatee of his testator, but of a person of whom his testator was executor, and had received sufficient assets to pay the legacy, but had not done it. HELD: The fact of such a legacy, and that the executor's testator was the executor, should be proved by the will and the record of his qualification; and parol evidence was inadmissible for that purpose.

This was an action of debt, at the relation of the plaintiffs in error, on the official bond of Alexander Catlett executor of John Catlett senior. The declaration averred the recovery of a judgment by the plaintiffs in error against the executor on a single bill of his testator, and a return of nulla bona on the execution. Issue was joined upon the plea of conditions performed; and on the trial before the County court there was a verdict and judgment for the plaintiffs in error. The case was carried by supersedeas to the Superior court, where the judgment of the County court was reversed and the cause remanded to the County court for a new trial. To this judgment of reversal the plaintiffs in error obtained a supersedeas from this court.

On the trial of the cause in the County court, the controversy turned upon the state of the executor's accounts; and two exceptions were taken by the defendants in error to decisions of the court rejecting evidence offered by them. The plaintiffs in error offered in evidence the executorial accounts of the executor as settled by commissioners of the County court, which had been

478 returned and approved and *recorded.

Upon the first of these settlements there was a charge under the head of "Paid to legatees," to said John A. Catlett six hundred and ninety-seven dollars and thirty-three and three-quarter cents. The defendants thereupon offered to prove to the jury by parol evidence, (having produced a witness for that purpose,) that said sum was paid to John A. Catlett as a legatee of Joseph Catlett deceased, on whose estate the said John Catlett, senior, the testator of the defendant Alexander Catlett, had administered, and that the said John Catlett senior had assets to have paid the legacy, but omitted to do so; which evidence the court on the motion of the plaintiffs in error excluded from the jury. The second bill of exceptions presents the same question as that raised by the first.

G. N. Johnson and Cooke, for the appellants.

There was no counsel for the appellee.

ALLEN, J., delivered the opinion of the court:

After stating the case, he proceeded:

We do not perceive any valid objection to the decision of the County court rejecting the evidence. If John Catlett senior had been the administrator of Joseph Catlett,

*See monographic *note* on "Executors and Administrators"; also, monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

and instead of paying the debts and legacies due from that estate, had wasted the assets, it would have been a debt from his estate of the highest dignity. But no foundation was laid for the introduction of parol proof of the facts relied on. The will of Joseph Catlett, or an official copy of it, would have been the best evidence that such a legacy had been bequeathed to John A. Catlett. And the order of court granting letters of administration upon the estate of Joseph Catlett to John Catlett senior, should have been produced to show his qualification. If the facts existed they could readily have been established by copies from the record; and the secondary evidence
479 *was properly rejected by the County court. We are therefore of opinion that the judgment of the Superior court reversing the judgment of the County court was erroneous. It is therefore considered that the same be reversed with costs. And this court proceeding, &c., it seems to the court here that there was no error in the judgment of the County court; it is therefore considered that the same be affirmed.

Judgment reversed.

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480 *Cordle v. Burch.

October Term, 1858, Richmond.

(Absent LEE, J.)

Bonds—Recitals—Estoppel*—Case at Bar.—N living in Virginia brought two suits in South Carolina, and B living there became his security for costs. N executed to B a bond with sureties living in Virginia, with condition to indemnify him against injury for having entered into the undertaking as surety for the said costs. In an action by B against N and his sureties, the records of the suits brought by N in South Carolina were offered in evidence by B, and were objected to on the ground that they showed that B had not become the surety at the date of the bond of N, and his sureties to him. HELD: That the defendants not showing that B was surety for N for costs in other cases, their bond must be held to refer to these suits; and they are estopped by their bond from denying that B was the surety of N at the time of its execution.

This is an action of covenant brought by Edward Burch against Charles Cordle, on two obligations of Josiah Nolley and his sureties, of whom the defendant was one; by one of which obligations the obligors bound themselves to pay unto the plaintiff, Edward Burch of Chesterfield district in the state of South Carolina, whatever sum of money he might be compelled by law to pay for the said Josiah Nolley, "he, the said Burch having become the said Nolley's security for costs in two suits instituted by the said Nolley against Thomas Kirkley and John Squiers his security, of the district and state aforesaid;" and by the other, after reciting that "Edward Burch of Chesterfield district, state of South Carolina hath entered into bond for the costs that may accrue in certain cases wherein Josiah Nolley is plaintiff and Thomas Kirkley and John Squiers are the defendants, in case the costs should fall on the said Nolley in the said cases," the obligors bound themselves to indemnify the
481 said Burch *from any harm or injury that he might sustain from having entered into the bond aforesaid. The only plea was "conditions performed," to which the plaintiff replied generally; and on the issue thereon joined, verdict and judgment were rendered for the plaintiff.

On the trial of the issue the plaintiff offered in evidence the two obligations aforesaid; and two transcripts of records of the Court of common pleas in the district of Chesterfield in the state of South Carolina, being the records of the two suits instituted by the said Nolley against the said Kirkley and Squiers, and of the proceedings against the plaintiff Burch as security for costs in the said suits. From these records it appears that the suits were instituted in December 1829, a rule was made for security for costs in March, and renewed in September 1830, and the bond of Burch as such security bears date the 8th of March 1831; whereas the obligations executed for his indemnity bear date, one of them on the 15th of March, and the other on the 29th of July 1830. All of the six persons whose names are signed to the first of these two obligations, are named as obligors in the last, but only three of them signed it. The last is a more formal instrument than the first, and seems to have been executed for that reason, as the object of each of them is the same. The defendant moved the court to exclude the said records from going in evidence to the jury; because it appeared that the plaintiff had not in fact become the security of the said Nolley at the date of either of the said obligations, but had become so afterwards, as appeared by said records. But the court overruled the motion, and told the jury that in the absence of any proof to the contrary, they ought to regard the said records as evidence of the amount of costs which the plaintiff had paid for Nolley, and for which the defendant was liable to the plaintiff. The defendant excepted to this opinion; which is the
482 only error *assigned in the judgment. There being a verdict and judgment for the plaintiff, Cordle applied to this court for a supersedeas, which was allowed.

G. N. Johnson, Gholson and Joynes, submitted the case for the appellant.

There was no counsel for the appellee.

MONCURE, J., after stating the case, proceeded:

There can be no doubt but that the two suits referred to in the obligations on which this action is founded, are the same suits of which transcripts of the records were offered in evidence; and that the plaintiff Burch became Nolley's security for costs in the said suits, and as such was compelled to

*See *foot-note* to Cecil v. Early, 10 Gratt. 198, where the cases which cite the principal case are collected.

pay the sums of money sued for and recovered in this action. There is no variance between the records and the obligations and declaration. The defendant offered no evidence of the existence of any other suits, or any other securityship for costs to which his obligations could refer; but rested his defence alone upon the ground that the bond by which the plaintiff became security for costs bears date after the date of the said obligations, which purport to be for the indemnity of the plaintiff against a prior securityship.

But though the obligations bear date, it does not follow that they were fully executed, before the bond. Delivery is necessary to the complete execution of a bond, which may not be delivered until long after its date, and will take effect from its delivery, not from its date. The date is prima facie, but not conclusive, evidence of its delivery at that time. The presumption may be repelled by other evidence. It is not unusual that a bond dated at one time and intended to be delivered at another, recites that the consideration has been received; when, in fact, it has not been received at the date, but is expected to be, at or 483 before *the delivery of the bond. The bond is considered as speaking at the time of its delivery, and not of its date. In such a case there is no incongruity; and if the consideration be received at or about the time of delivery, according to the intention and expectation of the parties, there can be no doubt as to the obligation of the bond on all the obligors, whether principals or sureties.

The circumstances strongly tend to show that this is precisely such a case; and well warranted the jury in so considering it. Nolley, residing in Virginia, instituted two suits in South Carolina, and was required to give security for costs. He had friends in Virginia who would become his sureties, but not, it seems, in South Carolina. The plaintiff Burch residing in that state agreed to become his security on being indemnified by a bond with sureties residing in Virginia; and accordingly the obligations aforesaid were given for his indemnity, and he became security for costs. It does not expressly appear when, or how, the obligations were delivered, nor whether delivered before, at the time, or after he became security for costs. They were signed in Virginia and delivered in South Carolina: Of course some time intervened between their date and delivery. They may have been sent by Nolley to his attorney in the suit to be delivered to Burch on his entering into bond as security for costs, if he had not already done so. In natural order, the delivery of the obligations would follow the execution of the bond; and it is fair to presume, in the absence of proof to the contrary, that such was the fact.

But it is immaterial in what order the obligations were delivered and the bond was executed. The whole was one continuous transaction. The substance of it plainly was that Burch agreed to become security for costs, and Nolley agreed to indemnify him. Burch did become such security, 484 and these obligations were *delivered to him for his indemnity. It must be presumed that they were so delivered with the defendant's consent. He acknowledged in them that Burch had become security for costs, and is thereby estopped from denying the fact, or showing that it occurred after, instead of before, the obligations were executed. Cecil v. Earley and others, supra 198, and Cox, &c. v. Thomas, &c., 9 Gratt. 312, and cases cited in the latter.

I think the court did not err in refusing to exclude the said records from the jury, nor in giving the instruction which it did; and am therefore for affirming the judgment.

The other judges concurred in the opinion of Moncure, J.

Judgment affirmed.

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485 *Foster's Adm'r v. Fosters.

October Term, 1853, Richmond.

Conflict of Laws—Emancipation of Slaves—Case at Bar.—The owner of slaves in Virginia took them with him in November 1831 to New York, with the intention to emancipate them, and there he executed a deed of emancipation attested by one witness. After remaining in New York a few days, he returned to Virginia, bringing the negroes with him; and ever after during his life he treated them as free. HELD:

1. **Same—Same—Valid in New York—Effect in Virginia.**—The owner of the slaves having taken them to New York for the purpose of emancipating them, they were by the laws of New York free, and so continued after their return to Virginia.*
2. **Same—Same—Same—Same.**—The acts of the owner of the slaves was not such a fraud upon the laws of Virginia as rendered his acts null and of no effect.

The case is fully stated in the opinion of Judge Samuels.

Lyons, for the appellant.

August, Watkins and Randolph, for the appellees.

SAMUELS, J. William Foster, Martha Ann Johnson, Ellen Johnson, Richard Johnson, Betsey Johnson, Thomas Johnson, Eliza Johnson and Francis Johnson, persons of color, brought suit in forma pauperis in the Circuit court of Henrico, for the recovery of their freedom, against Richard Adams, administrator of Francis Foster deceased, who had them in custody, holding them as slaves belonging to the estate of his intestate.

On the trial before the Circuit court evidence was offered tending to prove that on and before the 3d of November 1831, Francis Foster was the owner of a number of

*See JUDGE SAMUELS' opinion for the law of New York.

slaves, including William Foster,
486 Betsey *Johnson, Francis Johnson and Thomas Johnson, four of the plaintiffs below: That Martha Ann Johnson, Ellen Johnson, Eliza Johnson and William Johnson, the other plaintiffs, are the children of Betsey Johnson, born since the date above named. That Francis Foster acknowledged that he was the father of said William and Betsey, and of others of his slaves not parties to this suit. That about the 3d of November 1831, Francis Foster, having previously determined to emancipate his natural children, their mother also his slave, and the issue of his children, took with him to the city of New York these objects of his favor, including William, Betsey, Francis and Thomas, the only parties to this suit then in existence. That whilst in New York, November 3d, 1831, he executed a paper in the form of a deed of emancipation, which was attested by one witness and acknowledged before the mayor of the city, and ordered to be recorded. By this deed he professed to emancipate, amongst others, William Foster, Betsey Johnson, Francis Johnson and Thomas Johnson. That the sojourn of Francis Foster and of the colored persons taken with him, at New York, was for a few days only. That Francis Foster, before going to New York, and whilst there, and after his return, spoke of the trip to that place as intended for the sole purpose of giving freedom to the objects of his favor. That he returned to Virginia bringing back with him the party he had carried to New York. That Foster's reason for carrying his slaves to New York to be there emancipated, rather than to emancipate them in Virginia, was this, that they might remain in the state of Virginia; he supposing that the law requiring emancipated slaves to leave the state in twelve months would not extend to the case which he had devised. That after returning from New York, Foster and the party he had carried with him, lived together as a family upon terms of equality, and not
487 *as a master with his slaves. That Foster on the 27th of July 1835, executed a will which was admitted to probat the 9th of May 1836. By this will he emancipated by name, in express terms, his slaves other than his own children, their mother, and their descendants: To some of these last mentioned he bequeathed a portion of his personal property. That the persons claiming freedom under the alleged manumission in New York had not at any time thereafter been treated or regarded as slaves, although not registered as free negroes; that they had always after the death of Foster up to the year 1850, acted as free people, and were not included in the inventory or appraisement of Foster's estate: That in July 1850 they were taken into custody by the defendant below, claiming to hold them as slaves.

On the trial it was agreed that the laws of New York in force at the date of the deed of emancipation, should be considered as proved, as they are found in print, and used as if copied into the record. Looking to the statute of New York in force November 3d, 1831, thus made part of the evidence, it is seen that in § 1, p. 656, 1 Revised Statutes of New York, it is enacted, "No person held as a slave shall be imported, introduced or brought into this state, on any pretence whatever, except in the cases hereinafter specified. Every such person shall be free. Every person held as a slave who hath been introduced or brought in this state contrary to the laws in force at the time shall be free.

"§ 2. The preceding section shall not be deemed to discharge from service any person held in slavery in any state of the United States under the laws thereof, who shall escape into this state."

"§ 6. Any person, not being an inhabitant of this state, who shall be travel-
488 ing to or from, or passing *through this state, may bring with him any person lawfully held by him in slavery, and may take such person with him from this state; but the person so held in slavery shall not reside or continue in this state more than nine months; and if such residence be continued beyond that time, such person shall be free.

"§ 7. Any person who or whose family shall reside part of the year in this state, and part of the year in any other state, may remove and bring with him or them, from time to time, any person lawfully held by him in slavery, into this state, and may carry such person with him or them out of this state."

After the evidence was thus heard in connection with the statute of New York, the defendant moved the court to exclude from the jury the deed and the deposition to prove its execution, and the parol testimony, because the deed was not executed or recorded according to the laws of Virginia, but in fraud of those laws, and in violation of the policy of this state as settled by the Court of appeals in the case of Lewis v. Fullerton, 1 Rand. 15; and because parol evidence is not admissible or competent in Virginia to establish a claim to freedom by emancipation in 1831 or since that time. This motion the court overruled, and the defendant below excepted to the opinion of the court.

The defendant below also moved the court to instruct the jury that if they should believe from the evidence that the plaintiffs Betsey, William Foster, Francis and Thomas were the property of Francis Foster in the year 1831, and the others the descendants of Betsey, born in Virginia since that time; that he carried the four first named with him to the state of New York, with a view to evade the statutes of Virginia, concerning the emancipation of slaves, and the residence of free negroes in Virginia,
489 and emancipated *them by the deed exhibited in this cause, with no intent on his part or on their part, that they should become citizens of New York, but with the intent to bring them back to Virginia to re-

side here; that whilst in New York he executed the deed given in evidence, and then brought the persons named in it back with him to Virginia; and that they have from that time to this, resided in Virginia without any other deed of emancipation to them, and without being registered according to law as free persons in Virginia, that then they were not entitled to freedom, and the jury must find for the defendant. Which instruction the court refused. The defendant then moved the court to instruct the jury that the children of Betsey Johnson, born since her return to Virginia, who are plaintiffs in the cause, are not entitled to their freedom. This instruction was also refused; and another bill of exception was taken.

The jury having found a verdict for the plaintiff, the court rendered judgment thereon; and the question before the court is whether that judgment is erroneous.

If the deed of November 3d, 1831, had stood alone, or if it had had no other support than mere parol proof of Foster's intention to manumit his slaves, the motion to exclude it from the jury should have been sustained. The court below, however, was bound, in acting on the motion, to look to the other evidence which tended to show Foster's intention to emancipate his slaves according to the law of New York; that he went there and carried the slaves with him for that purpose; that according to the law of New York, thus voluntarily invoked by Foster, he was divested of all title to the slaves thus carried there. That the statute of New York, which is to be 490 regarded as *proven, by its general provisions would embrace this case; that Foster's title was not preserved by the terms of any exception therein. That all these exceptions apply to owners who, whilst in New York, continue to claim the slaves carried there. The deed, taken with the other evidence, might and ought to have been heard by the jury as tending to prove a manumission according to the laws of New York.

The plaintiffs' counsel argued here that Foster's purpose of keeping these parties in Virginia, notwithstanding the statute, 1 Rev. Code, p. 436, § 61, which required them to remove in twelve months after emancipation, was in contravention of public policy; that his scheme of carrying them to New York and emancipating them there, being intended to further his unlawful purpose, must be regarded as in fraud of the law, and therefore null and void in all its parts.

This argument does not apply to the first bill of exceptions, because the jury were to pass on the fraud alleged, and must necessarily have heard all the proof tending to show what was the nature of the transaction, before they could condemn it as fraudulent: The argument applies to the question on the second bill of exceptions only.

In reply it may be said that in a complex transaction like this, embracing various acts prompted by various motives, some of the acts may be valid and others invalid. Thus the law permitted Foster to emancipate his slaves, even within the state, if he had chosen to do so; the mode in which he might have done so is prescribed by statute: Thus there was nothing unlawful in the emancipation of the slaves. There was nothing in the law to prevent Foster from taking his slaves whithersoever he chose for any reason that to him seemed good: To hold otherwise would be an unjust interference with his rights of 491 property. *If then the law allowed emancipation within the state, and moreover allowed Foster to carry the slaves out of the state, it is impossible to perceive a reason why an emancipation without the state, according to the law of the place where made, should not be fully recognized here.

Whenever the alternative is presented that a given transaction against law must either stand and the law be evaded, or the law be enforced and the transaction held for nought, without question the law must prevail. If there were nothing in the statute but § 61, 1 Rev. Code 436, the argument of plaintiffs' counsel would deserve consideration; even then it is by no means clear that the section cited would not require the removal. Looking to § 64, 1 Rev. Code 437, we find a provision embracing the case before us. Foster's scheme can hardly be said to have been an evasion of the law; seeing that if it escaped the operation of the 61st section, it would have been embraced by the more stringent provisions of the 64th section. There is no such conflict between the law and Foster's transaction as makes it necessary, in vindication of the law, to hold that transaction void.

In regard to the first bill of exceptions, I place my opinion upon the ground, that if the jury should believe that Foster voluntarily went to New York, carrying his slaves with him for the purpose of setting them free; that he then and there invoked the aid of the laws to aid him in his purpose; and that in pursuance of those laws they were set free; this freedom should be recognized here; that consequently the evidence tending to prove the facts giving the freedom was properly permitted to go to the jury.

As to the second exception, I am of opinion the evidence did not tend to prove such fraud upon the law as would justify the jury in avoiding the transaction, 492 *and thereby find that the plaintiffs below were slaves; and that the instruction was properly refused.

No case can be found like this in its circumstances; yet general principles applicable thereto may be deduced from some of the cases. In Griffith v. Fanny, Gilm. 143, the owner having permitted his slave to reside in the state of Ohio, a nonslaveholding state, for no merely temporary purpose, it was held that the constitution of Ohio conferred the right of freedom. In Ben Mercer v. Gilman, 11 B. Monr. R. 210,

the master having permitted his slave to go at large in the state of Illinois, (a nonslaveholding state,) and act as a free man, and having recognized his right to freedom, was held to have lost his title to his slave, and the slave to have become free. Where the master allowed his slave to reside in Maryland under circumstances to give the slave his freedom according to the law there, the master was held to have lost his right. Hunter v. Fulcher, 1 Leigh 172.

On the other hand, cases are found in which the owner is held not to have lost title to the slave; as where the slave absconds from the master to a nonslaveholding state; the title in such case being protected by the federal constitution; or where the owner for a temporary purpose takes or sends his slave into a nonslaveholding state; or where under forms of law the courts of nonslaveholding states have adjudged in invitum that the master's right was lost: In all such cases the owner's right has been preserved. See Lewis v. Fullerton, 1 Rand. 15; Maria v. Kirby, 12 B. Monr. R. 542.

A safe, plain and practicable test of these questions will be found by ascertaining whether the owner intended to surrender his right of property under the operation of the laws of a nonslaveholding state; if he so intended, no wrong is done by 493 giving effect to *his intention. If he did not so intend, his right of property should be held unimpaired, whatever may have been done to divest him thereof under color of law in any nonslaveholding state.

I am of opinion to affirm the judgment.

DANIEL, J., concurred in affirming the judgment.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

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494 *Saunders v. The Commonwealth.

October Term, 1858, Richmond.

(Absent LEE, J.)

1. **Official Bonds—Sureties—Bankruptcy.***—The sureties of a public officer are not excluded from the benefit of the bankrupt law of 1841.
2. **Bankruptcy—Discharge in—Liabilities to State—Effect.**†—The states are not subjected to the provisions of the bankrupt law of 1841; and the discharge of a bankrupt does not discharge him from his liabilities to the state.

This was an information in the Superior court of chancery for the Richmond circuit by the Attorney General against John Fisher, late an inspector in the public warehouse in the city of Richmond, and Samuel S. Saunders and others, the sureties of Fisher in his official bond. The object of the proceeding was to recover from Fisher and his sureties the amount of the dues of the commonwealth upon the tobacco stored in the ware-house, which Fisher had failed to pay over. In the progress of the cause Saunders filed a plea that he had been declared a bankrupt, and discharged from the payment of all his debts by the decree of the District court of the United States for the eastern district of Virginia; and he filed with his plea a copy of the record of his discharge. The cause was brought on to be heard upon this plea, when it was overruled by the court. Whereupon he applied to this court for an appeal, which was allowed.

G. A. Myers, for the appellant.
The Attorney General, for the appellee.

DANIEL, J. The only question presented by the appellant, in his peti- 495 tion, and discussed by counsel *here, is whether or no, the order or decree of February 1844 overruling his plea alleging that he had been discharged as a bankrupt, pursuant to the act of congress, establishing a uniform system of bankruptcy, was erroneous.

The fact that the appellant is one of the sureties in the official bond of a public officer, and that the information was filed for the purpose of charging said officer and his sureties by virtue of said bond, with the amount of an alleged defalcation of the former, forms of itself, as I conceive, no objection to the validity of the defence presented by the plea. The debt sought to be recovered, it is true, may, in some sense, be said to be the consequence of the defalcation of a public officer. But the words of the first section of the act, "All persons &c. owing debts which shall not have been created in consequence of a defalcation as a public officer," &c. have, I think, been very properly construed as designed to withhold only, from the defaulting officer, &c. the benefit of the act. United States v. Davis, 3 McLean's R. 483. It is there said that the exception against a defaulting officer is personal, and is intended to withhold from him a benefit given to others, because he is a defaulter. He has not discharged his duty faithfully to the public, and he is,

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***Official Bonds—Sureties—Bankruptcy.**—See monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

†**Bankruptcy—Effect of Statute upon Debts Due to State.**—In *Re* Baker, 96 Fed. Rep. 957, it is said: "Various state courts have held that this exemption from general terms of legislative enactments applies to the states not only in their united, but also in their separate, sovereignties, and that the claims of a state are not within provisions for the release of debts owing by the bankrupt upon his discharge in bankruptcy unless expressly made so. The legislature will not be taken to have postponed the public right to that of an individual except in cases where such purpose has been most plainly manifested. Com. v. Hutchinson, 10 Pa. St. 466; *Saunders v. Com., 10 Gratt. 494;* Connecticut v. Shelton, 47 Conn. 400; Johnson v. Auditor, 78 Ky. 282."

See the principal case also cited and approved in Com. v. Ford, 29 Gratt. 688; *foot-note* to Levasser v. Washburn, 11 Gratt. 572.

therefore, excluded from a discharge for a debt thus incurred. But the policy of the exception does not extend to the innocent surety. He is guilty of no default, and is not censurable for the responsibility incurred; and there is, therefore, no reason why he should be denied a benefit extended to other debtors.

There is another ground, however, on which the action of the chancellor in overruling the plea must be sustained. This is a suit by the state against one of its debtors, and nothing is found in the act of 1841 manifesting a purpose to subject the states to its provisions. The language em-
496 ployed in some of the sections *in reference to the debts, and the creditors to be affected by the act, are broad enough to embrace the states. But I apprehend that a law of this kind will not be construed as intended to bind a state, unless the intent be manifested by express words or irresistible implication. The same policy which protects a state from the consequences attached to laches, and denies all validity to a plea of the statute of limitations when interposed to bar a public claim, would seem to apply to a plea of discharge under a bankrupt law. And in cases arising under the statutes of limitations, it has been well settled by numerous decisions, that, in England, debts due to the crown, and in this country, debts due to the commonwealth, are not within the statutes unless expressly named. This exemption in favor of the crown and of the states is placed on the ground that the legislature shall not be taken to have postponed the public right to that of an individual except in cases where such purpose has been most plainly manifested. McKehan v. Commonwealth, 3 Barr's R. 151; Commonwealth v. Johnson, 6 Barr's R. 136; United States v. Davis, 3 McLean's R. 483; 1 Watts' R. 55; Kemp v. Commonwealth, 1 Heh. & Munf. 85; Nimmo's executor v. Commonwealth, 4 Hen. & Munf. 57.

There are not wanting, however, authorities bearing directly on the question in hand. In an anonymous case reported in 1 Atk. R. 261, where a petition had been filed on behalf of a bankrupt to be discharged from a commitment under an extent of the crown, he having surrendered himself to the commissioners and conformed himself according to the acts of parliament relating to bankrupts, it was decided by the lord chancellor, that the crown was not within the statutes of bankrupts, and therefore that the petitioner could not be discharged from a commitment on behalf of the crown. And Eden, in his work on the bankrupt law, in treating of the effect
497 of an extent on the property *of the bankrupt, says, on the authority of a case in Strange, (to which I have not had it in my power to refer,) that the extent binds the property if issued at any time before actual assignment, because till then the legal property is not out of the bankrupt; and though in the case of a subject the assignment when executed vests the property in the assignees by relation to the act of bankruptcy, so that no lien can be acquired in the mean time, yet as the crown is not bound by the bankrupt acts, such relation does not operate to its prejudice. In 2 Comyn's Dig. 146, the general proposition is asserted that a bankrupt's certificate does not discharge him from a debt due to the crown, because the statutes of bankrupts do not bind the crown. And in the case of Commonwealth v. Hutchinson, 10 Barr's R. 466, the precise question before us was presented on a plea of discharge under the act of 1841; and the court held that the discharge could not protect the bankrupt from the demand of the commonwealth. The court said that the same principle which had been so often asserted with respect to the statute of limitations, applied with full force to the bankrupt law; that the commonwealth was not named in the act, and therefore was not bound.

The force of the presumption, arising from a failure to name the states, that it was not the intention of congress to bind them by the act, is much enhanced by the consideration that provision is made in the act for the manner in which debts, due by the bankrupt to corporations, are to be proved; the 5th section providing that corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer or other officer, who may be specially appointed for that purpose. If it had been the purpose of congress to bind the states by the act, the propriety of some similar provision for the agency by which the debts due to them should be
498 proved, could not have *failed to present itself; and the total absence of any like provision in reference to the states furnishes of itself a strong argument to show that they are not within the contemplation of the act.

Entertaining the opinion, in which I understand the other judges of the court to concur, that the act discloses no purpose on the part of congress to bind the states by its provision, I have not thought it necessary to enquire how far it might be within the constitutional power of congress, by an act plainly indicating such an intent, to interpose the bar of bankruptcy between a state and its debtors. And as the commonwealth made no offer to prove its debt, on the proceedings instituted by the appellant for his discharge, I deem it equally unnecessary to enquire how far such a step if taken might have affected the right of the commonwealth to recover in the information before us.

I think that the order overruling the plea was right, and that the decree should be affirmed.

The other judges concurred in the opinion of Daniel, J.

Decree affirmed.

499 *George v. Strange's Ex'or.

October Term, 1853. Richmond.

Injunctions—Against Judgments—Offsets—Adequate Remedy at Law*—Case at Bar.—An injunction to a judgment at law will not be sustained to allow the defendant at law to set up payments or offsets, which he might have pleaded at law: and if a discovery was necessary to enable him to prove them, he should have filed his bill of discovery in aid of his defence at law, or he should have filed interrogatories to the plaintiff under the statute.

The only question involved in this appeal is, Whether the appellant Edmund George, is entitled to a credit for four hundred and eight dollars and nineteen cents, with interest, the amount of a certain bond of Allen & Walthall, on a judgment obtained against him by the appellees as executors of Gideon A. Strange? Another subject was involved in the controversy in the court below, but no objection is made to the decree which was rendered thereon. The case, so far as it relates to the question above mentioned and is material to be stated, is as follows:

The appellant George filed his bill in the Circuit court of Fluvanna in September 1843, stating that he and said Strange in the latter's life time, had sundry trades which resulted in the purchase by the appellant of three several tracts of land in Fluvanna; one at the price of one hundred and fifty dollars, another at the price of one thousand four hundred dollars, and the other at the price of two thousand seven hundred and fifty-four dollars. That he had paid the purchase money of the two first mentioned tracts to Strange or his executors, and part of the purchase money of the last mentioned tract to Strange. That the executors of Strange had instituted 500 suit on the law side of the *court on the bonds of the appellant for the purchase money of the last mentioned tract, and recovered judgment thereon for five thousand and ninety-eight dollars and sixty-eight cents, to be discharged by the payment of two thousand five hundred and forty-nine dollars and thirty-four cents, subject to a credit of three hundred dollars, December 28th, 1837. That he was entitled to an additional credit of four hundred and eight dollars and nineteen cents, with interest from December 1st, 1837, it being the amount of a bond of Allen & Walthall assigned by the appellant to Strange, of which two hundred dollars was to be retained by Strange in part payment of the bonds on which the said judgment was founded, and the balance was to be handed over to the appellant. That after the death of Strange the appellant called upon one of his executors Magruder, to hand him over the said bond of Allen & Walthall or the money, which said Magruder refused to do, claiming the bond as the property of his testator's estate, by virtue of the said assignment; and that the appellant was unable to establish the fact of the said assignment by any evidence then in his possession; and he therefore called upon the said Magruder to say upon oath if the said bond thus assigned did not come into his possession as one of the bonds of Strange's estate, and if he did not refuse to deliver it to the appellant; and also to state how much of said bond was paid to his testator in his life time, and how much had been received by him since his testator's death: And praying to be allowed credit on the said judgment for the amount of said bond, and for an injunction to further proceedings on the judgment. An injunction was accordingly granted as to the said sum of four hundred and eight dollars and nineteen cents, with interest thereon from 1st December 1837. Official copies, numbered 1, 2 and 3, of the deeds from Strange 501 to the appellant for the said *three tracts of land, were exhibited with the bill. The deeds bear date in 1835 and 1836; that which conveys the last mentioned tract of land being dated the 10th of November 1835. The other exhibits filed with the bill were official copies of the said judgment at law, which was rendered September 5th, 1843, and of two papers purporting to be, one of them a receipt of G. A. Strange to Edmund George, dated the 25th December 1837, for said George's draft on Allen & Walthall for two hundred dollars, being a part of their note to said George for four hundred and eight dollars and nineteen cents, payable 1st instant; also an acceptance of Jacob Shook, held by J. A. Weed for said George's benefit for three hundred dollars, payable 25th-28th instant; for all of which said Strange was to account to said George; the other a letter from G. A. Strange, dated Richmond, 9th January 1838, addressed to Edmund George, Fluvanna county, in which the writer says, "I have succeeded in getting the money from Mr. Weed very promptly."—"Brown & Walthall have not paid me any money. Allen begs for a little indulgence, and assures me it shall be forthcoming. Not needing it, have given them a few days to blow on; especially, as you requested me not to press them. When I get it, will let you hear from me."

The originals of the two last mentioned exhibits are officially certified to be "now on file in the office of the Circuit superior court of law and chancery for Fluvanna county, (on the law side,) in the suit of Strange's ex'ors v. Edmund George." In April 1845 the appellee Magruder, one of the ex'ors of Strange, filed his answer, stating that he did not regard the said George entitled to any further credit on the bonds for which the judgment was recovered than the three hundred dollars allowed by the jury. That at the trial of the suit at law, the appellant filed his

*Injunctions—Against Judgments—Necessity for Taking Advantage of Remedy at Law.—On this question, see principal case cited in *foot-note* to Slack v. Wood, 9 Gratt. 40, where there is a large collection of cases, among others all the cases that cite the principal case.

502 plea, *and the original of the said receipt relied on to support his claim to the credit of four hundred and eight dollars and nineteen cents; but the jury refused to allow any part of said pretended payment embraced in said receipt, save the said sum of three hundred dollars. That respondent found the bond of Allen & Walthall for four hundred and eight dollars and nineteen cents among the papers of his testator, with an endorsement thereon, by which it was regularly assigned by George to Strange; and regarding it as the absolute property of Strange, refused to deliver it to George when demanded by him, unless he would pay the amount of it: That a credit for one hundred and fifty dollars received by Strange in his life time was endorsed on the bond. That respondent had never received one cent on account of it; having learned, upon enquiry as to the condition of the obligors soon after he became executor of Strange, that they were utterly insolvent, and that nothing could be made out of them: and that he was utterly ignorant as to what consideration passed from Strange to George for said bond. The bond is exhibited with the answer. There are two endorsements upon it; one purporting to be an assignment thereof by George to Strange, dated December 25th, 1837, and the other a receipt of Strange for one hundred and fifty dollars on account thereof, dated 20th January 1838. The only evidence in the case bearing on the question now in controversy is the deposition of Morris, who states that a short time after the death of Strange he was in want of money and proposed to borrow it of George, who said he had in the hands of Magruder executor of Strange a draft on Allen & Walthall for four hundred and eight dollars and nineteen cents, which he would let deponent have the use of; that he, the deponent, applied to Magruder for the draft, which he refused to give up, stating that he considered it to be-
503 long to the *estate of Strange. The date of Strange's death does not appear in the record. The only remaining fact appearing in the record which can have any relevancy to the question, is a statement made by the appellant in a supplemental bill offered to be filed in the case in April 1845, that Strange's executors held another bond against him for four hundred and sixty-six dollars and sixty-six and two-third cents, on which they had recovered judgment on the law side of said court; and that at different times, in July and August 1843, he paid the amount of said judgment, except a balance of eighty-four dollars and fifty-three cents, which remained unpaid. On the 6th of April 1846, a final decree was rendered in the case, disallowing the appellant's claim to a credit for the amount of said bond of Allen & Walthall, and dissolving the injunction which had been granted on account thereof: And from that decree this appeal was allowed.

Grattan, for the appellant.
Randolph, for the appellee.

MONCURE, J., after stating the case, proceeded:

The appellees claim the bond of Allen & Walthall as the property of their testator, because it was found among his papers at his death, with an assignment to him from the appellant thereon endorsed. This fact affords a presumption of ownership sufficient to sustain their claim unless repelled by other evidence. The only evidence in the case which tends to repel it, is the receipt of Strange for the draft on Allen & Walthall for two hundred dollars in part of their bond, and his letter of the 9th January 1838. This evidence applies only to two hundred dollars of the bond, and leaves unaffected the claim of the appellees to the residue. There is not enough in the case to make them chargeable with the res-
504 idue, even if it were considered *that their testator received the bond for collection only. There is no evidence to show that the bond was collected, or could have been collected, except as to the credit of one hundred and fifty dollars endorsed thereon; and the appellee Magruder avers in his answer that he had never received a cent on account of the bond, having learned, upon enquiry soon after he became executor of Strange, that the obligors were utterly insolvent, and nothing could be made out of them.

Whether there is enough in the case to make the appellees chargeable with the amount of the draft, might be a question of difficulty. On the one side it might be said that the appellant being largely indebted, and having made various payments to Strange at and after the time of the assignment of the bond, it ought to be presumed that the amount of the draft was accounted for in some of their settlements. On the other it might be said that the burden of showing that it had been accounted for devolved on the appellees; and that not having shown that fact, they are therefore still bound for the amount.

But I deem it unnecessary, if not improper, to decide that question in this case. If the appellant was entitled to any credit on account of the bond of Allen & Walthall, he had a plain and complete remedy at law by pleading payment or setoff in the suit in which the judgment enjoined was recovered. Indeed the appellee Magruder in his answer avers that at the trial of the suit the appellant filed the original receipt and claimed credit for the amount of the bond, but the jury refused to allow it; and he refers to official copies of the verdict, judgment, receipt and letter aforesaid as part of his answer.

It is unnecessary to enquire whether this averment should be taken to be true or not. It is sufficient that the appellant had an adequate remedy at law, and shows no suffi-
cient reason for not having availed
505 himself *of it; or for having a new trial, if he resorted to his legal remedy and was unsuccessful. That a court of equity has no jurisdiction in such a case has been often, and recently, declared by

this court. The cases are numerous, and it is needless to cite them. The only allegation in the bill which can tend to excuse the failure of the appellant to defend himself at law is, that he was unable to establish the fact of the assignment by any evidence in his possession, and he therefore calls upon the appellee Magruder to say upon oath if the said bond thus assigned did not come into his possession as one of the bonds of Strange's estate, and if he did not refuse to deliver it to the appellant when the receipt of Strange was exhibited to him; and also to say how much of said bond was paid to his testator in his life time, and how much to him since his testator's death. But it is not pretended that any of the facts embraced in this allegation, even if they be considered material, came to the knowledge of the appellant after the trial of the suit at law. He then knew that the bond had been assigned to Strange and probably still remained in the hands of Strange's executors, and he could have resorted to a bill of discovery, if necessary, pending the suit at law. That he should have done so, and not suffered the judgment to be rendered at law and then filed his bill, is shown by the case of Faulkner's adm'x v. Harwood, 6 Rand. 125. Indeed a bill of discovery was unnecessary, as a discovery might have been had under the statute, in the suit at law.

I am therefore for affirming the decree of the court below.

The other judges concurred in the opinion of Moncure, J.

Decree affirmed.

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506 *Meem v. Rucker.

October Term, 1853, Richmond.

1. **Injunctions—Against Judgments—Failure to Make Defence at Law—Mistake.***—An injunction to a judgment at law will not be sustained where defendant at law has failed to make his defence at law, from ignorance of the nature of the proceeding against him, and a misapprehension of the steps it was necessary to take in order to subject him.

2. **Same—Same—Averments in Bill—Must Be Proved—Case at Bar.**—The mere averment by a plaintiff in his bill asking for an injunction to a judgment at law, of the facts constituting his excuse for not defending himself at law, is not sufficient; he must prove them.

The case is stated by Judge Lee in his opinion.

Garland, for the appellant.
J. Thompson, for the appellee.

LEE, J. In the month of February 1843 one John J. Morgan of Amherst county, placed in the hands of the appellee Rucker, who was a constable of said county, various claims against different persons, amounting in the whole to the sum of one hundred and fifteen dollars and seventy-nine cents; and took from him a receipt for the same, signed in his official character, and in which he undertook to collect the said claims or to return them to the said Morgan or his agent. At this time a suit was pending in the Circuit court of Amherst county in the name of the appellant Meem, against the said Morgan and another for the recovery of the amount of several notes claimed to be due from the defendants; and in March 1843 the said Morgan having been surrendered by his special bail, confessed judgment for the sum of four hundred and eighty-four dollars and sixty-one cents, the debt claimed, with interest and costs of suit; and
507 having *been prayed into custody, he took the oath of an insolvent debtor and was discharged. Upon taking the benefit of the act for the relief of insolvent debtors, the said Morgan made out a schedule of his effects, in which was embraced his claim against the appellee founded upon the receipt aforesaid. In November 1843 a summons was issued in the usual form at the instance of the appellant, requiring the appellee to appear at the then next term of the Circuit court of Amherst, and to declare on oath whether the said sum of money specified in the receipt, or any part thereof, was due from him to the said Morgan. This summons was duly executed on the appellee more than twenty days before the term; and he making default by failing

*Injunctions—Against Judgments—Necessity of Taking Advantage of Defence at Law—Laches.—On this subject, see *foot-note* to Slack v. Wood, 9 Gratt. 40, where there is a large collection of cases, among others, the cases that cite the principal case. In addition, see, citing the principal case, Hill v. Bowyer, 18 Gratt. 385; Scott v. Hore, 21 Fed. Cas. 836; Harner v. Price, 17 W. Va. 544, 548; Farland v. Wood, 35 W. Va. 462, 14 S. E. Rep. 142.

In Graham v. Citizens' Bank, 45 W. Va. 705, 32 S. E. Rep. 247, it is said: "If he did see these depositions for the first time after adjournment, it does not show that they were before the jury. If he saw them just when the jury returned, that utterly defeats his bill as to this ground of new trial, because the law compelled him to make a motion then and there for a new trial, and state this fact as its ground. He did not. The law is that an application to equity for a new trial cannot be had on merely asking. He must prove good ground. Black v. Smith, 13 W. Va. 780. And the ground must be one which was unknown to the party before adjournment of court. Alford v. Moore's Adm'r, 15 W. Va. 597; *Meem v. Rucker, 10 Gratt. 506;* Faulkner's Adm'x v. Harwood, 6 Rand. 126." See also, Hubbard v. Yocum, 30 W. Va. 748, 5 S. E. Rep. 871.

Also, in Evans v. Taylor, 28 W. Va. 187, it is said: "To entitle a defendant to relief in equity, it devolves upon him to show by the averments of his bill, not only that he has a valid claim or defence, but also that it is such that he cannot avail himself of it fully at law, or if it is a legal defence, that he was prevented from making it at law by fraud, accident or some adventitious cause unmixed with laches or neglect on his part. (Shields v. McClung, 6 W. Va. 79; *Meem v. Rucker, 10 Gratt. 506.*)"

to appear according to its requirement, in March 1844 a judgment was rendered against him for the full amount specified in his receipt as the sum of the claims placed in his hands, with interest and costs. Upon this judgment a writ of fieri facias was sued out, and the appellee then exhibited his bill in the Circuit court of Amherst against James Powell, sheriff of Amherst, the appellant, and the said Morgan, praying an injunction to the said judgment, and for general relief. In this bill he sets out the facts hereinbefore stated; and by way of accounting for his failure to appear and make his defence in the court of law, he alleges that when the summons was served upon him, being ignorant of such proceedings, and supposing that it was a mere proceeding to entitle Meem to the collections as he made them from the debtors, and that it was incumbent on the other party to prove that he had collected before he could be held accountable, it made so slight an impression upon him that he altogether forgot the summons, and by mistake "as aforesaid" failed to attend to the summons; whereby a judgment by default was entered up against him.

The defendant Meem answered the 508 bill, insisting *that he was a bona fide creditor of Morgan, and that in seeking to make his debt he had proceeded strictly and precisely in the manner prescribed by law, and that he had obtained the judgment against the complainant without any pretence of wrong on his part, and without any violation of any agreement made by him, or any omission of what the law required. He denies all knowledge of the justice or invalidity of claims mentioned in the receipt, or of the solvency or insolvency of the respective parties from whom they purported to be due. He insists that the complainant had had a day in court to make his defence, and that it was gross laches and neglect on his part to fail to do so at the proper time; and that the reason assigned for such failure is utterly inadequate and inadmissible: and upon every ground contests the complainant's right to the relief sought. The complainant, in support of the allegations of his bill, filed the depositions of numerous witnesses and other evidence tending to prove that the claims mentioned in his receipt had not been collected by him, either because of the insolvency of the supposed debtors, or from other causes not involving any neglect of duty on his part: and upon the hearing of the cause, the court pronounced a decree perpetuating the injunction, but requiring the complainant to pay all the costs both at law and in chancery. From this decree Meem has appealed to this court.

I deem it entirely unnecessary here to enquire into the regularity of the judgment which was rendered against the appellee, or to consider whether a constable into whose hands claims may have been placed for collection, by a party who afterwards takes the oath of an insolvent debtor, can be so regarded as a debtor of the insolvent in respect of such claims, that a judgment for the amount can be entered up against him as by default at the suit of the 509 creditor, upon his *failure to appear in answer to a summons served upon him. This, if it be available, as well as the insolvency of the parties from whom the debts were due, or the inability of the constable to collect them for any cause, is matter of defence proper and appropriate to the court of law; and if error be committed in its decision, the error must be corrected by resort in the appropriate method, to the proper appellate tribunal. It can constitute no part of the elements of a case for relief in the court of chancery against the judgment which may have been rendered against the party complaining.

Now that a party to whom a day and an opportunity have been allowed to make his defence against a demand set up against him in a court of law, but who has wholly failed to avail himself of them, will not be entertained in the court of chancery on a bill seeking relief against the judgment which has been rendered against him in consequence of his default, upon grounds which might have been successfully taken in the court of law, unless some reason founded in fraud, accident, surprise, or some adventitious circumstance beyond the control of the party, be shown why the defence was not made in that court, is a proposition which has been so repeatedly affirmed that it has become a principle and maxim of equity as well settled as any other whatever. It has been recognized and acted upon in very numerous cases in this court as well of ancient as of recent date. So numerous indeed are they and so familiar, that I deem it entirely unnecessary to cite them here. The rule has its foundation in wisdom and sound policy. It springs out of the positive necessity for prescribing some period at which litigation must cease; and I am utterly unable to appreciate the force or justness of the complaints which in view of its supposed harsh operation in particular cases, have sometimes been made against it. I 510 *think that private right and public interest alike require that it should be adhered to.

In the present case, the defence now sought to be made to the demand against the appellee, is one entirely appropriate to the court of law; and as the appellee has had a day in that court in which he might have set it up, but failed to do so, the only enquiry which we have to make is whether a good and sufficient reason has been shown in excuse for this failure.

And here the first remark which occurs is that no proof whatever is offered by the appellee touching the matter of the supposed excuse. It rests wholly in averment on his part, not proven by any evidence offered by him, nor disproven by any offered by the appellant. Now I apprehend a party seeking relief in a case of this kind, must make out by proof the matter

which he alleges in excuse for his failing to defend himself in the court of law. It might be very unsafe, and open a door to great abuses to establish that he may rest upon his simple allegation and cast the burden of disproving it upon the opposite party.

But conceding for the sake of the argument that the matter of excuse alleged is sufficiently established, we are to enquire to what it all amounts, and whether it is a satisfactory answer to the objection that the appellee failed to defend himself at law. When the summons was served upon him, he was ignorant of the nature of such proceedings, and mistakenly supposed it was a mere proceeding to entitle the appellant to the benefit of the collections as he made them from the debtors named in the receipt, and that the appellant would have to prove he had collected money upon it before he could be held accountable. Certainly there is nothing in this to excuse his total disregard of the summons served upon him. It distinctly apprised him what he had to do in order to protect himself from liability, and if ignorant in the premises 511 *as he professes to have been, he should have sought the aid of counsel, and not relied upon his own vague and imperfect idea of what was intended by the proceeding. Ignorance and mistake of the law can furnish no ground for relief in a court of equity, and least of all in a case in which the party had full opportunity in another forum to protect himself against the consequences of such ignorance and mistake, by the exercise of the most ordinary prudence and the performance of a plain duty. Any other rule would be found idle and impracticable. Nor is the case strengthened by the allegation that because of the meaning he attached to it, the service of the summons made so slight an impression upon him, that he altogether forgot it, and so, "by mistake," failed to attend to it. This was pure negligence, and the court can no more measure the strength of men's memories than it can the size of their understandings. Necessarily in every case where a party disregards the mandate and requirement of the process of a court of justice, it must be at his peril; and this he must be held to know.

In truth the true statement of the grounds upon which relief is sought, is a sufficient exposition of their fallacy and utter insufficiency.

But the hardship of the case in compelling an ignorant and innocent officer to pay out of his own pocket money which he has been unable to collect, without any default on his part, has been strenuously urged by the counsel for the appellee, and the page of the English classics has been invoked in support of the argument. Hard cases, it has been said, are the shoals and quicksands of the law; and there are to be found cases involving doubts and difficulties, and where the exercise of a certain discretionary power would seem to have been deemed necessary and proper, in which the great hardship of the case was referred to 512 as an *element of consideration. But it must be unnecessary to say that in a case of this kind, involving no doubt or uncertainty, where no margin is left for the exercise of any discretion, presenting questions the solution of which is to be found in the application of plain, simple, acknowledged principles of law, the hardship attending it, however great, cannot abrogate those principles, or in the slightest degree affect, alter or modify them. And besides, the inevitable answer to the argument is that the hardship complained of is not to be traced to the administration of justice, but to the party's own folly and gross laches.

Recurring to the numerous decisions which have been made in this court in similar cases, I am utterly unable to perceive how the decision in this case can be reconciled with the principles which they have so repeatedly affirmed. I am therefore of opinion to reverse the decree of the Circuit court with costs to the appellant, to dissolve the injunction, and to dismiss the bill.

The other judges concurred in the opinion of Lee, J.

Decree reversed.

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513 *French v. Townes & als.*

October Term, 1853, Richmond.

(Absent LEE, J.)

Deed of Trust and Power of Attorney Executed on Same Day—Construction—Case at Bar.—P being indebted to F, who was also bound as his surety to a considerable amount, and being in very embarrassed circumstances, left his home in Virginia. F went after him for the purpose of obtaining satisfaction for what was due to him, and indemnity for his liabilities, and found him in Baltimore. There, in the absence of all his other creditors, and without request from them, P executed to F two papers on the same day, and acknowledged them before a justice of the peace; but the certificate was not directed to the clerk of any court for the record of the papers. One of the papers was a power of attorney by which P authorized F to take possession of his whole estate, to sell it, and from the proceeds pay any of P's debts for which F was surety, and any debt which P owed F or which F had assumed to pay for P. The other was a deed of trust, by which P conveyed to F nearly all his property, with power to sell and to pay first certain specified creditors, and second all other creditors of P. The first class included all the debts for which F was the surety of P. F proceeded to sell the property and pay debts. T, one of the creditors of the first class in the deed, filed a bill against F for an account of the trust subject, and F in his answer insisted that he was authorized under the power to sell to pay first his own debts, but admitted that as to the debts for which he was surety, they stood on an equal footing with the other creditors of the first class. HELD:

*For monographic note on Assignments for the Benefit of Creditors, see end of case.

1. **Same—Construed as One Instrument.***—That under the circumstances, the deed of trust did not revoke the power of attorney; but that the two papers were to be construed as one instrument.

2. **Same—Same—Effect as to Surety of Debtor.**—That taking the two papers as constituting one instrument, F was entitled upon the construction of the instrument, to be first paid any debt due to him from P, or which he had assumed for P, and any debt for which he was bound as P's surety.

3. **Same—Same—Admissions in Answer—Effect.**—But that F having admitted in his answer, that as to the debts for which he was surety he stood upon the same footing as the other creditors of the first class in the deed of trust, he is bound by that admission, and must be paid ratably with them.

514 *4. **All Parties Claiming under One Instrument—Recordation.**— That all the parties claiming under the instrument, there cannot be a question among them whether it was properly admitted to record.

5. **Deeds of Trust—Sale of Trust Subject to Beneficiary by Mistake of Fact†—Case at Bar.**—Amongst the property conveyed to F was a horse which P had bought of T at the price of four thousand dollars. T bought the horse from F at three thousand five hundred dollars, more than he would have given for him but for the understanding that it should be credited on the bond of P for four thousand dollars; and F supposing that T's portion of the trust fund would be equal to this amount, agreed that it should be so credited. In fact it was more than T was entitled to. Both parties having acted under a mutual mistake, the arrangement will be disregarded, and F will be charged with the real value of the horse at the time of the sale, and T will be allowed his *pro rata* share of the whole debt of four thousand dollars, and charged with the value of the horse as so much received by him out of the trust fund on account of his debt.

6. **Same—Liability of Parties Raised by Pleading—Need Not Except to Commissioners' Report.**—The questions as to the construction of the instruments and the liabilities of F and T for the horse, being presented by the pleading and proofs, no exception to the commissioner's report was necessary to raise them for adjudication.

7. **Same—Commissioner's Report‡—Case at Bar.**—In the absence of any proof to the contrary, it was proper for the commissioner, in stating the amount of the different debts secured by the deed, to take the amount stated in the deed.

In the year 1841 Thomas Payne of Greensville county, being greatly embarrassed and having left the state, James S. French, who had advanced money and incurred liabilities for him, went in search of him; and meeting him in Baltimore, an arrangement was made between them, in pursuance of which Payne executed to French two instruments, both bearing date the 1st day of December 1841, and acknowledged before two justices of the peace in the city of Baltimore on the next day: But the certificate of the justices does not say the instrument was certified in order to be recorded. Both instruments were lodged in the clerk's office of the County court of Greensville at a quarter to five o'clock on the 6th of December 1841, and admitted to record. One of these instruments is a power of attorney from Payne to French authorizing French to collect all moneys due to Payne, 515 placing him in *possession of all his property real and personal, with power to sell the same publicly or privately, for cash or on a credit; to pay all debts or claims which might be presented against him; and further authorizing French out of the proceeds of any sales he might make, first to pay and discharge all claims for which French was his security or endorser, and also such as he then owed to French or of which he may have assumed the payment.

The other instrument is a deed of trust from Payne to French as trustee to secure several creditors therein named in the first place, and then all other creditors of Payne. The deed conveyed a tract of land called Bonner's, several slaves, all his horses, and amongst them a horse named Wellington, the stock, corn, &c. on the plantation, and an interest in other slaves or the proceeds of their sale, in Alabama. Of the debts first secured by this deed French seems to have been liable for about two thousand seven hundred and ninety-three dollars and forty-nine cents; and there were debts for which he was not liable, amounting to seven thousand six hundred and sixty-two dollars and thirty-three cents: And all these debts were placed upon an equality in the deed, and were to be first paid.

***Two Deeds—Construed as One Instrument.**—See, on this subject, *foot-notes* to Anderson v. Harvey, 10 Gratt. 386; Walden v. Walden, 33 Gratt. 88.

†**Equity Practice—Mistake—Mutual.**—See principal case cited in Harner v. Price, 17 W. Va. 548.

‡**Commissioner's Report—Exceptions—When Necessary—When Not.**—In a note by the editor to Warren v. Warren, 2 Va. Law Reg. 196, it is said: "The exception in every case should be specific. This is illustrated in the application of the rule to commissioners' reports. In Simmons v. Simmons' Adm'r, 33 Gratt., at p. 457, it is said: 'Exceptions to masters' reports are said to be in the nature of special demurrers, and the party objecting must point out the error, otherwise the part not excepted to will be taken to be admitted.' 2 Dan. Chanc. Prac. (4th American Ed.) 1316, note 4, and cases there cited. In all cases where exceptions are necessary to all [they are not necessary where the error is apparent on the face of the report. Cookus v. Peyton's Ex'or, 1 Gratt., at p. 453; *French v. Townes, 10 Gratt., at p. 526*; 2 Rob. Prac. (Old) 383, and cases there cited; Simmons v. Simmons' Adm'r, 33 Gratt., at p. 456, and cases cited], they should specify with reasonable certainty the particular grounds of objection relied on, so as to enable the opposing party to see clearly what he has to meet, and the court what it has to decide. Crockett v. Sexton, 29 Gratt. 46." See also, citing the principal case, Hyman v. Smith, 10 W. Va. 317.

Pleading—Cross Bills.—On this subject, see, citing the principal case, *foot-note* to Moorman v. Smoot, 28 Gratt. 80; Atwood v. Shenandoah Valley R. Co., 85 Va. 973, 9 S. E. Rep. 748. See also, Faulkner v. Davis, 18 Gratt. 652.

In July 1842 Edmund Townes and two others filed their bill in the Circuit court of Greensville county, which was afterwards removed to Southampton county, in which they state, they sold to Payne a horse named Wellington for four thousand dollars, for which he executed to them his bond; and that Townes was his endorser on a note to Joseph Allen for one thousand five hundred dollars. That these debts were secured by the deed of trust aforesaid. That a very considerable property real and personal had gone into the possession of French, and that he had thus far rendered no account, as far as they knew, of his transactions. That they are advised he
516 must account as trustee, as the *deed was a revocation of the power of attorney. That they had purchased from French the horse Wellington, whose value had been almost destroyed by the bad management of Payne whilst in his possession, and had agreed to credit Payne's bond for the amount of three thousand five hundred dollars. That they did this not because they thought the horse worth this amount, but because they were informed by French that matters were turning out badly; and they were willing to credit Payne's bond for three thousand five hundred dollars for the horse; reducing their debt to five hundred dollars. That nothing had been paid on the debt due to Allen, whilst they are informed that nearly all the other debts secured by the deed have been paid. And making French and the other creditors mentioned in the deed, parties, they pray for an account of the trust subject, and the manner in which it has been disposed of. That French's account with Payne may be settled; that the rights of all the parties may be settled; and for general relief.

French answered the bill. He states, that about the close of the year 1841 Thomas Payne was indebted to him to a very considerable amount; and that he was also Payne's security to several persons whom he names and who are cestuis que trust in the deed: And being so involved as security for Payne, defendant went in search of him to try and get security. That as he was about to leave Petersburg to look for Payne, who was said to be somewhere in the north, he was accosted by Edmund Townes, one of the plaintiffs, and induced to accept his claims against Payne with a view to try and have them adjusted; and defendant took them to do the best he could with them, although he was himself so largely involved for Payne. That defendant made several trips to the north, and incurred several hundred dollars additional expense in finding Dr. Payne, whom he at length met with in Baltimore. Payne
517 then *readily undertook to secure defendant, and with a hope of doing so, executed the two papers referred to in the bill: The interest of the plaintiff Edmund Townes being put on an equal footing with the claims for which the defendant was bound as security.

The defendant further states that he sold the land called Bonner's under the power of attorney, the proceeds of which he insists he had a right to dispose of as authorized under the power of attorney; and after this sale he had both the power of attorney and the deed of trust recorded. That there were many executions out against Payne which bound the personal property, and which therefore he was obliged to apply to their satisfaction; and there was left but a small amount, very insufficient to pay the debts for which he was bound as surety.

As to the debt to Allen, defendant insists that Townes had discharged it by the payment of one thousand dollars. And as to the debt for four thousand dollars, he insists that plaintiffs purchased the horse at three thousand five hundred dollars, with a full knowledge of the trusts of the deed. He says that he was not at that time fully informed of the extent and condition of the property conveyed to him in trust, or of the liens thereon, or the debts which were to be paid; and that he believed at that time that there would be that amount due to the plaintiffs; though he is now satisfied that they are not entitled to receive so much upon a pro rata distribution of the trust fund. He says he is ready and willing to account.

The other defendants answered: And in April 1843 the court made an order for an account. In this order it is stated that the bill is taken for confessed as to Richard Darden one of the defendants, though he had answered.

The commissioner made a report, to
518 which no exceptions *were filed by any party. In this report in stating an account of the moneys which came to the hands of French, he charges the Bonner land at two thousand five hundred dollars. This land French sold to Avent for one thousand five hundred dollars, and a note on the Merritts for about one thousand two hundred dollars, which had been assigned by Payne to Avent, and which French took without recourse, though Avent informed him that the Merritts claimed to have set-offs against it. Avent sold the land on the same day for two thousand five hundred dollars, and the commissioner states, that the parties considered that a fair price for the land. It was sold by French on the day on which the deed of trust was recorded, but at an earlier hour of the day. The account between Payne and French showed that Payne was debtor on the 1st of August 1842 in the sum of three hundred and eighty-six dollars and sixty-one cents; and in the distribution of the fund he was not allowed a credit for this sum or any part of it. In the distribution of the fund, one statement is made including the proceeds of the Bonner land, and another in which it is excluded. Allen's debt and the debt due to Simmons one of the creditors mentioned in the deed of trust, are credited as of the amount stated in the deed; and the commissioner states that no evidence was offered by either party as to their respective amounts: Though as to the latter, he was

informed by French, and had heard, that probably a large portion of the debt would be received from another source. Allen's debt was then in suit and was defended on the ground that it was usurious. The proofs were that soon after the plaintiffs purchased the horse Wellington from French, one of his legs gave way in training before he had a trial run, and that he was not then worth more than five hundred dollars; but it did not appear that he was injured before 519 the sale. The commissioner *states that it was asserted in his presence at the time of taking the accounts, by Edmund Townes, that he gave more for this horse, in consideration of its being endorsed on the note against Payne, than he would have given for him in money, believing the prospect of securing his debt bad. To which the commissioner understood French as assenting: But he immediately after said he would make no admission which would impair his legal rights: And there was proof of a similar admission by French at another time. It was however, the opinion of the person who ran the horse in 1841 that at the time the plaintiffs bought him he was worth what they gave for him.

The cause came on to be heard in May 1845, when the court held that French must account for the proceeds of the Bonner land as a part of the trust fund, and that he was not entitled to call upon the plaintiffs to refund to him on account of the sale of the horse Wellington; and there was a decree distributing the fund among the creditors provided for in the deed of trust; thus excluding French from any participation on account of the debt due from Payne to him. But the amount decreed to be paid to Townes on account of the debt due to Allen, was not to be paid until there was produced proof that Townes had paid the money to Allen. French applied to this court for an appeal from this decree, which was allowed.

Stanard, for the appellant.
Gholson, for the appellees.

ALLEN, J. In the year 1841 Thomas Payne of Greensville county, being greatly embarrassed, and having left the state, the appellant, who had advanced money to and incurred liabilities for him, went in search of him, and meeting him in Baltimore, an arrangement was made between them, 520 out of which this *controversy has arisen. Payne executed to the appellant two instruments, both bearing date on the 1st day of December 1841, and acknowledged before two justices of the peace in the city of Baltimore on the next day. Both instruments were lodged in the clerk's office for Greensville county at a quarter to 5 o'clock on the 6th of December 1841, and admitted to record. One of these instruments is a power of attorney from Payne to the appellant, authorizing the latter to collect all moneys due to his principal, placing the appellant in possession of all his effects, real and personal, with power to sell the same publicly or privately, for cash or on credit, and empowering the appellant to pay all debts or claims which might be presented against him; and further authorizing the appellant, out of the proceeds of any sales he might make, first to pay and discharge all claims where the appellant might be his security or endorser, as well also as such as he then owed the appellant or such as he may have assumed the payment of.

The other instrument is a deed of trust from Payne to the appellant as trustee, to secure sundry creditors therein named in the first place, and then all other such claims as should be presented to the appellant against the grantor. The deed conveyed a tract of land known as Bonner's, sundry slaves, all his horses, amongst them a horse named Wellington, the stock, corn, provisions, &c. on his plantation, some slaves in Alabama, and his interest in the slaves sent to the south and sold or to be sold by John M. Rives. Amongst the creditors named, the appellant appears from the recitals in the deed to have been liable as endorser for the debts due to Peyton Mason, to Francis Epps, to Sturdivant & Hurt, and to Hurt, Patterson & Wills, whose debts, with interest to the 1st January 1842, amount, according to the commissioner's report, to two thousand seven hun- 521 dred and ninety-three dollars *and forty-nine cents. The debts for which it does not appear from the deed that he was responsible, amount, according to the report, to seven thousand six hundred and sixty-two dollars and thirty-three cents. All these debts were by the deed placed on an equality and to be first paid; and the private debt to the trustee for cash advanced or debts assumed and any other debts for which he might be liable as endorser of Payne, if there were any such debts, would be postponed until the preferred creditors were satisfied.

It does not appear from the record that the creditors of Payne had any notice of the execution of the deed of trust, that any negotiation had preceded the execution thereof, or that they were consulted in relation thereto. All that the record discloses in regard to this matter, is the statement of the appellant in his answer, that as he was about to leave Petersburg to look for Dr. Payne, who was said to be somewhere in the north, he was accosted by E. Townes, one of the appellees, and induced to accept his claims against Payne, to try and have them adjusted; that he took them to do the best he could with them, although he himself was so largely involved for Payne. That he made several trips to the north, incurred several hundred dollars additional expense in finding Payne, whom he afterwards met with in Baltimore. That Payne then readily undertook to secure him; and with the hope of doing so, executed the power of attorney and deed of trust; the interest of the said appellee Townes being placed on an equal footing with the claims which the appellant was bound for as security. Upon this state of facts the question arises, What was the effect of these instru-

ments executed under the circumstances aforesaid; and what rights did the appellant acquire under them? The two instruments were executed at the same time
522 and acknowledged on *the same day. By one the appellant is constituted attorney in fact, by the other trustee. Both refer in a great measure to the same property. In my view of this transaction, it is unnecessary to determine whether the power of attorney in this case was revocable in the life time of the principal or not; there has been no attempt to revoke it unless the deed of trust is to have that effect; and to give it such effect would, it seems to me, do violence to the intention of the parties. The appellant was the confidential friend, as well as the security and individual creditor of the debtor; he alone seems to have been active in seeking out the debtor for the purpose of procuring some indemnity for himself and other creditors. It was natural that he should seek for, and that the debtor in consideration of the burden he was assuming, should agree to give him some priority over other creditors: And that appears to me to be the effect of the two instruments. Executed under the circumstances disclosed by the record, they should be construed together as one instrument; and so interpreted as to give effect to the obvious intent of the parties. That it was the intent of the parties to give the appellant the preference which the power of attorney secures, is fairly to be inferred from the circumstances adverted to; and it would be unreasonable to suppose that Payne contemplated a revocation by the deed of trust. The conduct of the parties would be inexplicable upon that supposition. They intended that both instruments executed at the same time should be operative; and construing them together, the property of the debtor would be applied first to the debts due to or assumed by French and those for which he was bound as security; secondly, to the debts specified in the deed, except those for which the appellant was bound; and thirdly, to the general creditors. But the appellant by his answer admits that in taking
523 the *deed of trust, the interest of the appellee E. Townes was placed on an equal footing with the claims for which the appellant was bound as security; and as all the enumerated debts are placed on the same footing by the deed of trust, they are all equally entitled to the benefit of the admission contained in the answer: And this circumstance reconciles the apparent incongruity between the two instruments. The power of attorney secured a preference as well for the debts for which he was liable as security, as for the individual debts. But in drawing the deed of trust, that preference as to security debts was waived; otherwise there would have been no necessity for naming them in the deed of trust; but the individual debts not being enumerated in the deed, were left to be paid in the order prescribed by the power of attorney.

The intention of the parties and the contract to be implied from that intention as deduced from the two instruments, having according to the admissions of the answer, been modified so far as respects the security debts, it was not in the power of the appellant afterwards to enlarge his rights by selling the land known as Bonner's as attorney in fact and not as trustee: And the enumerated creditors have the right to participate in the proceeds of the land as well as the residue of the trust fund. According to this view the appellant should be charged with the whole amount received or collected by him out of effects of Payne not embraced in the deed of trust, together with the proceeds of the trust fund, and credited with the amount then due to him or the payment of which he had assumed, and has actually discharged. The residue should be applied to the debts enumerated in the deed of trust.

It appears from the commissioner's report that the balance due to French on private account was three hundred and eighty-
524 six dollars and sixty-one cents. *The account as settled shows upon its face that all the items of the private account are charged after the 1st of December 1841. There is no exception to the report, and the charges may have been for payments assumed by him at or before the date of the power of attorney. But as there must be a recommitment of the report, leave should be given to exhibit the facts in regard to these credits.

Treating the power of attorney and the deed of trust as one instrument, and construing them together, no question can arise under the registry laws. The appellant being a party to each cannot allege any defect in the recordation, if one existed, and the other creditors claiming the benefit of his act and thereby recognizing his agency, are equally bound with him, and the rights of all are to be deduced from both instruments viewed as one transaction, to which all were parties directly or through their agent.

Another objection to the decree arises out of the transactions of the parties respecting the horse Wellington. It appears that Payne on the 8th of October 1841 executed to the appellees Edmund Townes, William Townes and James Williamson, his single bill at twelve months for four thousand dollars, being for the price of the horse sold to him by said appellees. This was one of the debts enumerated in the deed of trust. The bill alleges that after the execution of the deed, and the appellant had taken possession and disposed of most of Payne's property, they took of him this horse, his value having been much impaired by bad management whilst in Payne's possession, and agreed to credit the four thousand dollar bond by three thousand five hundred dollars, reducing their debt to five hundred dollars. This they did, not because they thought the horse worth anything like that sum, but because they were informed by the appellant that matters were turning out badly.

525 *The appellant in his answer, avers

that Edmund Townes purchased of him as trustee the horse at the price of three thousand five hundred dollars, and instead of paying the money to him, a credit was entered on the note. That at that time he was not fully informed of the condition of the effects conveyed to him or the debts to be paid; and he admits that he did believe at that time, there would be that sum due to the holder of the note. And he insists that the said appellees should be required to refund the excess of the three thousand five hundred dollars over the pro rata proportion they would have been entitled to receive on the note for four thousand dollars out of the trust fund. The horse was resold on the 14th December 1841, and a credit of that date entered on the note for three thousand five hundred dollars; and the bill of sale given by the appellant to said appellees recites that the price of the horse was endorsed as a credit on the note.

The fair inference from the pleadings and exhibits, confirmed by the admission of the appellant before the commissioner, though partially retracted, is, that the purchase of the horse was made, and the price of three thousand five hundred dollars agreed on, under the impression that the amount would be allowed to go as a credit on the bond. The appellant, in his answer, states that he believed at the time that there would be that sum due to the holder of the note; and it is fair to presume the impression was created in part by his own representations. It would not, under such circumstances, be just to said appellees to hold them responsible for the price agreed to be allowed under such circumstances. Both parties acted under a mistake. The trustee was in error as to the value of the trust fund and the amount of charges upon it, and the appellees dealt with him for a portion of the trust property, knowing it to be 526 such, under the mistaken *impression that they would be entitled to as much as the price they agreed to pay. The sale at this conjectural price should be disregarded in the settlement of the trustee's account, and the trustee should be charged with the actual value of the horse at the time of the repurchase by the appellees, and the appellees should be allowed their pro rata share of the whole debt of four thousand dollars, charging them with the actual value of the horse, as so much received by them out of the trust fund on account of said debt: And if the sum so received exceeded their proportion, they should be required to refund the excess for the benefit of the other creditors secured by the deed.

The questions as to the construction of the instruments and the liability of the appellant for the price of Wellington, and the obligation of the said appellees to refund, are presented by the pleadings and proofs, and no exception to the master commissioner's report was necessary to raise them for adjudication.

Some other errors are assigned relating to particular items of the commissioner's report, and in regard to matters which may have been influenced by extraneous evidence; and there being no exception to the report, they cannot properly be noticed here. Of this description is the charge against the trustee of two thousand five hundred dollars for the Bonner land. The commissioner states, and the deposition of Avent returned with and referred to in the report, proves, that the appellant received one thousand five hundred dollars in cash and a check on bank, and took from Avent the purchaser a bond on the Merritts for one thousand and sixty-six dollars, in payment of the residue of the balance of the price. That the appellant was told offsets were claimed by the obligors, and the appellant took the bond without recourse: and the commissioner states that the bond was in suit. The land was sold for upwards of two thousand six hundred 527 *dollars, but the commissioner has charged the trustee with two thousand five hundred dollars; the parties considering that a fair price for the land, Avent having resold it on the same day for that sum. If the trustee received a bond in payment without recourse, it might have been a question whether he was not chargeable for the nominal amount. But the parties themselves, according to the commissioner's statement, considered the sum of two thousand five hundred dollars a fair price for it; and the sale by Avent shows that it was; and the trustee has made no objection to the price charged, though he insists upon his right to apply it under the power of attorney to the debts for which he was liable. I think he was properly charged with this sum.

So in regard to the objection that Simmons did not prove his debt. The deed acknowledges the debt to be about one thousand dollars. The commissioner took the amount from the deed, as he was bound to do in the absence of any proof of payment. But he says he was informed by the appellant, that probably a large portion of the debt would be received from another source. There does not appear to have been any doubt of the existence and amount of the debt; and no payment being proved, he could do no less than report it. But as all the parties interested in the trust fund, the appellee as well as the appellant, have an interest in reducing the amount of the debts to be charged upon it, leave should be given to reduce the debt by showing any payment. As the case must go back and be recommitted for other purposes, no delay will be occasioned thereby.

The remaining errors assigned, that the suit of Allen v. Townes had not been decided, and that the decree erroneously stated the pleadings, are not objections of which the appellant could complain. It would have been more regular to require the 528 appellant to *pay the money to a receiver, to abide the event of the suit referred to, and to give leave to the creditors entitled to the fund to apply for their portions thereof, if the recovery of the debt by Allen should be entirely defeated.

As to the pleadings taking the bill for confessed as to Darden who had filed his answer, he has not complained, and the decree upon his claim conforms to the allegations of his answer; he is allowed to come in upon the trust fund for the whole amount of his debt, and that was all he asked. I think there was no error in the decree for which it should be reversed at the instance of the appellant, except in the refusal to allow him a credit for the whole amount of the individual debt due to him by Thomas Payne on the 1st December 1841, or the payment of which he had assumed for said Payne on or before that day, and which he shall have actually discharged; and in failing to dispose of the price or value of the horse Wellington as above indicated. For these errors I think the decree should be reversed, and the cause be remanded.

The other judges concurred in the opinion of Allen, J.

Decree reversed.

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Fraudulent and Voluntary Conveyances, appended to Cochran v. Paris, 11 Gratt. 348.

I. GENERAL ASSIGNMENTS.

It is a perfectly well-settled principle of law, as we shall see further on, that assignments for the benefit of creditors, which stipulate for the release of the debtor by the creditors from further liability for the residue of their demands, must convey all, or substantially all, of the debtor's property. Long v. Meriden Britannia Co., 94 Va. 594, 27 S. E. Rep. 499; Skipwith v. Cunningham, 8 Leigh, 271; Gordon v. Cannon, 18 Gratt. 387, and *note*; Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464. See *infra*, this note, "Stipulations for Release of Debtor."

The conveyance need not show on its face that it embraced all the estate of the grantors but this fact may be shown by other evidence. Long v. Meriden Britannia Co., 94 Va. 594, 27 S. E. Rep. 499.

Debtor Cannot Impeach His Own Deed.—But a debtor cannot set up the fact, against a deed executed by him for the benefit of his creditors, that it is invalid because all his property is not conveyed thereby, and thus enable him to take advantage of his own wrong. Robinson v. Mays, 76 Va. 708.

1. WHEN DEED IS ABSOLUTE—DISTINGUISHED FROM DEED OF TRUST.—When a grantor in a deed of trust conveys all of his property to a trustee for the benefit of his creditors, with power to sell the same immediately, and authorizes the trustee, after paying the expenses of the trust and discharging the lien on the property, to make a *pro rata* distribution of the proceeds among the grantor's creditors, and reconvey to him whatever may remain unsold in case the property shall be more than sufficient to pay all debts, such deed is absolute, and the conveyance is to a trustee for the purpose of raising a fund with which to pay debts, as distinguished from a deed of trust in the nature

of a mortgage to secure the payment of debts, and amounts to an appropriation of the property; so far as may be necessary to the accomplishment of that purpose. Sandusky v. Faris (W. Va.), 38 S. E. Rep. 563.

II. WHO MAY ASSIGN

1. CORPORATIONS.—An insolvent corporation has a right to assign all of its property for the benefit of its creditors generally. Indeed, it would be strange if this were not true. After a corporation has become insolvent, being unable to proceed with its business, the only proper thing to be done is to dispose of its property to those entitled to receive it; and the best and fairest way to do this is to assign its property to a trustee for the benefit of its creditors. Lamb v. Cecil, 25 W. Va. 288.

It was held in Farmers' Bank v. Willis, 7 W. Va. 31, that the bank has the right to assign its assets for the benefit of its creditors, independently of the act of the general assembly of Virginia, passed in 1866 on that subject.

Power of President and Cashier.—Where the management of the affairs of a corporation is intrusted by its charter to the board of directors, the president and cashier, unless specially authorized by the charter, have no power to assign the *choses in action* of the corporation to its creditors as security for payment of a precedent debt of the corporation without authority from the board of directors. The assignment so made is not merely voidable, but absolutely void. Lamb v. Cecil, 25 W. Va. 288.

Insolvency—Duty of Directors—Preferences.—In the event of the insolvency of a corporation, it is the duty of the directors to act in the discharge of their duties with prudence, vigilance and fidelity, and to apply its assets, for the benefit of the creditors in preference to the claims of stockholders and other persons. Planters' Bank v. Whittle, 78 Va. 737.

Directors Not Creditors' Trustees.—Directors of a corporation are not technically trustees for the creditors, in the event of its insolvency, nor are they bound to apply the assets ratably among the general creditors. Planters' Bank v. Whittle, 78 Va. 737.

Trust Fund for Creditors.—A deed of trust conveying all the property of a corporation for the benefit of all who are or may be holders of stock of a certain issue, does not create a trust fund for the benefit of the creditors of the corporation, though it contains the resolution of the stockholders authorizing it, reciting that it was deemed expedient to execute a mortgage and issue bonds, the money to be derived from the sale thereof to be used to pay the outstanding debts of the corporation and for improvement, and though it contains a provision that the trustee deliver a certain amount of the bonds to the corporation, to be applied to the payment of their outstanding indebtedness, and such other uses as the directors shall determine. Roanoke St. Ry. Co. v. Hicks, 96 Va. 510, 32 S. E. Rep. 295.

Common Seal Affixed — Presumption — Officers. — When the common seal of the corporation appears to have been fixed to a deed of assignment for the benefit of creditors, and the signature of the proper officers are proved, the courts ought to presume, that the officers did not exceed their authority; and the seal itself is *prima facie* evidence that it was affixed by proper authority. The contrary must be shown by the objecting parties. Lamb v. Cecil, 25 W. Va. 288.

Copy of Deed Sufficient.—Where a deed of assignment was made for the benefit of the creditors of the corporation, a copy of said deed from records of deeds of the county may be exhibited with the bill by the trustee with the same effect, as if he had filed the original. Lamb v. Cecil, 25 W. Va. 288.

2. PARTNERSHIPS. — A partnership in failing circumstances may make an assignment for the benefit of its creditors: and if two or three partners convey all of the effects of the firm and the individual property, and the third has none, they may require a release both of the firm and all the members, by the creditors who accepted the deed. Gordon v. Cannon, 18 Gratt 387.

Partner's Implied Authority to Assign.—"It is settled law that one partner has no implied authority to make a general assignment of the effects of the partnership for the benefit of creditors, unless his copartner is absent so that he cannot be consulted, or is incapable of giving his assent or dissent. Such an assignment is a virtual dissolution of the partnership; it supersedes all the business of the firm, as such, and takes from the control of each partner all the property with which the business is conducted; nor do the purposes of the business require that such power should be implied." Hill v. Postley, 90 Va. 200, 17 S. E. Rep. 946.

"Thus far there is no American case which says that one partner, when the other members are present, may, without their consent, make a general assignment of the firm effects to a trustee for the benefit of creditors." Livingston v. Russell, 1 Am. Lead. Cas. 447.

Right of Surviving Partner to Assign—Preferences.—Upon the death of one member of an insolvent firm the survivors may make a valid general assignment of the firm assets for the benefit of the firm creditors and give preferences. Patton v. Leftwich, 86 Va. 421, 10 S. E. Rep. 686. See also, Galt v. Calland, 7 Leigh 594.

One Partner Absent from State.—It is settled law that one partner, in the absence of his copartner, has the right to convey the assets of the firm (other than real estate) to trustees to secure the creditors of the partnership. But when all the partners are present they have a right to be consulted in giving a preference to particular creditors, but when one or more are out of the state, the resident partner is the sole manager of the firm, and may convey the assets and choses in action to creditors of the company to discharge firm debts, and hence may give preferences. Williams v. Gillespie, 30 W. Va. 556, 5 S. E. Rep. 210; Millhiser v. McKinley, 96 Va. 207, 35 S. E. Rep. 446.

Resident Partner May Assign Personalty but Not Realty.—It is perfectly well settled that a resident partner, who has the management of all the business of the company (the other parters residing out of the state) has the power to deliver over and assign the goods and choses in action of the company to the creditors of the company, in discharge of the partnership debts. But as to real estate, which passes by deed only, the deed of one partner passes nothing but his own interest therein, because the deed of one partner is not the deed of the others, nor has he, as a partner, the power to execute the deed for them. McCullough v. Sommerville, 8 Leigh 415.

Effect of Seal.—Though one partner cannot in general bind his copartner by deed, so as to make it operative at law as a deed, yet an assignment by one partner of the effects of the firm for the benefit of creditors, which would be lawful if there were

no seal, will not be allowed *in equity* to be defeated by the circumstance of a seal being annexed to the instrument. It *seems*, moreover, that an assignment of partnership effects, made by one partner by instrument under his seal, would, *at law*, be as effectual and binding on the other partner, as if there were no seal. M'Cullough v. Sommerville, 8 Leigh 415.

Deed Indiscriminate—Reformation.—Where partners make an indiscriminate conveyance of individual and social property to pay individual and social debts, or make a deed purporting to convey only individual property, the deed will not be held fraudulent either in fact or in law, but equity will reform the deed according to the probable intent of the grantor, and the justice of the case, and apply the property to pay the respective creditors, observing any order and preference established by the deed. McCullough v. Sommerville, 8 Leigh 415; Gordon v. Cannon, 18 Gratt. 387, and *note*.

Deed to Be Construed Distributively.—An assignment for the benefit of creditors, made by the members of a private banking firm in Virginia, and conveying all their individual and firm property for both individual and firm debts, will not be held fraudulent on its face because it appropriates partnership assets to pay individual debts in preference to partnership debts, where the state court has decided that such deeds should be construed distributively, and the partnership assets should be applied to partnership debts, and the individual assets to individual debts; and also where both the assets and the debts were so mixed that it was impossible, at the time of the assignment, to distinguish between them. Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354; McCullough v. Sommerville, 8 Leigh 415; Gordon v. Cannon, 18 Gratt. 387.

Presumption as to Individual Assets—Release Clause.—Where an assignment is made by a firm of the social assets, to pay the social debts, containing a release clause, but conveying no property of the individual creditors, the law does not presume that such property existed and was withheld from the creditors, but the presumption is in favor of innocence and honesty. Long v. Meriden, etc., Co., 94 Va. 594, 27 S. E. Rep. 499.

Partnership, Individual Debts—Export Evidence.—Where an attempt is made to prove, by an expert accountant, that debts constituting a part of the consideration for an assignment of partnership interests, were individual, and not partnership debts, by showing that there was no entry of them upon the partnership books, and the expert testifies that the books were so poorly kept that they did not show fully or satisfactorily the transactions of the firm, and that he was unable to find any entry on the books of the debts named, and also failed to find on the books any entry of other debts which were admitted to be partnership debts, then such evidence is insufficient to prove that the debts were individual, and not partnership debts, so as to invalidate the assignment as a transfer by one partner of his interest in an insolvent partnership to his copartner so as to enable the latter to make a valid assignment of the partnership effects to pay his separate creditors, no fraud having been shown in the making of such assignment. Millhiser v. McKinley, 98 Va. 207, 35 S. E. Rep. 446.

Individual Debts—Denial in Answer—Effect.—When the answer to a bill filed to set aside an assignment of partnership interests denied that a part of the debts specified as consideration for the assignment were individual debts, as charged, and averred that they were partnership debts, and the bill waives an answer under oath from the defendants, nevertheless the denial of the answers constitutes a traverse of the allegations of the bill, and puts the complainants upon proof of the charge. Millhiser v. McKinley, 98 Va. 207, 35 S. E. Rep. 446.

III. WHO ARE INSOLVENTS.

"To render a person insolvent under the statute (Code of West Virginia 1891, § 2, ch. 74), he must be one whose whole property will not pay all his debts. Simply because a trader fails to meet all his obligations when due, though his assets be more than ample to pay them all, would be too harsh and rigorous a construction of the intention of the legislature." Wolf v. McGugin, 37 W. Va. 552, 16 S. E. Rep. 797; McArthur v. Chase, 13 Gratt. 683.

IV. WHO MAY BE ASSIGNEE.

Effect of Trustee Being a Secured Creditor.—The fact that the trustee in a deed of assignment is a creditor secured therein, does not affect the validity of the deed, but only the power of the trustee to act. If the debtor does not object to his acting, it is no reason why another creditor should object: if that is the only objection to him. Gordon v. Cannon, 18 Gratt. 387; Johnston v. Zane, 11 Gratt. 564.

V. WHAT PASSES BY ASSIGNMENT.

Claims against Government.—Under the words in a deed of trust, "all debts due the grantor," a claim which the grantor has on a foreign government for damages for detention of a ship will pass. Griffin v. Macaulay, 7 Gratt. 476.

Rights of Action for Damages.—The rights of action transferred to the assignee are rights of action founded upon beneficial contracts made with the bankrupt, where the pecuniary loss is the substantial and primary cause of action, and for injuries affecting his property, so far as they do not involve a claim for personal damages. Dillard v. Collins, 25 Gratt. 343.

Claims for Personal Damages.—Under the English Bankrupt Act and the Bankrupt Act of 1841, and the present act, the rights of action which are transferred to the assignee do not include claims for personal damages. Dillard v. Collins, 25 Gratt. 343.

Crops.—A deed of trust which, among other things, conveys growing crops of wheat, rye and oats, and which is not to be enforced for two years from the date thereof, is not *per se* fraudulent as to creditors. Cochran v. Paris, 11 Gratt. 348; Dance v. Seaman, 11 Gratt. 778.

Unpaid Subscriptions to Stock.—A deed of trust for the benefit of creditors which includes, "all the estate, property, and rights, and credits" of the grantors, "of every kind and wherever situated," enumerating many by name, and followed with "all means payable to the company, whether on tolls or assessments on stock for the company or otherwise" will pass the title to the unpaid subscriptions to the capital stock of the company to the trustees, with power to collect and receive the same, when authoritatively called for, to the extent of the rule made. Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866.

Claims Not Yet Due.—A conveyance by an insolvent firm to a trustee, of all debts due them, under the special provisions of the deed, was held only to pass the balance of a debt, after offsetting a claim not yet due, held by the debtor against the firm. Fry v. Boyd, 3 Gratt. 73.

Right to Perfect Mechanic's Lien.—The right to

perfect an inchoate mechanic's lien, existing in a contractor under § 2475 of the Va. Code, passes by his general assignment for the benefit of his creditors to his assignee, and the assignee, on the completion of the work, may take the necessary steps to perfect the lien, although the statute is silent on the subject. Bristol, etc., Co. v. Thomas, 93 Va. 396, 25 S. E. Rep. 110.

Property Held in Trust.—A debtor may make a conveyance to a trustee for the benefit of his creditors of property held by him nominally in trust for others, but which is equitably and in reality his own, and withhold property nominally his own, but which in reality belongs to others. Brown v. Putney, 90 Va. 447, 18 S. E. Rep. 883.

Assignment to Secure Future Advances—One may not only convey or transfer a chose in action or any other property to secure an existing indebtedness, but it is also well settled that he may likewise do so for the purpose of securing future loans and advances. Didier v. Patterson, 93 Va. 534, 25 S. E. Rep. 661; Alexandria Savings Institution v. Thomas, 29 Gratt. 483.

Indebtedness of a Partner to Firm.—Under the words in a deed of trust, "all debts due the grantor," the indebtedness of a partner of the grantor to the partnership will pass. Griffin v. Macaulay, 7 Gratt. 476.

Bond of Partner Does Not Pass.—If a bond be executed to the acting partner of a late mercantile company, a deed from such partner conveying all his real and personal property, in trust, for the payment of his debts and those of the company (without mentioning the debts due to the company), is not to be considered an assignment of such bonds to the trustee. Anderson v. Bullock, 4 Munf. 442.

Property Exempt by Law.—A failure to convey property exempt by law does not avoid the deed on the ground that it does not convey all or substantially all of the property of the debtor. Such property as is exempted under the poor debtor's law and the homestead exemption need not be conveyed. Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464.

It is not a badge of fraud, that the assignor, in an assignment for the benefit of creditors, omits to include a small amount of exempted personalty. Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329.

Borrowed and Collected Money.—Where checks and drafts were sent by a bank to a banking firm for collection, but before they were received the firm was dissolved by the death of a partner, it was held that the surviving partner should have either returned the checks or remitted the proceeds to the bank, and that the firm's assignee for the benefit of creditors must pay over such proceeds to the bank. First Nat. Bank of Alexandria v. Payne, 85 Va. 890, 9 S. E. Rep. 153.

Property Must Be Included in Assignment.—Under a bill filed by general contract creditors, asking the court to administer the trust created by a general assignment by their debtor for the benefit of creditors, the court has no jurisdiction to subject the property not included in the assignment, and on which the plaintiffs have acquired no lien. Spindle v. Fletcher, 93 Va. 186, 24 S. E. Rep. 910.

Assignor Competent Witness.—The assignor in a deed conveying property for the benefit of creditors, is a competent witness to prove that the property levied on by the sheriff is the same property conveyed by the deed. Kevan v. Branch, 1 Gratt. 275.

1. CONFLICT OF ASSIGNMENT LAWS.

Voluntary Assignments.—A voluntary assignment for the benefit of creditors of personal property and choses in action wherever situated or found, will pass to the assignee property situated in another state, unless it comes in conflict with some positive or customary law of the state or place where the property or *choses* may be located or found, and the assignment will have priority over an attachment by a creditor of the foreign state, which was served on the debtor of the assignor after the assignment, and before the debtor had notice of it. But this rule does not apply in the case of involuntary and coercive assignments. Bank of the Valley v. Gettinger, 3 W. Va. 309; Harrison v. Bank, 9 W. Va. 424.

Foreign Assignment—Priority.—Certain debtors, residents of North Carolina, convey their property to trustees to secure the payment of their debts. The terms of the trust deed were broad enough to include certain *choses in action* due from debtors in Virginia, and secured on lands in the state of Virginia. The deed is recorded in North Carolina *before* an attachment is levied on the *choses* in Virginia in the hands of the debtors, but is not recorded in Virginia until *after* the attachment is levied. The court held, however, that the deed, though not recorded in Virginia until after the attachment was levied, will, nevertheless, take priority over the attachment. Gregg v. Sloan, 76 Va. 497.

Foreign Assignment—Construction.—A deed of assignment, after conveying the debtor's property, and describing it by its location, which is Virginia, adds, "and it is further expressly understood, that if through accident or forgetfulness or inadvertence the grantor has omitted to mention any claim or property that the same shall be understood as being conveyed hereby to the said trustees, to all intents and purposes as fully as if specifically mentioned." *Held*, that certain goods, situated in Ohio, would pass by the deed. Wickham v. Martin, 18 Gratt. 427, and *note*.

Effect upon Debts Due Assignor in Foreign State.—A deed of assignment conveying all the debtor's property, and valid according to the laws of the state where the assignment is made, will operate to pass property, belonging to the debtor wherever situated, hence it will have priority over an attachment against the creditor in the foreign state, which is levied *after* recordation in the home state, but *before* recordation in the foreign state. Gregg v. Sloan, 76 Va. 497.

VI. REQUISITES AND VALIDITY.

1. JOINDER OF WIFE OF ASSIGNOR.—In Virginia the wife must join in an assignment of real estate to bar her dower. Reynolds v. State Bank, 6 Gratt. 174.

2. SCHEDULE OR INVENTORY.

Assignment Valid before Schedule Annexed.—A deed conveys a stock of goods of the grantors, and refers to a schedule of the goods, which when made out is to be considered as annexed to the deed, and to be taken as a part of it. Though the schedule is not annexed before the recording of the deed, the deed is valid without it. Gordon v. Cannon, 18 Gratt. 387.

Effect Where There Is No Specification in Deed or Schedule.—A deed of trust is not fraudulent because it conveys among other things, cattle, household and kitchen furniture, and debts, without specification, either in the deed, or by schedule accompanying it, and provides that the assignor shall remain in possession of the property for six months, and

that no creditor shall have the benefit of the trust, who does not release the assignor from any further liability in three months. Kevan v. Branch, 1 Gratt. 274.

Necessity of Inventory.—The failure of a trustee to take an inventory of the goods conveyed, does render the assignment void; this circumstance goes to the conduct of the trustee, and not to the provisions of the deed. Williams v. Lord, 75 Va. 390.

Improper to Sell Schedule Itself.—Where a variety of property is embraced in a schedule, a sale, not of the property specifically, but of the schedule itself, is a violation of duty on the part of the sheriff; and the purchaser at such a sale, if he acquired the legal title, would, in a court of equity, be treated as a trustee for the benefit of those interested. Clough v. Thompson, 7 Gratt. 26.

Omission of Schedule as Evidence of Fraud.—"No irresistible inference of a fraudulent intent is deducible either from a provision postponing a sale of property for a reasonable length of time, and reserving the use thereof to the grantor in the meantime, or from the omission to annex a schedule of the property, or from all these circumstances combined." BURKS, J., in Brockenbrough v. Brockenbrough, 31 Gratt. 580; Young v. Willis, 82 Va. 298.

3. ACCEPTANCE.

Acceptance Unnecessary.—It is not necessary to the validity of a deed of trust, that it should be executed by the *cestui que trust*. The deed operates to pass the legal title so soon as executed by the grantor and trustees, and can only be avoided by the dissent, express or implied, of the *cestui que trust*. Skipwith v. Cunningham, 8 Leigh 271; Merchants' Bank of Danville v. Ballou, 98 Va. 112, 32 S. E. Rep. 481.

A deed of assignment passes the legal title as soon as executed by the assignor and the trustee, and can be avoided only by dissent, or disclaimer, express or implied, of the trust creditors. Acceptance by the *cestui que trust* is unnecessary to the validity of the deed. Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. Rep. 611.

Though a deed is executed without the knowledge of the creditors secured by it, yet if, when informed of its execution, they assent to it, it is valid. Cochran v. Paris, 11 Gratt. 348; Dance v. Seaman, 11 Gratt. 778.

Knowledge of Execution—Presumption.—It is not necessary to the validity of a deed of assignment, that it should be executed by the trustee or beneficiaries, or even that they should know of its existence before the intervention of subsequent claims. The deed being apparently for the benefit of the creditors thereby secured, their acceptance of it will be presumed until the contrary appears. If any of them refuse it, their refusal will relate back to the date of the deed, and avoid it *ab initio* as to them. Evans v. Greenhow, 15 Gratt. 156.

Ratification or Assent Necessary.—But where a deed of assignment has had no sanction by previous assent or subsequent ratification, it is no shield of the property against subsequent levy of executions by the creditors named therein, or other creditors, nor any effectual impediment to the *bona fide* conveyance by the grantor for valuable consideration. Spencer v. Ford, 1 Rob. 648.

Presumption as to Assent—Effect of Subsequent Assent.—"The American authorities upon this subject are somewhat variant, but the great majority of them concur in principles fatal to the pretensions of the appellant. Some hold, that where a deed is beneficial to the grantee, his assent will be presumed until the contrary appears. 2 Conn. Rep. 633; North v. Turner, 9 Serg. & Rawle 244; Gray v. Hill, 10 *Id.* 436; Smith v. The Bank of Washington, 5 *Id.* 318; Wilt v. Franklin, 1 Binney 502. Some declare that the subsequent assent of the grantee renders the deed good by relation. 7 Peters 609, 2 Gallison 557. And this would seem conformable with the doctrine as to an escrow, where the second delivery relates back to the first and avoids all mesne acts. It seems to have very generally prevailed in relation to assignments for the benefit of creditors, whose subsequent assent has been deemed sufficient to give effect to the deed *ab initio*. 9 Mass. Rep. 307, 13 Johns. Rep. 285; Marbury v. Brooks, 7 Wheat. 556; Brooks v. Marbury, 11 Wheat. 78; Nicoll v. Mumford, 4 Johns. Ch. Rep. 529." TUCKER, P., in Skipwith v. Cunningham, 8 Leigh 271.

4. NECESSITY OF RECORDATION.—A deed of assignment for the benefit of creditors is void in Virginia as to creditors until recorded. Va. Code, ch. 114, § 1; Shufeldt v. Jenkins, 22 Fed. 359.

Recordation Unnecessary Where Possession Is Given.—But a deed that conveys and *delivers* personal property to trustees for the purpose of paying debts therein specified, and under which the trustees take possession of the property and proceed to sell it for the purposes of the trust, is valid as a transfer thereof and need not be recorded to protect the property against the demands of creditors who had not acquired liens upon it before the transfer was consummated. Clark v. Ward, 12 Gratt. 440.

By Whom Deed Recorded.—A deed to a trustee for the benefit of creditors may be admitted to record by a clerk who is the trustee therein, and acted as the counsel of the grantor in its preparation, as the act of admission is ministerial only. Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329.

5. DELIVERY.—Delivery of a deed of assignment, it would seem, is absolutely essential. It is the final act, the formal declaration of the grantor's determination to complete the conveyance or enter into the contract. Skipwith v. Cunningham, 8 Leigh 271.

VII. PREFERENCES.

1. AT COMMON LAW.—"Nothing can be more firmly settled than at common law, apart from the statutes of bankruptcy, a debtor, even in failing circumstances, until his property is specifically bound to the satisfaction of his debts, has an absolute right to dispose of it at his pleasure. He may give undue preference to a part of his creditors, or even to one, and such preference cannot be treated as a fraud." Savings Inst. v. Thomas, 29 Gratt. 490.

At common law, a man, though insolvent, until a lien became fixed in some way on his property, might, without fraud, convey or transfer it in trust, and prefer one creditor over another, even though it left no estate to pay other creditors. Wolf v. McGugin, 37 W. Va. 552, 16 S. E. Rep. 798; Harden v. Wagner, 22 W. Va. 356; Skipwith v. Cunningham, 8 Leigh 271. But see Code of West Virginia, § 2, ch. 74, which has changed the common law in this respect in so far as it relates to insolvent debtors.

When a deed of assignment for the benefit of creditors is unaffected by the bankrupt law, a partner has a right to convey partnership property to secure firm creditors, and in doing so to make preferences among them. Millhiser v. McKinley, 98 Va. 207, 35 S. E. Rep. 446.

It is firmly settled that a debtor in failing circumstances may make a valid assignment of his whole

estate (subject, however, to existing liens thereon), for the benefit of his creditors, in such order of priority as he may choose to prescribe in the assignment; and though his estate be insufficient for the payment of all his debts, he may lawfully subject it, in the first place, to the payment in full of such of his debts as he may choose to prefer, and then to the payment *pro rata* of the claims of such of his creditors as may, in a reasonably limited period accept the terms of the assignment and release him from all further and other liability on account of said claims. And such an assignment may be valid, even though it does not direct any surplus which may remain after satisfying the claim of the accepting and releasing creditors to be applied to the payment of his other debts, or any of them; or even though it directs any such surplus to be paid to the debtor himself. Gordon v. Cannon, 18 Gratt. 387, and *note*.

The following language was used by JUDGE RIELY in Long v. Meriden, etc., Co., 94 Va. 596, 27 S. E. Rep. 499: "If anything can be considered as settled by repeated judicial decisions and lapse of time, it may be considered as thoroughly settled in this state that a deed of assignment by a debtor of his property for the payment of his debts, which stipulates for his release by his creditors from personal liability for such part of their debts as the fund may not discharge, though giving preferences to some of the creditors, is valid. It is too late at this day to depart from a doctrine so consistently recognized and uniformly enforced by this court, and to question the validity of such a deed of assignment."

It is settled that a debtor, in failing circumstances, may make a valid assignment for the benefit of creditors, and may make preferences as between them. To make such preferences is neither illegal nor immoral when not prohibited by statute. Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329; McCullough v. Sommerville, 8 Leigh 415; Evans v. Greenhow, 15 Gratt. 156.

It was held in Skipwith v. Cunningham, 8 Leigh 271, that notwithstanding certain creditors, that are embraced in a deed, will have preference to the judgment creditor, yet the latter has a right to an account of the trust fund, and to the payment of his debt out of the surplus, if any, after satisfying the preferred creditors and those who accede to the composition.

As a debtor has the right to pay one creditor in preference to another, so he may, without the imputation of fraud, secure one creditor to prevent another from getting an advantage. Williams v. Lord, 75 Va. 390.

In Virginia, the fact that an assignment for the benefit of creditors contains preferences is not in itself a badge of fraud rendering the assignment invalid. Talley v. Curtain, 54 Fed. Rep. 43.

Preference Conditional—Release as Condition.—A debtor in failing circumstances may convey his whole property for the payment of his debts, giving preferences among his creditors, and require a release from such as accept it. Gordon v. Cannon, 18 Gratt. 387.

Must Be Plainly Expressed.—But preferences in assignments for creditors must be distinctly declared, as they are disfavored in law. Goodman v. Henry, 42 W. Va. 526, 26 S. E. Rep. 528.

Knowledge of Creditors Unnecessary.—A deed of trust to secure certain preferred creditors, is not fraudulent *per se*, because made without the knowledge of the creditors. Dance v. Seaman, 11 Gratt. 778.

A debtor, on the verge of insolvency, and in the absence of statute, may execute a deed of trust to secure *bona fide* creditors, in preference to others, and provide that he shall remain in possession for three years, by paying interest on the secured debts, even though executed without the knowledge of or consultation with the creditors secured, and the deed will not be fraudulent in itself. Sipe v. Earman, 26 Gratt. 563; Young v. Willis, 83 Va. 291. See also, Norris v. Lake, 89 Va. 513, 16 S. E. Rep. 663.

Effect of Statute of Fraudulent Conveyances upon Rule.—The act for the prevention of fraudulent conveyances does not apply to those made *bona fide* for a valuable consideration, and does not prevent a debtor, in failing circumstances, from preferring one class of creditors to another, the legality of which arrangement is too well settled to be called into question now. Skipwith v. Cunningham, 8 Leigh 271; McCullough v. Sommerville, 8 Leigh 415. In the latter case it was held to be entirely fair and legal for a debtor in failing circumstances to prefer, in payment, one just creditor, or set of creditors, to another; nor is his right to do so, at all weakened or impugned by the maxim that equality is equity. It cannot interfere with the right of creditors to make preferences.

Impeaching Creditor Does Not Acquire Priority.—A creditor who successfully impeaches one of the preferred claims, does not thereby obtain the preference originally given such claim, for the rule is well settled, that the creditor cannot impair or displace any prior, valid, subsisting lien. Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. Rep. 611; Hulings v. Hulings, 38 W. Va. 357, 18 S. E. Rep. 620.

Unconditional Preference of Surety.—An assignment for the benefit of creditors, cannot unconditionally prefer a creditor, who is surety on the note of the assignor, where it does not appear that he has paid, or will be required to pay, as surety, the debt for which he is bound. Stoneburner v. Motley, 95 Va. 784, 30 S. E. Rep. 364.

Preference of Debt Barred by Limitations.—An assignment for the benefit of creditors may prefer a debt barred by the statute of limitations at the time of its execution. Stoneburner v. Motley, 95 Va. 784, 30 S. E. Rep. 364.

2. UNDER STATUTES.—Under Va. Code 1873, ch. 57, § 63, which provides that liens or encumbrances giving preferences to creditors, except to secure debts contracted or money borrowed at the time of creating the lien or encumbrance, shall enure to the benefit ratably of all the creditors of the company existing at the time, there may be an assignment of the assets of the company, at their face value, in discharge of the indebtedness, when no lien is created by so doing. Planters' Bank v. Whittle, 78 Va. 737.

Notice of Insolvency Immaterial.—If a party, giving a preference is insolvent that is enough to avoid such preference under § 2, ch. 74, of the West Virginia Code of 1891, and lack of notice by the creditor receiving the preference is immaterial. The party dealing with the seller must inquire as to the status of the party with which he deals. The public law tells him this. Wolf v. McGugin, 37 W. Va. 552, 16 S. E. Rep. 797.

The act of February 12, 1866, which requires banks of the commonwealth to go into liquidation, the banks being insolvent, and execute deeds conveying all their property, including debts due to them, to trustees for the payment of debts, forbids and pre-

vents all preferences among the creditors of the bank. Exch. Bank v. Knox, 19 Gratt. 739.

Form of Instrument Immaterial.—The form of the instrument or act by which the preference forbidden by the statute, whether by deed of trust, assignment, or sale is accomplished is immaterial, so that it results in such preference, it being the design of the statute to prevent an insolvent debtor from devoting his property to work a preference among his creditors. The contention that the statute only applies to general assignments for creditors, and not to a transfer of a specific property for particular debts, is unfounded, and whether partial or general, the statute applies. Code W. Va. 1891, § 2, ch. 74; Wolf v. McGugin, 37 W. Va. 552, 16 S. E. Rep. 797.

Courts of Equity.—A court of equity will take charge of property transferred or charged to give a preference to creditors contrary to statute and apply it *pro rata* upon all debts, whenever it shall become necessary to resort to this to defeat a preference. Wolf v. McGugin, 37 W. Va. 552, 16 S. E. Rep. 797.

3. CORPORATIONS.—An insolvent corporation, like an insolvent individual, may give preferences to particular creditors in a general deed of assignment of all its property for the benefit of its creditors, upon its ceasing business. Pyles v. Riverside, etc., Co., 30 W. Va. 123, 2 S. E. Rep. 909, and *note* 2; Burr v. McDonald, 3 Gratt. 215.

It was held in Burr v. McDonald, 3 Gratt. 215, that a deed by a private corporation in trust to pay its debts, which gives preferences in favor of some of its stockholders for the suretyship of the corporation, if made prior to the Act of Feb. 15, 1837, Sess. Acts 1836-7, ch. 84, § 17, p. 79, is legal and valid.

a. CHARTERED COMPANIES.—Preferences by chartered companies are forbidden. Va. Code 1887, § 1149.

b. STARE DECISIS.—"Where there was a decision in Virginia, seventeen years before the formation of this state, holding that an insolvent corporation, having ceased to do business, could prefer creditors, and at the time of such decision there was a statute in existence in Virginia, but not applicable to the case decided, which denied to a *mining* or *manufacturing* corporation the right to make any incumbrance preferring a creditor, and such statute continued until 1863, after the formation of this state, when it was repealed by implication, and there has been no statute in force in this state for twenty-four years denying the right of a corporation to make preferences, the law, as thus settled in Virginia, is the law of this state, and cannot be changed except by the legislature. The decision thus rendered has become a rule governing property, and it is not in the power of the court to change it." Pyles v. Riverside, etc., Co., 30 W. Va. 123, 2 S. E. Rep. 910, and *note*.

c. EFFECT OF STATUTES.—It was held in Pyles v. Riverside, etc., Co., 30 W. Va. 123, 2 S. E. Rep. 909, that there was nothing in any of the statutes of West Virginia that would take away the common-law right of a corporation, that is insolvent, to prefer a creditor the same as a natural person could do. But the statute is now changed on this subject. See latter clause of sec. 2, ch. 74 of the Code W. Va. 1891 (Acts 1891, ch. 123).

Under Acts 1863, ch. 83, § 18, declaring that a corporation may do for the purposes for which it is incorporated, and in the transaction of its proper business, but subject to the restrictions contained in the act, "whatever would be lawful for a natural person to do," an insolvent corporation may make preferences in a deed of trust for the benefit of its creditors. Ruffner v. Welton Coal & Salt Co., 36 W. Va. 244, 15 S. E. Rep. 48.

4. TRUSTEES.

When Trustee May Prefer Himself.—Where the deed of trust authorizes it, the assignee or trustee may first pay any debt that is owing to him from the debtor. French v. Townes, 10 Gratt. 513.

Right to Preference Waived.—But although a trustee is entitled to a preference as to some of his claims, by the express provision of the trust deed, still an admission in his answer, in a suit by another creditor, that he is not entitled to such preference, will constitute a waiver of it. French v. Townes, 10 Gratt. 513.

5. DIRECTORS.

Directors May Prefer Themselves.—It is not only settled that directors may make preferences between creditors, but such preferences may be made in their own favor when they themselves are creditors of the corporation. Of course in such cases they must act with the utmost good faith, and the transactions to be upheld must be free from the taint of fraud or suspicion. Planters' Bank v. Whittle, 78 Va. 737.

Bank Insolvent—Right of Directors to Preference.—But it seems that where a bank is insolvent, and should have closed its doors, a director has no right to draw his money and thus prefer himself to the other creditors for whom he was acting as trustee. Lamb v. Laughlin, 25 W. Va. 322.

6. SURETIES OF DEBTOR.

Preference to Sureties of Debtor.—Where a deed of trust is made to secure certain creditors, for some of whose debts sureties are bound, and the deed directs the trustees so to dispose of the trust property that no surety in the said debts shall suffer or be injured on account thereof, then the debts for which the sureties are bound are preferred debts, and to be first satisfied. Miller v. Holcombe, 9 Gratt. 665; French v. Townes, 10 Gratt. 513.

VIII. RESERVATIONS AND STIPULATIONS.

1. RESERVATIONS FOR BENEFIT OF ASSIGNOR GENERALLY.—Where a deed of assignment for the benefit of creditors reserves to the assignor a power inconsistent with the avowed object for which the deed is made, it is null and void, as to creditors and purchasers. Lang v. Lee, 3 Rand. 410; Didier v. Patterson, 93 Va. 534, 25 S. E. Rep. 661.

A deed of assignment for the benefit of creditors that reserves to the grantor power to use and enjoy the property conveyed, that is inconsistent with the avowed object of the assignment, is void as to creditors. Saunders v. Waggoner, 82 Va. 316. But see Young v. Willis, 82 Va. 291.

An assignment for the benefit of creditors that reserves any benefit to the grantor himself, or introduces limitations and contingencies such as will give him control over the property or its proceeds, so as to enable him, in effect to defeat the conveyance; or to reserve the power to revoke it; or to stipulate for the maintenance of the grantor or his family, or for his employment at a fixed salary, will render the deed fraudulent. Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464.

"The doctrine in Virginia, settled by a long and uninterrupted line of decision, is that while there may be provisions in a deed of trust of such a character as of themselves to furnish evidence sufficient

to justify the inference of a fraudulent intent, yet this cannot be so except where the inference is so absolutely irresistible as to preclude indulgence in any other. Hence, provisions postponing the time of the sale, and reserving the use of the property to the grantor meanwhile, though perishable and consumable in the use, permitting sales on credit, for the payment of surplus after satisfaction of creditors secured, the omission of a schedule or inventory, and the like, have been regarded as insufficient to justify the court in invalidating the deed for fraud in point of law. The fraudulent intent is held not to be presumed, even under such circumstances, and in its absence the fact that creditors may be delayed or hindered is not of itself sufficient to vacate the instrument, while the right to prefer one creditor over another is thoroughly established. Dance v. Seaman, 11 Gratt. 778; Brockenbrough v. Brockenbrough, 31 Gratt. 590; Young v. Willis, 82 Va. 293." Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. Rep. 354.

Sale by Grantor When Required by Creditors.—A deed of trust for the benefit of creditors does not reserve to the grantor an interest and control over the property inconsistent with its avowed objects and adequate to their defeat, because, after conveying certain property to the trustee, it directs him, "when so required by the creditors, to take charge of said property, and sell the same at public auction." Stoneburner v. Motley, 95 Va. 784, 30 S. E. Rep. 364.

Reservations by Corporation of Benefits.—A deed of trust executed in Virginia by the president, under authority of a resolution of the directors of the corporation created under the laws of Virginia, for the purpose of transacting an express and transportation business, and domiciled in said state conveying all its property to trustees for the benefit of its creditors, reserving the enjoyment of the property, under the title of the trustees, from its date, Sept. 20, until Nov. 1, following, unless the trustees should be required by some creditor secured to take possession, and requiring the trustees, out of the proceeds of property, to pay all debts that might become due from the company, to its officers and agents, and all amounts of indebtedness that the company might incur to railroad companies for transportation, over and above the net receipts for such transportation for a like period, and further reserving to the grantor absolutely all tolls and compensation for the transportation of express matter not yet delivered to the consignees not transported under existing contracts, is to be construed by the laws of Virginia, and so construed, is valid. Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866. See also, Railroad Co. v. Glenn, 28 Md. 287, which was decided especially in the light of Virginia decisions.

Reservation for Small Debts.—Where the assignor reserved a small sum for the purpose of paying small unliquidated claims, such reservation has been sustained, and held not to vitiate the assignment. Skipwith v. Cunningham, 8 Leigh 271, 31 Am. Dec. 642.

Reservation of Bare Maintenance, etc., Valid.—A settlement which gives to the grantor a bare maintenance with his wife, for his life, and provides that the property shall not be subject to his debts thereafter contracted, does not vest him with such an interest in the property as can be subjected to satisfy such after-contracted debts. Johnston v. Zane, 11 Gratt. 552.

a. STIPULATIONS FOR EMPLOYMENT OF GRANTOR.—A deed of assignment for the benefit of creditors, which authorizes the trustee to run and operate the business for a limited time, and to employ agents to aid him in disposing of the stock, is not fraudulent *per se* because the trustee employed the grantor as his chief salesman to dispose of the stock of goods. Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464.

A deed, executed by the grantors, that required and provided, that they should be appointed the agent of the assignee, to remain in the store, and to sell the stock of goods until the whole shall be disposed of, and to collect the assets due the firm, was upheld in Janney v. Barnes, 11 Leigh 100.

b. RETENTION OF POSSESSION BY GRANTOR.

Retention of Possession for Three Years.—A deed of trust for the benefit of creditors which reserves to the grantor the right to remain in possession of the property for three years, and during that time to charge the property, to an indefinite extent, with such advances as might be made by the trustees, is void as to creditors thereby postponed. Sheppards v. Turpin, 3 Gratt. 373.

Continuance in Possession for Six Months.—But in Kevan v. Branch, 1 Gratt. 374, the deed of trust was held not to be fraudulent, though it stipulated that the assignor should be allowed to remain in possession of the assigned cattle and household furniture for six months.

Retention of Possession for Eleven Months.—A deed conveying property to a trustee for the benefit of creditors, that provides for the retention of possession by the grantor, and that he shall receive the profits until the maturity of certain bonds, eleven months later, and in case of default in payment at the end of that time, then, at the request of any creditor, the trustee may sell the property, does not invalidate the deed. Such a provision is common in deeds of trust to secure creditors. The length of retention of possession is not unreasonable. Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 339.

Retention of Possession for Sixteen Months—Perishable Property.—On the other hand, where a deed of trust to secure creditors, conveys perishable property, such as wheat, to a trustee, with a provision that the grantor shall remain in possession for sixteen months, is a reservation inconsistent with the avowed purpose of the deed, as giving the grantor the opportunity to defeat the rights of creditors, and is void, because it is a possession with *jus disponendi*. The retention of possession of property for proper purposes, is different from the retention of the property with the power, express or implied, to dispose of it for the grantor's own benefit. Such power is inconsistent with the character of the instrument, and is tantamount to a power of revocation. Gardner v. Johnston, 9 W. Va. 403.

Retention of Possession for Three Years.—But the reservation, in a deed to secure creditors, of the right to manage the property therein conveyed for three years before sale, the rents and profits during that time to belong to the creditors secured, is not such an unreasonable restraint upon the power of sale as to constitute a fraud. Noyes v. Carter (Va.), 23 S. E. Rep. 1.

Retention until Default of Payment.—A trust deed made by an insolvent debtor conveying his household and kitchen goods and furniture to secure a *bona fide* debt due from him to his mother, and payable at six months, with a provision in the deed that the grantor shall retain the possession, use, and enjoy-

ment of the property until there is default in the payment of the debt at its maturity, and the trustee shall be required by the creditor to sell the same, is a valid conveyance. Klee v. Reitzenberger, 23 W. Va. 749.

"It is settled in this state and in Virginia, that no conclusive inference of an intent to defraud is deducible from a provision in a trust deed postponing a sale of the property conveyed for a reasonable length of time, and reserving the use of it to the grantor until the sale, even though a portion of the property may be perishable in its nature, and consumable in the use." SNYDER, J. (dissenting). Landeman v. Wilson, 29 W. Va. 702, 2 S. E. Rep. 203; Brockenbrough v. Brockenbrough, 31 Gratt. 590; Young v. Willis, 82 Va. 298.

In all, or at least most of the cases in Virginia and in West Virginia, where the deeds of trust have been held fraudulent on their faces, it appeared that the property conveyed, or a part thereof, was of a perishable nature, and the deed contained a clause permitting the debtor to retain possession and control. The deeds in the following cases were held void: Lang v. Lee, 3 Rand. 410 (a general deed of assignment, but stipulated that the grantor should remain in possession and make sales); Sheppards v. Turpin, 3 Gratt. 373; Spencer v. Bagwell, 6 Gratt. 444; Addington v. Etheridge, 12 Gratt. 436; Kuhn v. Mack, 4 W. Va. 186; Gardner v. Johnston, 9 W. Va. 403; Landeman v. Wilson, 29 W. Va. 702, 2 S. E. Rep. 203.

c. POSTPONEMENT OF SALE.—Though a deed of assignment is not fraudulent by reason of a postponement of the time of sale, and the reserving the property to the grantor in the meantime, yet where the time of sale may be postponed or hastened by the grantor, so as to enable him to defeat any creditor who should attempt to subject the interest in the property reserved to the grantor, to the payment of his debt, the deed is fraudulent. Quarles v. Kerr, 14 Gratt. 48, and *note*; Brockenbrough v. Brockenbrough, 31 Gratt. 580.

Postponement of Sale in the Deed for Three Years.—A provision in a trust deed, which authorizes a sale of the property within three years, at the instance of the grantor, does not render the deed fraudulent. Sipe v. Earman, 26 Gratt. 563, and *note*; Young v. Willis, 82 Va. 298.

Postponement of Execution of Deed for Eighteen Months.—A deed which conveys without a schedule, household furniture, the various kinds of stock on a farm, bacon and lard, to secure a *bona fide* debt, but not to be enforced for eighteen months after its execution, is valid against creditors, though the deed was made without the knowledge of the creditor, and the grantor was indebted to insolvency at the time of the conveyance. Lewis v. Caperton, 8 Gratt. 148.

Moreover, a deed which conveys land to secure a *bona fide* debt, which is not to be enforced for two years, and only then or afterwards upon a notice of the sale for one hundred and twenty days, is valid against creditors, and this is so even though the execution of the deed is postponed for five years from the date of the conveyance, and the rents and profits of the property in the meantime are reserved to the grantor. Lewis v. Caperton, 8 Gratt. 148.

2. RESERVATION OF SURPLUS.—A provision, in a deed of trust to secure certain preferred creditors, that the surplus proceeds of the sale, after payment of the secured debts, is to be paid to the grantor, is not fraudulent in itself. Dance v. Seaman, 11 Gratt. 778. See also, Young v. Willis, 82 Va. 291, 297.

Stipulation as to Surplus Void as to What Creditors.—But a provision in an assignment for the benefit of creditors, that repayment shall be made to the assignor of the surplus left after the complete discharge of the debts of all assenting creditors, is void, in so far as it attempts to protect such surplus from the claims of nonassenting creditors; but will not invalidate the assignment as to the assenting creditors. Skipwith v. Cunningham, 8 Leigh 271.

Reservation after Paying, Accepting and Releasing Creditors.—An assignment for the benefit of creditors may be valid, even though it does not direct any surplus which may remain after satisfying the claims of the accepting and releasing creditors to be applied to the payment of his other debts, or any of them; or even though it direct any such surplus to be paid to the debtor himself. Gordon v. Cannon, 18 Gratt. 387.

Settlement of Surplus on Family of Debtor Valid.—Moreover, a deed to secure creditors, which provides, in the first place, amply for all the then existing debts of the grantor, and then settles the balance of the property on the grantor's family, is, in the absence of actual fraud, a valid deed. Johnston v. Zane, 11 Gratt. 552.

The Law Implies Reservation, When.—But if an insolvent debtor makes an assignment of all of his property for the benefit of his creditors, reserving benefits to himself at the expense of his creditors, the assignment will be set aside as fraudulent and void. This rule, however, has no application to an assignment by the debtor, of the part only of his estate, made in good faith for the purpose of raising money or securing the existing creditors, reserving the surplus to himself. The law will imply such reservation. Didier v. Patterson, 93 Va. 534, 25 S. E. Rep. 661.

Right of Unsecured Creditors to Surplus.—Creditors left unsecured by an assignment are entitled to an account of the property, in order that it may be determined whether there is any surplus out of which to pay their indebtedness. Skipwith v. Cunningham, 8 Leigh 271.

Attachment of Surplus.—An attachment is served upon trustees in a deed of trust for the payment of certain debts, and among them are the debts due to the plaintiff in the attachment. There could be no surplus in the hands of the trustees until the plaintiff's debts were paid, and consequently there can be no surplus in their hands liable to the attachment. Clark v. Ward, 12 Gratt. 440.

3. STIPULATIONS FOR RELEASE OF DEBTOR.—It is settled law that where a debtor stipulates in his deed of assignment for a release from his debts by his creditors, he is imperatively required to convey all, or substantially all, of his estate, or all of a substantial value. Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464; Skipwith v. Cunningham, 8 Leigh 271; Williams v. Lord, 75 Va. 400; Gordon v. Cannon, 18 Gratt. 387, and *note*; Phippen v. Durham, 8 Gratt. 457; Kevan v. Branch, 1 Gratt. 274.

A debtor cannot divide his property into two parcels, and protect himself in the enjoyment of one parcel by giving up the other; he cannot require his creditors to accept a part and release the others; and when he attempts it, the deed is fraudulent and void. Quarles v. Kerr, 14 Gratt. 48, and *note*.

When a debtor in a deed of trust conveys *all* his property to a trustee for his creditors, and gives to such creditors a reasonable time in which to accept

its terms, and provides that such as accept shall release all further claims against him, the deed is not fraudulent *per se*. But if the deed does not convey all or substantially all of his property, the release cannot be upheld, for he can have no right, while he is full handed, to extort from his creditors a release of a part of their just demands. Clarke v. Figgins, 27 W. Va. 663; Kevan v. Branch, 1 Gratt. 274.

"The decisions of Virginia allow the requirement of a release in an assignment." Talley v. Curtain, 54 Fed. Rep. 49.

a. EFFECT ON SECURITIES.

Effect on Collaterals Previously Assigned.—Collateral securities, assigned to a creditor previous to the deed of assignment, are not affected by a clause in the deed which requires a creditor to release the debtor from personal liability for any debts left unpaid after the trust fund is exhausted. The release will not extinguish the debt, nor deprive the creditor of any security held for it. For the release of a right cannot be construed to mean more than it expresses. Long v. Meriden, etc., Co., 94 Va. 594, 27 S. E. Rep. 499.

Security Previously Assigned Unaffected.—A party to a composition deed, who executes the release required thereby, of all claims and demands against the grantor, in consideration of its benefits, is not to be prevented, either in view of the release, or of the general principles in regard to composition deeds, from retaining a note assigned to him in good faith by the grantor, before the execution of the deed, in discharge or payment of a *bona fide* debt. Lambert v. Jones, 2 P. & H. 144.

Grantor Cannot Allege His Own Fraud.—When a deed of trust for the benefit of creditors conveys all of the debtor's property, a stipulation for a release of the debtor contained therein, is valid; and the grantor will not be allowed to assail the deed on the ground that all his property was not conveyed by it. Robinson v. Mays, 76 Va. 708.

Need Not Appear on Its Face.—It is not necessary that a deed of assignment for the benefit of creditors should show, on its face, that all the estate of the debtor is conveyed. That fact may be proved by evidence *aliunde*. Gordon v. Cannon, 18 Gratt. 387, and *note*.

Must Appear on Its Face.—But a deed, imposing a release, should show upon its face all that the creditors ought to know, for they have the right to be informed whether the assignor has transferred *all* his property. And where the deed does not, in fact, convey *all* the property, it is fraudulent in law. Shufeldt v. Jenkins, 22 Fed. Rep. 359.

Although a deed of trust for the benefit of creditors, requiring a release, is good on its face, still it is fraudulent in fact, if it be shown by the evidence and pleadings that some property has been withheld, and that it does not convey all as it purports to do. Clarke v. Figgins, 27 W. Va. 663.

Policies, Not Speedily Convertible.—The object of an assignment for the benefit of creditors is a speedy realization of the assets and a prompt distribution amongst the creditors, hence a creditor need not, in a deed containing a release clause, include assets which are not speedily convertible, such as policies which contain no provision for a cash surrender value. Long v. Meriden, etc., Co., 94 Va. 594, 27 S. E. Rep. 499.

Failure to Include an Equity of Redemption.—Moreover, the failure to include in a deed of trust for the benefit of creditors, an equity of redemption in land, when the prior incumbrances on the land far exceed its value, and so the deed would not be strengthened thereby, will not invalidate it, even though it contains a provision for a release as a condition precedent to payment, for such a failure is not an indication of fraud whether the debtor conveys all or substantially all of his property, and does not try to secure to himself a substantial benefit. Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329.

Property Exempt by Law.—Where a debtor, in a deed of assignment for the benefit of creditors, conveys to the trustee his entire estate, except what is exempt by law, although it stipulated for a release, the deed is valid, and it is not invalidated by the fact that the debtor fails to turn over or deliver up to the trustee, in pursuance of the terms of the deed, any property of any kind, except that embraced in the exemption, when the title of the property is absolutely vested in the trustee, with the right to take immediate possession thereof, and he can recover from the debtor or other person any that is withheld from him. Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464.

Formal, Technical, Release under Seal Unnecessary.—Where a deed of assignment for the benefit of creditors does not in terms provide for the execution by the creditors of formal technical releases under seal, no such releases are necessary, but the taking the benefit of the trust shall, *ex proprio vigore*, operate a discharge of the debtor from personal liability. Robinson v. Mays, 76 Va. 708.

Virginia and West Virginia—Stare Decisis.—It was held in Clarke v. Figgins, 27 W. Va. 663, that the cases of Kevan v. Branch, 1 Gratt. 274; Phippen v. Durham, 8 Gratt. 457; Gordon v. Cannon, 18 Gratt. 387, which decided that in order to maintain the validity of a deed requiring a release, the debtor must convey *all* or *substantially* all his property to his creditors, would be followed in West Virginia without enquiring into the grounds for rendering it. Thus, it will be seen that so far as this rule is concerned it is taken as *stare decisis* in the courts of West Virginia.

b. LIMITING TIME FOR ACCEPTANCE AND RELEASE.

Limit of Thirty Days Valid.—A deed which conveys all the property of the grantor in trust for the payment of his debts, is valid, though it contain the provision that no creditor shall take any benefit under the deed who does not, within thirty days from its date, signify his acceptance of its terms and conditions; and further agree to release and acquit the grantor from all further claims for the debt acknowledged therein. Phippen v. Durham, 8 Gratt. 457.

Thirty days is not too short a time to allow creditors for acceptance of the provisions of the deed, especially where they all reside at the same place, and can be easily communicated with, and are, within the thirty days, informed of the deed and its provisions. Williams v. Lord, 75 Va. 390.

Postponing the time for the execution of the trust to an unreasonable time, may when taken in connection with other circumstances, prove a fraudulent intent. If made with such an intent, the time to which the sale was postponed would not affect it. Dance v. Seaman, 11 Gratt. 778.

It was held in Gordon v. Cannon, 18 Gratt. 387, that where the assets consisted of 4,000 acres of land in Texas, and a warehouse stock in Virginia, (60) days is sufficient time for the creditors to inform themselves of the value of the property conveyed, and of the amount of the debts, and to determine whether they would accept or reject the offer.

Acceptance after Judgment Obtained.—A deed of trust conveying land for the benefit of creditors, which is executed by the maker of the deed and trustees, and duly recorded before a judgment is obtained against the maker, will intercept the lien of a judgment, although the creditors may not have given their assent to the deed until after the judgment. In such case, even in a court of equity, the equity of the judgment creditor will generally be considered inferior to the equity of the creditors claiming under the deed. Skipwith v. Cunningham, 8 Leigh 271.

4. DISCRETIONARY POWERS TO TRUSTEES.

a. POWER TO CONTINUE ASSIGNOR'S BUSINESS.—The law does not condemn as vicious and illegal a provision in a deed which gives to the trustee discretionary power to run and operate the business for a year, if he deems it wise to do so, having in view the interest of the creditors, and, as such a provision is not mandatory, it is salutary, and not fraudulent and illegal. Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464.

A deed of assignment of a stock of goods for the benefit of creditors is not fraudulent on its face, because it provided that the trustee may continue the business so as to dispose of the stock in the due course of business. Taylor v. Mahoney, 94 Va. 508, 27 S. E. Rep. 107.

When Invalid.—Two grantors make an assignment of their property to secure three classes of creditors named in the deed, in the order therein named. In the deed the assets are valued by the grantors, and the deed is silent as to any other creditors than those therein specified, and the value of the property, as fixed by themselves, far exceeds the amount of the debts secured, and among the property is a flouring mill by them valued at $20,000, almost one-half of all their property, and a provision is inserted in the deed as follows: "And should the said trustee deem it to the best interest of said creditors [secured creditors], he is thereby authorized either to rent or run the mill property for the period of one or more years, or for a greater or less period of time, as shall seem to him advisable after having consulted with said creditors, and obtained their consent, or the majority thereof in interest therein. *Held*, that the deed is fraudulent on its face." Landeman v. Wilson, 29 W. Va. 702, 2 S. E. Rep. 208; Kyle v. Harveys, 25 W. Va. 730.

Moreover, a provision in a deed of trust to secure creditors, that the grantor shall keep possession of the property conveyed, and sell the same and carry on the business as usual, is a reservation inconsistent with the purpose of the deed, because it is for the benefit and advantage of the grantor, and is null and void as to creditors. Kuhn v. Mack, 4 W. Va. 186.

When Valid.—A stipulation in a deed of assignment is proper when it is designed to be ancillary to the winding up of the debtor's business, or more effectually to promote the interests of the creditors and not those of the debtor. Marks v. Hill, 15 Gratt. 400.

So also, deeds of trust for the benefit of creditors have been sustained as valid which contain provisions for the continuance of the business of the debtor or grantor by himself or by his assignee or trustee, but most of these cases rest upon the important principle that the stipulation was designed more effectually to promote the interests of the creditors, and not intended for the benefit of the debtor; or when it was intended to be auxiliary in the winding up of the debtor's business, as when he had on hand at the time of the assignment unmanufactured material in the way of his business, or the like. Kyle v. Harveys, 25 W. Va. 730.

Corpus of Trust Fund Not Liable for Debts by Trustee.—Although a trustee in a deed of trust to secure creditors, may be authorized to continue the business of the grantor with the object of winding up the trust affairs, and bringing the trust property to sale to the best advantage, and to replenish the stock, and postpone the execution of the trust for a reasonable time, yet provisions in a trust deed, which authorize the trustee to carry on the business, and for that purpose, to subject the *corpus* of the trust to the casualties incident thereto, by which it may be lost or wasted, are void, because such provisions confer powers adequate to the defeat of the trust. Catt v. Knabe, 93 Va. 740, 26 S. E. Rep. 246.

In Virginia the fact that an assignee is authorized in his discretion to complete the manufacture of material on hand and partly finished, and thus preserve it, is not an indication of fraud which will invalidate the assignment. Talley v. Curtain, 54 Fed. Rep. 43.

Power to Replenish Stock.—A provision in a deed of assignment for the benefit of creditors, is not illegal, which empowers the trustee to make purchases of additional stock from the proceeds of his operation of the business, to aid in keeping up the business and disposing of the other stock to greater advantage, as such purchases are merely ancillary to the winding up of the business. Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464; Williams v. Lord, 75 Va. 390; Catt v. Knabe, etc., Co., 93 Va. 740, 26 S. E. Rep. 246.

May Borrow Money to Add to Stock.—So an assignment for the benefit of creditors is presumed to be honest which provides that the trustee shall take charge and control of the goods assigned and sell them to the best advantage, and that the trustee may add to the stock by purchase, and to accomplish that purpose he may borrow money to a limited amount, when these privileges are for the manifest benefit of the creditors, and to better enable them to dispose of the goods. Williams v. Lord, 75 Va. 390.

Current Expenses First Paid.—Where, in a composition of the creditors of the firm, one of the parties is appointed by them to carry on the business and pay them out of the proceeds, the expenses of carrying on the business should be paid before they are entitled to any of the proceeds. Karn v. Blackford (Va.), 20 S. E. Rep. 149.

b. POWER TO EMPLOY AGENTS AND CLERKS.—A provision in a deed of trust for the benefit of creditors that the trustee shall employ such agents as he may deem necessary, and pay them a reasonable compensation out of the trust fund, and not be liable for their omissions or defaults, or for any moneys other than such as shall actually come to his hands in the execution of the trust, does not discharge the trustee from the obligation to select fit agents, and hold them to a strict and prompt responsibility for their acts, and so does not invalidate the deed. Gordon v. Cannon, 18 Gratt. 387, and *note*; Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464.

c. COMPROMISE BY TRUSTEE.—A trustee, who makes a compromise with a third person in relation to a trust subject, though he may purchase the subject for himself, is bound to account as trustee for all the profits made in the transaction, according to the well-settled doctrine that a trustee, standing in a fiduciary character, and making a profit out of any transaction in the scope of his agency, must account

to the *cestui que trust* for that profit. Miller v. Holcombe, 9 Gratt. 665.

d. POWERS AS TO SALE OF TRUST ESTATE.

(1) *Sale on Credit.*—An express power to sell on credit on the face of an assignment, does not render a deed of trust or assignment fraudulent on its face. Kyle v. Harveys, 25 W. Va. 728, and cases cited.

In Dance v. Seaman, 11 Gratt. 778, where the assignment provided that it was not to be enforced for two years, the court said that the postponing the time of sale, or directing a sale on credit, do not of themselves furnish evidence of fraudulent intent, but may tend to prove a fraudulent intent in connection with other circumstances.

(2) *Private Sale.*—A provision in a deed of assignment authorizing the trustee to sell the property at a private sale, does not render the deed fraudulent on its face. Landeman v. Wilson, 29 W. Va. 702, 2 S. E. Rep. 208.

In Kyle v. Harveys, 25 W. Va. 716, 52 Am. Rep. 235, it was held that the authority to the assignee to sell at a private sale, as soon as possible, was not fraudulent if made with the *bona fide* intention that as much as possible should be realized for the creditors; but if the assignor believed at the time that the interest of creditors would be prejudiced by a private sale, and he requested a private sale merely for the purpose of giving himself or his assignee remunerative employment, the assignment is fraudulent and void as against all the creditors of the assignor.

IX. FRAUD.

1. HOW ASCERTAINED.—If an inspection of the deed alleged to be fraudulent on its face, does not show that it contains provisions clearly showing an intent on the part of the grantor to hinder, delay, or defraud his creditors, the deed will not be held fraudulent on its face. Landeman v. Wilson, 29 W. Va. 702, 2 S. E. Rep. 208; Douglass, etc., Co. v. Laird, 37 W. Va. 687, 17 S. E. Rep. 188.

In order to decide whether a deed of assignment for creditors is fraudulent or not on its face, the court must look to the deed itself, without reference to extrinsic facts as to motive. If the law imputes to the grantor a fraudulent design in making the assignment, no evidence of intention can charge the presumption. Landeman v. Wilson, 29 W. Va. 702, 2 S. E. Rep. 208.

2. FRAUDULENT INTENT IN GRANTOR.—If there was a fraudulent intent in the grantor in making the deed (of which there was no evidence), as it is not fraudulent on its face, and the trustee and creditors secured by it had no knowledge of its execution until it was done, they cannot be affected by such fraudulent intent, and the deed is valid as to them. Sipe v. Earman, 26 Gratt. 563, and *note*.

Notice by Assignee of Fraud in Grantor.—Where an assignee for the benefit of creditors or a trustee of a trust deed accepts the assignment or trust deed, and such deed contains, to his knowledge, on its face, one or more falsehoods on a material point, calculated to deceive and mislead creditors to their injury, such assignee or trustee will be treated as having notice of his grantor's fraudulent intent, because a falsehood said or done to the injury of the property rights of another is of the very essence of fraud. Douglass, etc., Co. v. Laird, 37 W. Va. 687, 17 S. E. Rep. 188.

Fraud of Assignor—Trustees and Beneficiaries without Notice.—When the trustee and beneficiaries have no notice of any fraud on the assignor's part, it cannot affect the validity of the deed. Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329. See also, Sipe v. Earman, 26 Gratt. 563, and *note*.

A trustee in a deed of trust or assignment made to secure creditors is regarded as a purchaser for value, and in order to make the deed void, notice of the grantors' fraudulent intent must in some way be brought home to him or the creditors. Douglass, etc., Co. v. Laird, 37 W. Va. 687, 17 S. E. Rep. 188.

"While it is well settled in Virginia that the trustees and beneficiaries in a deed of trust to secure *bona fide* debts occupy the position of purchasers for a valuable consideration (Wickham v. Lewis, 13 Gratt. 427; Evans v. Greenhow, 15 Gratt. 156; Kesner v. Trigg, 98 U. S. 50, 53), yet they cannot hold with notice of the fraudulent intent of their grantor, or of the fraud rendering his title void. And it is equally well settled in the states of West Virginia and Virginia, that notice to the trustees is notice to the beneficiaries. Fidelity Ins., etc., Co. v. Shen. Val. R. Co. (Sup. Ct. of Appeals of W. Va., Feb. 25, 1889), 9 S. E. Rep. 185; Beverley v. Brooke, 2 Leigh 425; French v. Loyal Co., 5 Leigh 641." Per MR. CHIEF JUSTICE FULLER in Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. Rep. 354.

"In controversies arising under this statute (Code Va. 1873, ch. 114, § 1, p. 896), involving, as they do, the rights of creditors locally, and a rule of property, we accept the conclusion of the highest judicial tribunal of the state as controlling." Per MR. CHIEF JUSTICE FULLER in Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. Rep. 354. The statute provides, among other things, that "this section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

3. EFFECT OF PARTIAL ILLEGALITY.—Where a deed of trust is made for the benefit of various creditors whose claims are distinct and unmingled with each other, though a part of them are illegal and fraudulent, the security will not be avoided as to the other part if they are fair and untainted with fraud, provided the creditors owing such claims have given no aid in any way to the concoction of the fraud. Such a deed ought to be considered distributively, and though avoided in part, it should be effectual as far as it is good. Ruffner v. Welton Coal & Salt Co., 36 W. Va. 244, 15 S. E. Rep. 48.

Deed Fair in Part Will Be Upheld to That Extent.—Where a deed of assignment is made for the security of various creditors whose claims are distinct, and is in part fair and untainted with fraud, and in part is illegal and fraudulent, and the deed is not fraudulent upon its face, it will be upheld in so far as it is fair and untainted, unless the creditors directly or indirectly had notice of such fraud at the time the deed was executed, and participated in the fraud. Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. Rep. 611.

A trust deed for creditors is not invalidated as a whole by the invalidity of some of the debts secured, but will stand as to the valid portion of the debts. Craig v. Hoge, 95 Va. 275, 28 S. E. Rep. 317.

A deed of assignment being fraudulent as to any provision therein, is void *in toto* as against creditors who are entitled to take advantage of the fraud. Landeman v. Wilson, 29 W. Va. 702, 2 S. E. Rep. 208.

When Fraud Must Exist.—If an assignment for the benefit of creditors is not fraudulent when the assignee takes possession of the assigned property,

it can never afterwards become fraudulent, so as to deprive the creditors secured by the deed of its benefit, by any conduct or combination of the assignor and assignee or either of them, entered into subsequently. Kyle v. Harveys, 25 W. Va. 716.

4. EVIDENCE OF FRAUD.

Insolvency and Pendency of Suits.—The insolvency of the grantor and the pendency of suits at the time the deed of assignment is executed, are not entitled to much weight in determining the question of fraud. They are not inconsistent with honest intent, for men seldom give trust deeds to secure creditors, generally, unless they are insolvent or in failing circumstances. Williams v. Lord, 75 Va. 390; Young v. Willis, 82 Va. 296.

The fact that a deed to a trustee for the benefit of creditors is made pending suits against the grantor by a creditor, who soon afterwards recovered large judgments, and whose debts were placed in the least-favored class, does not indicate fraud. Nor that certain bonds for debts due the sons of the grantor, written on the day the deed was prepared, were antedated one month, when this is explained by the trustee in his deposition, and when the sons had no notice of the fact that the bonds were antedated. Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329. See also, Sipe v. Earman, 26 Gratt. 563. In the latter case the execution of a deed pending a suit against the grantor, by an unsecured creditor, and a short time before the term at which it was probable judgment would be rendered against him, does not render it fraudulent.

Failure to List Debts for Taxation.—Failure to list certain debts for taxation, is not sufficient proof that they were fraudulent, when uncontradicted evidence shows that they are *bona fide*. Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329.

Failure to Convey All Property.—That the grantor does not convey all his property in the deed of assignment, is not a circumstance indicative of fraud, for what is not conveyed by the deed, so far as it is liable for debt, may be subjected at once, by the suit of any creditor, to his claim. Williams v. Lord, 75 Va. 390.

Relations—Implied Contract to Pay for Board.—It is well settled that as between persons standing to each other in the relation of husband and wife, parent and child, grandparents, brothers, stepchildren, and other near relations, no action upon an implied promise to pay for board and lodging can be maintained, but there must be an express contract or agreement to pay for them. Hence, a deed of trust for the benefit of creditors is fraudulent, in so far as it secured the father of the grantor for board furnished the grantor and his horse for twelve years, where there was no antecedent contract to pay for the same. Stoneburner v. Motley, 95 Va. 784, 30 S. E. Rep. 364.

Deed May Secure Grantor's Father.—A deed of trust for the benefit of creditors is not fraudulent, because it secures the grantor's father for goods sold by him to the grantor for business purposes, and which were intended to be paid for. Stoneburner v. Motley, 95 Va. 784, 30 S. E. Rep. 364.

In an action to set aside a trust deed preferring certain creditors, it appeared that the defendant, as agent for his wife, bought of the plaintiff a large quantity of goods, obtaining credit by false statements as to his pecuniary condition. Within three months the defendant and his wife conveyed all the goods in her store to a trustee to secure alleged debts to her father and brother-in-law, the latter having no visible means, and who had on oath returned to the commissioners of revenue his entire estate at five dollars. Evidence showed that nearly all the goods purchased had disappeared, leaving no trace on the books or elsewhere; that a large number of trunks, belonging to the defendant had disappeared, and that numerous new trunks had been bought by him, and sent by rail, full of something, to the father's store at R, that the father had shipped to himself since the defendant's purchase, a large quantity of goods, from the latter's town, that the plaintiff's clerks had called at the father's store, and identified the goods there as sold by them to the defendant. *Held*, that there was ample evidence of fraud, and that the deed must be set aside. Armstrong v. Lachman, 84 Va. 726, 6 S. E. Rep. 129.

Suspicion of Fraud Insufficient.—It is a well-recognized rule of law in Virginia, that, in order to justify a decree annulling an assignment, fraud must be proved by clear and satisfactory testimony, and courts cannot act upon mere suspicion or presumption that the assignee and preferred creditors had notice of and participated in the fraud. Simon v. Ellison (Va.), 22 S. E. Rep. 860.

X. OTHER FEATURES OF ASSIGNMENTS.

1. RECITALS IMMATERIAL.—A trust deed to secure creditors reciting the amount of the debts due to the different creditors, is not conclusive evidence, even as against the assignor and his administrator, of the amount of the respective debts. Griffin v. Macaulay, 7 Gratt. 476.

2. CONSIDERATION FOR ASSIGNMENTS—PRE-EXISTING DEBT.—In Exchange Bank v. Knox, 19 Gratt. 747, CHRISTIAN, J., said: "It is well settled that the trustees and beneficiaries in a deed of trust to secure *bona fide* debts are purchasers for valuable consideration. A pre-existing debt is of itself a valuable consideration for a deed of trust executed for its security. Wickham v. Martin, 13 Gratt. 427; Evans v. Greenhow, 15 Gratt. 153."

Acceptance as Consideration.—In West Virginia it is not necessary to the validity of a deed of trust in favor of creditors, that it should be executed by them. The deed passes the legal title as soon as executed by the grantor and the trustee, who is deemed a purchaser for valuable consideration, and it can be avoided only by the dissent of the creditors, express or implied. Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. Rep. 611.

Right of Holder of a Check.—Although the holder of a check does not present it to the bank until after a general assignment for the benefit of creditors, still this does not defeat his right to it. Hulings v. Hulings, 38 W. Va. 351, 18 S. E. Rep. 628.

3. SET-OFF.

Claims Not Due.—An assignment by a debtor of debts due the firm is subject to the debtor's right to offset a claim not yet due, held by him against the firm. Fry v. Boyd, 3 Gratt. 73.

Right to Set Off Claims Acquired after Assignment.—Under the act of February 12, 1866, requiring the banks of the commonwealth to go into liquidation, a debtor of the bank cannot set off notes of the bank brought up by the debtor after the execution and recording of the deed and notice thereof to the debtor. Exchange Bank v. Knox, 19 Gratt. 739.

Set-Off between Original Parties—Holder for Value.—"It is a principle of law, too well settled to admit of doubt or argument now, that a set-off as between original parties, acquired after the assignment for a *bona fide* purpose, of the subject in controversy

and notice thereof, cannot be set off against a holder for value," per CHRISTIAN, J. Exchange Bank v. Knox, 19 Gratt. 739.

XI. EFFECT OF ASSIGNMENTS.

Deed of Assignment Does Not Revoke a Power.—A debtor on the same day executes two papers; one a power of attorney to his creditor, who is also a surety, authorizing him to sell and indemnify himself first out of the proceeds, and to pay any debts which he (the debtor) owed him, and the other was a deed of trust, assigning all his property to his creditor to pay certain named creditors, and afterwards all other creditors. *Held*, that the deed of trust did not revoke the power and the two instruments were to be construed as one. French v. Townes, 10 Gratt. 518.

1. EFFECT UPON LIENS.

Judgment Lien Creditor—Election—Choice of Liens.—Although a party, secured under an assignment for the benefit of creditors, subsequently acquires a judgment on his debt which is audited and receives a number of payments thereon, still he may bring an action to subject after-acquired property to the lien of his judgment, and his participation in the prior proceeding is not such an election to proceed under the trust deed, as precluded suit on the judgment, because the plaintiff's lien under the trust deed and his lien under the judgment, though for the same debt, are distinct and on separate subjects. Miller v. Byers, 99 Va. 163, 37 S. E. Rep. 782.

Execution Creditor—Lien—Surplus.—An execution creditor, whose execution has been returned without a levy, has no lien on the tangible personal property of his debtor after the return day of the execution, and hence has no right to insist that a prior deed of trust on the property shall be enforced so as to enable him to subject the surplus, if any. Having no lien, a court of equity has no jurisdiction to administer the trust to ascertain and subject the surplus, if any, at his instance. Spence v. Repass, 94 Va. 716, 27 S. E. Rep. 583.

Specific Lien Creditor—Separate Bill.—Notwithstanding the fact that a general creditors' bill has been filed by the trustee, to administer the estate of the debtor, who has conveyed it in a general deed of trust, still a creditor, holding a specific lien on some of the debtor's property, may, before the general bill matures, to which he is a party, though not yet served, file a separate bill to enforce his lien, and it may be treated as a petition in the general suit; the two causes may be heard together and the rights of all parties settled and adjudicated at the same time. Bristow v. Home Bldg. Co., 91 Va. 18, 20 S. E. Rep. 947.

Equitable Lien.—Where a debtor who contracts to give a lien on two adjoining tenements belonging to him, to secure a debt due the creditor, he being in possession of one of the tenements under an agreement by which the rent is to be set off against the interest on the debt, and the debtor, afterwards becomes embarrassed in his circumstances, and conveys all his property in trust to pay his debts, the creditor is entitled to enforce his equitable lien not only against the debtor but against the creditors of the debtor under the trust deed. Ott v. King, 8 Gratt. 234.

Rights of Prior Judgment Creditor.—An assignment for the benefit of creditors, by an agricultural society, of the proceeds of a fair about to take place on their grounds, is void, as against the lien of an execution issuing before the payment of such proceeds to the creditors. Huling v. Cabell, 9 W. Va. 522.

Assignments Irrevocable.—"The instant the legal title becomes vested in the trustee, a trust arises in behalf of those in whose favor it is declared, provided there be a sufficient consideration to sustain it: *and from that moment it is beyond the power of the grantor. He cannot revoke it*, nor can he even extinguish it by getting a reconveyance; for no act of the trustee can affect the rights of the *cestui que trust*." Skipwith v. Cunningham, 8 Leigh 271.

Decree—Effect upon Statute of Limitations.—Where a bill in chancery is filed for the purpose of settling an estate conveyed in trust to pay certain debts, and a decree is entered in the cause, referring it to a master and directing him to report all outstanding and unsatisfied debts against the estate, such decree makes the suit one for the benefit of general creditors of the estate, restrains them from afterwards proceeding by separate suits to enforce their claims, and stops the running of the statute of limitations against their claims from the date the decree is entered. Houck v. Dunham, 92 Va. 211, 23 S. E. Rep. 238.

2. JURISDICTION.

Equitable Jurisdiction Exclusive.—The trust arising under a general assignment for the benefit of creditors is peculiarly and exclusively an object of equitable jurisdiction, and creditors may compel a proper management of the trust by the assignee. Wagner v. Coen, 41 W. Va. 351, 23 S. E. Rep. 735.

Jurisdiction over Property Not Conveyed.—If creditors, secured by a deed of trust, file a bill praying the court to administer the trust created by the assignment for the benefit of creditors, the court has no jurisdiction to subject property not conveyed in the assignments, and on which the creditors have obtained no lien. Spindle v. Fletcher, 93 Va. 186, 24 S. E. Rep. 910.

Remedy of Holder of an Assigned Bond in Equity.—A man indebted by bond, executed a conveyance of *all his property* in trust, for the payment of his just debts in the first place; for his own support during his life in the second place; and, afterwards, for the benefit of his wife, etc. He died, without any will or property acquired after the date of such conveyance; and no person administered on his estate. It was *held*, that an assignee of the bond was not restricted to his remedy at law against the assignor, but, without bringing any action at law, might obtain relief in equity by a decree of a sale of the property in the hands of the trustee. In such case, if the fund in the possession of the trustee prove insufficient, the plaintiff in equity may recover the balance of his claim from a debtor of the obligor; and, in default of both these funds in whole or in part, he may proceed against the assignor. And, it seems, that all persons concerned being made parties, the court may do complete justice in one suit, and make a full end of the whole controversy. Taylor v. Ficklin, 5 Munf. 25.

Mistake—Sealed Instrument—Relief in Equity.—A partner, by mistake executes a penal obligation, in the name of the firm, under seal, to a party that has lent money to the firm, instead of a promissory note, then he dies, and the other partners, with the decedent's executor, make a deed of trust to secure the firm creditors. The holder of the penal bond files a bill in equity against all the partners. *Held*, that equity has jurisdiction to correct the mistake, and hold the parties as much bound as if there were no seal, although at law there would be no

remedy on the sealed obligation, except against the partner who executed the penal obligation. Galt v. Calland, 7 Leigh 594.

Concurrent Jurisdiction.—The circuit court of Augusta county and the hustings court of the city of Staunton, have concurrent jurisdiction of suits to adjust priority of liens against an estate deeded in trust for creditors, and to divert to the payment of certain creditors the share which by the deed would pass to other creditors. Craig v. Hoge, 95 Va. 275, 28 S. E. Rep. 317.

3. EFFECT OF TRUSTEE'S REFUSAL TO ACT.

Appointment of New Trustee.—Where a debtor conveys a large amount of property in trust to trustees to secure creditors, and the trustees, not having signed the deed, refuse to act, the court should not simply appoint trustees in place of those named in the deed, but should have the trust administered under its own supervision and control. Reynolds v. Bank, 6 Gratt. 174.

Where a debtor conveys a large property, real and personal, in trust to secure certain creditors, and the trustees, not having signed, refuse to act, one or more creditors may sue for themselves and the other creditors secured by the deed. Reynolds v. Bank, 6 Gratt. 174.

Where a debtor conveys a large property real and personal, in trust to secure certain creditors, and the trustees not having signed, refuse to act, the appointment of commissioners to sell and administer the trust under the supervision and control of the court is authorized either under the prayer for the appointment of trustees, or under the prayer for general relief. Reynolds v. Bank, 6 Gratt. 174.

Equity Will Appoint Successor.—"When a court of equity is called upon for any purpose, to take control of the property conveyed by a deed of trust to secure creditors, it generally authorizes a trustee, or if he refuses to act, some one in his place, to administer the trust under its own supervision and control; before it directs a sale it has the claims and priorities of all parties fixed and ascertained, unless a good excuse for not doing so is alleged and shown, and it does not disburse the assets until it can give complete justice to all according to their deserts." Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. Rep. 611.

XII. RIGHTS, DUTIES AND LIABILITIES OF TRUSTEES GENERALLY.

Payment to a Receiver.—When a trustee in a deed of assignment for the benefit of creditors is restrained by injunction from disbursing any funds until the future order of the court, and he answers that "he has the fund in hand ready to disburse according to the trust deed, or as the court may direct," if the parties in interest desire it to be paid into the hands of the general receiver they must so move, and the trustee, who does not appear to have received interest or other profit on it, will not be chargeable with interest, because he did not of his own motion cause it to be turned over to the general receiver. Darby v. Gilligan, 37 W. Va. 59, 16 S. E. Rep. 507.

Right to Redeem Collateral Securities.—The trustees, debtors, or other creditors interested have the right to redeem collateral securities, held by creditors, secured in a general assignment, on their debts, by the payment of the secured debts in full; and a court of equity, having jurisdiction of the debtor's estate for distribution, may compel the surrender of such collaterals, or any balance thereof remaining after full satisfaction of the secured debts. Williams v. Overholt, 46 W. Va. 339, 33 S. E. Rep. 226.

Right to Collect Assets by Suit.—Whatever claims a bank could collect by suit or action before an assignment, may be so collected afterwards by the trustee in the deed of assignment. Lamb v. Cecil, 25 W. Va. 288.

May Assert Lien, Set Aside Fraudulent Conveyances, etc.—Upon taking the oath of insolvency all the property and rights of the insolvent debtor are vested, by law, in the sheriff, who as representing the creditor, is entitled to assert the legal and equitable rights of the creditor, and to set aside fraudulent conveyances of the insolvent, and recover the property for the benefit of creditors. Clough v. Thompson, 7 Gratt. 26.

Unfaithfulness of Trustee—Fraud.—A deed of trust for the benefit of creditors is not fraudulent because of the unfaithfulness of the trustee, unless such unfaithfulness resulted from the carrying out of its provisions according to their apparent intent. Taylor v. Mahoney, 94 Va. 508, 27 S. E. Rep. 107.

Creditor Competent to Act as Trustee.—An objection that the trustee is himself a creditor, and would have to resort to a court of equity to sell the property conveyed by the deed, does not strike at the validity of the deed. Gordon v. Cannon, 18 Gratt. 387.

Duty of Trustee to Act Impartially.—A trustee, in a deed to secure debts, is the agent of the debtor as well as of the creditor, and it is his duty to act impartially with respect to both. He must in all respects conform to the terms of the deed, and where a discretion is vested in him, he should exercise it prudently and fairly. Wilson v. Wall, 99 Va. 358, 38 S. E. Rep. 181.

Trustee Must Always Take Security.—It was held in Miller v. Holcombe, 9 Gratt. 665, where trustees in a deed of trust for the benefit of creditors sold slaves, a part of the trust subject, to three partners, all of whom were wealthy men at the time of the transaction, and abundantly good for all their engagements, without taking any security for the purchase money, and permitted them to retain the property for years until they became insolvent, they will be held personally bound for the amount of the fund lost. However ample the purchasers' means may be at the time, prudence would dictate that the trustee should require security for what the purchaser owes, and the situation and circumstances of the purchaser will not relieve the trustee of this duty.

Mingling Trust Funds.—Among the duties of the assignee, experience has shown that none are more important than keeping his transactions as assignee wholly separate and distinct from his own private affairs. This is indispensable and its importance is so obvious that it needs no comment, for without this it is impossible to ascertain the status of the trust fund. He should deposit the money in bank for safe-keeping, and it should be deposited to the separate account, in his name as trustee or assignee, so that the fund may at all times be traced and identified, and the true state of his money account, as trustee, be capable of ready ascertainment. If the trustee violate this duty, and waste or misappropriate the fund or any material part of it, etc., a receiver may and should be appointed. Wagner v. Coen, 41 W. Va. 351, 23 S. E. Rep. 735.

Trustees Represent Creditors.—Under the act of February 12, 1866, requiring banks of the commonwealth to go into liquidation, the trustees are the trustees of the creditors, and not of the bank. Exch. Bank v. Knox, 19 Gratt. 739.

Liability of Trustee of Personal Representative.—It would seem that the liability of a trustee for the collection of *choses in action* is different from that of a personal representative. Wimbish v. Blanks, 79 Va. 365; Crouch v. Davis, 23 Gratt. 62.

Joint Liability of Trustee.—Where property is conveyed to two trustees to be sold for the payment of certain creditors of the grantor, and the trustees undertake to administer the trust property so conveyed, both trustees are responsible for the proper application of the whole trust subject, even though they make an agreement between them that the trust subject shall be given up to the entire control and management of one of them. The creditors have a right to look to both of them, and as against the creditors of the trust fund this agreement cannot be given in evidence, however conclusive it may be between the parties. Miller v. Holcombe, 9 Gratt. 665.

When Assignee Held Personally Liable.—An assignee for the benefit of creditors ought not to be made personally liable for the notes, bonds, and accounts assigned when they become due, but only at the time when actually collected by him, except such notes, bonds, and accounts as are lost by his negligence or improper conduct. Ruhl v. Berry (W. Va.), 35 S. E. Rep. 896.

Liability of Representative of Trustee.—Where a sale under a deed of trust to secure a debt was declared invalid long after it was made, and the trustee's representatives were adjudged to pay into court the value of the land when sold, with interest, and the debt was then paid from the trustee's estate, though less than the value of the land, with interest, the trustee's representative must pay into court, for the benefit of the debtor's estate, the difference. Mosby v. Johnson, 86 Va. 429, 10 S. E. Rep. 425.

Assignee Realizes Less Than Scheduled Price.—Unless it is shown that an assignee neglected his duty and did not use reasonable diligence in collecting debts, he is not to be charged with a loss merely because there is a difference between the amount realized at the sale and the price of the goods as stated in the invoice. The *onus probandi* is on the adverse party to show that he failed in his duty, and that the choses assigned might have been collected by due diligence. Wimbish v. Blanks, 76 Va. 365.

Trustee Must Settle Accounts.—It is provided by the Code of West Virginia, ch. 72, sec. 6, p. 686, that, "In all cases where a debtor conveys all his property to a trustee for the benefit of his creditors, or where he conveys all his property except what is exempt from execution or other process, every such trustee shall settle his accounts before a commissioner of accounts of the county in which such deed is recorded, and the provisions of chapter eighty-seven of the Code of W. Va., as amended, shall apply to such settlement as far as applicable."

Liability for Acts of Cotrustee.—Although a person named trustee in a deed to secure debts, unites in sales necessary in the execution of the trust, and other formal acts, still he is not responsible for the misapplication or waste of the funds by his cotrustee, when he receives none of the trust funds; they being received by his cotrustee; and he being guilty of no fraud in relation thereto. Griffin v. Macaulay, 7 Gratt. 476.

Estimated Rents.—Trustees in deeds of trust for the benefit of creditors are not responsible for estimated rents when he has received none, and where his delay in selling the property arose out of the difficulty in finding a purchaser. Griffin v. Macaulay, 7 Gratt. 476.

Burden of Proof—Due Diligence by Trustee.—Before a trustee can be charged with certain *choses* conveyed in a deed of trust for the benefit of creditors and reported by the commissioner as "doubtful" at the date of the assignment, the *cestuis que trust* must prove that those *choses* might have been collected by due diligence. Wimbish v. Blanks, 76 Va. 365.

Notice to Trustees of Prior Bill of Sale.—Where one or two trustees in a deed of assignment for the benefit of creditors has actual knowledge of a previous bill of sale conveying a part of the assets called for in a deed of assignment, the failure to record the bill of sale will not prejudice the creditors. King v. Levy (Va.), 22 S. E. Rep. 492.

An assignee for creditors, with notice of prior bill of sale of the property assigned, secures no greater rights to the property than his assignor possessed. King v. Levy (Va.), 22 S. E. Rep. 492.

Knowledge of Prior Unrecorded Conveyance.—Knowledge by trustees, in a deed of trust to secure creditors, of a prior unrecorded conveyance binds the beneficiaries though the trustees did not know of the debtor's intention to execute the deed, nor of its recordation, until afterwards. Merchants' Bank of Danville v. Ballou, 98 Va. 112, 32 S. E. Rep. 481.

Holder of Overdue Note—Composition Deed.—Where a note is received in a composition proceeding, to be paid according to the terms of the trust deed, a party that acquires the note after maturity holds it subject to the provisions of the deed, because of the well-settled rule that the transferee of an overdue note, takes it as a dishonored note, subject to all the equities and defences that it was subject to in the hands of his immediate indorser, whether he had notice or not. Karn v. Blackford (Va.), 20 S. E. Rep. 149.

Right of Set-Off against Assignee.—When the assignee of a bank brings suit against a director to recover the proceeds of notes that he has wrongfully obtained by collusion with the cashier, the director and surety will not be entitled to set off the debt of the bank due him for deposits against the plaintiff's demands, except to the extent that he may be entitled to dividends from the assignee on account of his debts against the bank. Lamb v. Pannell, 28 W. Va. 663.

1. SALE OF TRUST PROPERTY.

a. WHAT TRUSTEE MAY SELL.—The sheriff, who is a trustee for all who are interested in the estate of an insolvent debtor, is not justified in selling the interest of the debtor in the estate surrendered by the schedule or vested by law in the sheriff, when owing to alleged incumbrances, the validity of which is controverted, or the extent thereof is unascertained or uncertain, the property is not in a condition to be disposed of for its value. Clough v. Thompson, 7 Gratt. 26.

Chattels Held by Third Party.—The sheriff, who, by law, is trustee for the creditors, cannot sell the goods, chattels and estate of the debtor in the possession of a third person, until the same are recovered in the manner prescribed by statute. Such a sale would not vest the legal title. Clough v. Thompson, 7 Gratt. 26.

Real Estate of Insolvent Where Sold.—Real estate of an insolvent debtor vests in the sheriffs of the counties in which it lies; hence a sale thereof by the sheriff of another county, in which the oath of insolvency is taken by the debtor, is without authority and void. Clough v. Thompson, 7 Gratt. 26.

Provisions in Express Terms as to Sale.—The fact that a deed of assignment for the benefit of creditors does not in express terms provide for a sale by the trustee of the property conveyed, when required so to do by the creditors secured, is insufficient of itself to render the deed void. Sec. 2442 of the Code of Va. amply provides for a sale in case of default in the payment of the debt secured. Taylor v. Mahoney, 94 Va. 508, 27 S. E. Rep. 107.

b. ADVERTISEMENT OF PROPERTY.—No general rule can be laid down as to the length of time property should be advertised for sale. Ordinarily a direction "duly advertised" is sufficiently complied with by advertising in accordance with the prevailing custom adopted by a prudent man in the management of his own affairs, or by following the rule of courts in relation to sales of like property in the jurisdiction in which the property is situated. Wilson v. Wall, 99 Va. 353, 38 S. E. Rep. 181; Morriss v. Ins. Co., 90 Va. 370, 18 S. E. Rep. 843, disapproved.

c. PUBLICATION OF NOTICE OF SALE.—The publication of a notice of sale under § 7, ch. 72, of the Code of W. Va. is complete on the fourth issue of the paper containing it, if it be published in the paper once in each successive week, though the four weeks have not elapsed between the dates of the first and last publications; and if the copy of such notice so published be posted at the front door of the courthouse of the county in which the sale is to be made, on the day of its first publication in the paper, it is sufficiently posted. Sandusky v. Faris (W. Va.), 38 S. E. Rep. 563.

Confirmation of Sale—Power of Court.—When property has been assigned for the benefit of creditors to trustees who have filed a bill for directions as to the administration thereof, and a sale has been made by order of the court, but not confirmed, the title still remaining in the trustees until confirmance, the property is still so far in the possession of the court, that it may restrain any interference therewith, under execution issued by other courts. Ford v. Watts, 95 Va. 192, 28 S. E. Rep. 179.

d. RIGHT TO ENJOIN SALE.

Amount of Debts, etc., Uncertain.—The grantor in a deed of trust for the benefit of his creditors thereby consents to an immediate sale of such property, and, such consent being analogous to that given by a debtor in a decree directing a sale of his property made and entered with his consent, he will not be permitted to enjoin such sale merely because the amounts of his debts, their priorities, and the persons to whom they are due and owing have not been ascertained. Sandusky v. Faris (W. Va.), 38 S. E. Rep. 563.

Certificate of Clerk—Bond and Security.—The failure of a trustee in a deed of trust, who has voluntarily given a bond to faithfully perform his duty as such trustee, and account for and pay over all money that may come into his hands in the execution of such trust, to append to his notice of sale to be made under the deed of trust, a certificate of the clerk that such bond and security has been given, is not sufficient ground for enjoining the sale. Sandusky v. Faris (W. Va.), 38 S. E. Rep. 563.

e. PAYMENT OF PURCHASE MONEY.

When Purchase Money Paid.—A purchaser, under a deed of trust, conveying land with general warranty to secure debts, cannot be excused from paying the purchase money (and therefore be excused from paying interest thereon) until he obtains possession. Findlay v. Toncray, 2 Rob. 374.

Provision as to Payment of Purchase Money.—A deed of assignment for the benefit of creditors, made by the members of a private banking firm in Virginia, after preferring certain creditors, and authorizing the assignees to sell the property either at public auction or private sale, provided that at any auction sale any creditor of the second class might purchase any property and pay at its full face value the amount found due such creditor, or so much thereof as might enable him to complete the payment of his purchase money; and that the assignees might divide the land to be thus sold into lots, in order to enable as many creditors as possible to become bidders on these terms. *Held*, that the provision was not necessarily fraudulent, and therefore under the Virginia decisions, did not avoid the assignment. Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354.

Rights of Purchaser in Surplus.

Dower and Sales.—A purchaser of land under a deed of trust conveying it with general warranty, to secure debts, where the land is sold for more than enough to pay those debts, cannot apply any part of the surplus to extinguish a dower right in the land existing at the time of the warranty, and to pay taxes assessed on the property before the sale was made. Findlay v. Toncray, 2 Rob. 374.

To Maintain Suit to Recover.—A purchaser of land, under a deed of trust conveying the same, with general warranty to secure debts, and sold for more than enough to pay the debts, cannot retain a part of the surplus of the purchase money to pay the costs of instituting an action of unlawful detainer to recover possession, when the claims of such purchaser are objected to by another creditor of the grantor, who obtained a decree against him after the deed of trust, and has acquired a lien. Findlay v. Toncray, 2 Rob. 374.

2. TITLE OF TRUSTEE.

a. TRUSTEES PURCHASERS FOR VALUE.—The trustees and trust creditors in a deed of assignment for the benefit of creditors are considered purchasers for value. Douglass, etc., Co. v. Laird, 37 W. Va. 687, 17 S. E. Rep. 188; Merchants' Bank of Danville v. Ballou, 98 Va. 112, 32 S. E. Rep. 481; Exchange Bank v. Knox, 19 Gratt. 739.

Under the laws of West Virginia the trustee is not only the holder of the title of the assignor but he is treated as holding the assets transferred in the capacity of a purchaser for value. Lamb v. Pannell, 28 W. Va. 667.

In Evans v. Greenhow, 15 Gratt. 153, the trustee and beneficiaries in a deed to secure *bona fide* debts, without notice, were held to be purchasers for value within the meaning of the exception in the statute, Code, ch. 188, § 3, p. 177, which provides that every *fi. fa.* shall be a lien on all the personal property from the time it is delivered to the sheriff to be executed. They will be preferred to an execution creditor of the grantor in the deed, as to a *chose in action* thereby conveyed. See also, Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354.

Where an insolvent merchant purchases goods not intending to pay for them, and after getting possession of them he conveys them and all his other estate in trust for the payment of his debts,

the trustee having no notice of the fraud, the trustee is a purchaser for value without notice. Wickham v. Martin, 13 Gratt. 427, and *note*; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. Rep. 354.

Lien of Judgment Inferior to Title of Assignee.—A deed of trust by a bank for the benefit of creditors, conveying to the trustees all its property of every kind, wheresoever situated, will take priority over an execution lien, the judgment being obtained after the title of the trustees was perfect. The lien can only operate on what belongs to the bank, and after this conveyance the assets were no longer the property of the bank, but belonged to the trustees, who took as a purchaser for value. Harrison v. Farmers' Bank, 9 W. Va. 424.

b. PARTIES—EXCEPTION TO RULE.—A firm composed of D and A assigned property in trust for the payment of debts owing by a former firm composed of D and C, and debts owing by the firm D and A for which the assignee had in any way become bound, the surplus to be paid over to the firm under the terms of the trust. Therewith it drew an order on the assignee in favor of a creditor payable out of the surplus of the trust fund, which was duly accepted. On a bill by the creditor against the trustee alone praying an accounting and that the surplus might be ascertained and applied to the liquidation of the order it was held that neither the firm D and A nor the firm D and C were necessary parties defendant, as they were represented by the assignee. Buck v. Pennybacker, 4 Leigh 5. This it will be seen forms an exception to the general rule, that all persons interested in the controversy must be made parties, it being well settled that the rule does not apply where they are fully represented by a party designated by themselves (trustee), as in this case.

XIII. RIGHTS OF CREDITORS GENERALLY.

Attaching Creditor May Share Ratably.—Where a creditor secured by a deed of trust with others, attempts to attach and subject the property of his debtor, who is also secured by the deed, in preference to the other creditors in the deed, although he fails to do this, still he is not precluded from claiming his *pro rata* share of the trust fund. Clark v. Ward, 12 Gratt. 440.

Right of Lien Creditor to Pro Rata Proportion.—A mortgages lands to B to secure a debt due to him; and then, by a general deed of trust, conveys the equity of redemption of the same lands, together with sundry personal property, to a trustee, to raise a fund to pay *all his debts*, including debts due B other than that specially secured by the mortgage. *Held*, B is entitled to receive the *whole* of the debt specifically secured to them by the mortgage, out of the proceedings of the mortgaged lands, and then to come in for the distribution of the fund in the hands of the trustee under the general deed of trust, for satisfaction of the other debts due him, *pro rata* with the other creditors. Bell v. Hammond, 2 Leigh 416.

Rights of Creditors Injured by Assignment.—Every creditor who has been injured by an assignment for the benefit of creditors has a right to the protection of the court, and his legal rights cannot be made to depend upon what any other creditor, or a majority of the creditors, may say or do with regard to the debtor's property after the preferred creditors have been satisfied. Landeman v. Wilson, 29 W. Va. 702, 2 S. E. Rep. 203.

Right of Secured Creditors to Participate in General Fund.—Creditors secured by a general assignment of their debtor's estate are entitled to present participation in the general funds arising from such assignment, although they may hold collateral securities on their debts. They cannot be required to surrender such securities until their debts are fully satisfied. Nor can they be refused participation in the general fund until such securities are exhausted. Williams v. Overholt, 46 W. Va. 339, 33 S. E. Rep. 236.

Right to Show Intention to Secure.—A creditor of the grantor in a deed to secure creditors, may show by proofs that his debt was intended to be secured under the provision for another creditor. Griffin v. Macaulay, 7 Gratt. 476.

Books of Grantor.—The books of the grantor in a deed of trust for the benefit of creditors are proper evidence of the amount of the debts due to the creditors secured by the deed. Griffin v. Macaulay, 7 Gratt. 476.

1. STATUTORY PROVISIONS—RIGHTS OF SIMPLE CONTRACT CREDITORS TO SUE.—Code Va. 1887, § 2460, provides that a creditor, before obtaining judgment or decree for his claim may institute any suit which he might institute after obtaining such judgment or decree to avoid a fraudulent assignment of the debtor's estate, and may obtain such relief as he would be entitled to after obtaining a judgment or decree for the claim which he might be entitled to recover. See also, Wallace v. Treakle, 27 Gratt. 479; Price v. Thrash, 30 Gratt. 515; Stovall v. Border Grange Bank, 78 Va. 188.

When it is sought to avoid a fraudulent conveyance and subject the property conveyed to the satisfaction of the plaintiff's debt he may sue in equity to set aside the conveyance without a prior judgment, the statute (Code of W. Va., ch. 133, § 2) providing that a creditor need not sue and obtain a judgment before proceeding in equity to set aside a fraudulent conveyance. Tuft v. Pickering, 28 W. Va. 332. See also, Watkins v. Wortman, 19 W. Va. 82.

2. ATTACKING CREDITORS.

Creditors at Large Take Priority.—Creditors at large, who file a bill to set aside a fraudulent conveyance, and obtain a decree setting it aside, acquire a specific lien on the land from the day the bill is filed, and are entitled to priority over the other creditors at large. See Code of Virginia 1860, ch. 179, sec. 2; Wallace v. Treakle, 27 Gratt. 479.

Judgment Creditors.—A creditor cannot have the aid of the court of equity to prevent, in any way, or interfere with, the disposition which his debtor may make of his property, unless the creditor has first proceeded as far as he can at law. To subject *real estate*, he must have obtained a judgment at law: and to subject *personal estate*, he must have a judgment and execution. Rhodes v. Cousins, 6 Rand. 187.

Secret Agreement—Bill Not Sustained.—The creditors, named in a deed, requiring them to signify their acceptance to its terms and conditions within thirty days from its date, and further agree to acquit and release the debtor from additional liability, being dissatisfied with the trusts therein declared, it is agreed between them and the debtor, that they will not sign it, and that another will be executed by the debtor, but the day before the time expires, two do sign it, with the avowed purpose to each other, of securing the benefit of the deed to all creditors. Afterwards one of these signing creditors files a bill against the other and the trustee to have the trust executed for the exclusive benefit of the two. *Held*, that the bill should be dismissed with costs. Phippen v. Durham, 8 Gratt. 457.

Priority—Substitution.—Under sec. 2460 of Va. Code, a creditor is not entitled, on showing the invalidity of a debt secured by a trust deed for creditors, to have his debt substituted therefor, and his lien declared prior to the liens of other creditors included in the deed, whose lien attached when the deed was made. Craig v. Hoge, 95 Va. 275, 28 S. E. Rep. 317.

XIV. REMOVAL OF TRUSTEES.

A court of chancery has power, in Virginia, to remove trustees in a deed of trust to secure creditors, and to substitute others in their place, both by virtue of the jurisdiction of such courts over the subject of trusts, and under Code of Va. 1873, ch. 155, § 6, as amended by Acts Va. 1874, pp. 224, 225, and ch. 174, § 8, as amended by Acts Va. 1874, 1875, p. 423, providing that in case of death, failure to act, etc., of a trustee, in a deed of trust, a court of equity in the county in which such deed is or might have been recorded, may appoint a trustee in his place, and in such case no conveyance to the substituted trustee is necessary. Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866. See also, McCullough v. Sommerville, 8 Leigh 415.

1. APPOINTMENT OF RECEIVERS.—Where an assignment or conveyance is made by an insolvent firm to a trustee of the assets of the firm for the payment of the claims of creditors, and it is apparent that there is danger of a loss of property in the hands of the trustee, the court may appoint a receiver, and have the assets administered under its own control. Wagner v. Coen, 41 W. Va. 351, 23 S. E. Rep. 735.

Lien Creditor May Have Receivor Appointed.—A specific lien creditor may have a receiver appointed to administer the specific property upon which he holds his lien, and to collect rents for his benefit, and the trustee may be enjoined from disturbing such property, when a debtor has made a general assignment for the benefit of his creditors, and assigned the property upon which the specific lien is held, and the lien more than covers the property. Bristow v. Home Bldg. Co., 91 Va. 18, 20 S. E. Rep. 946.

When Special Receivor to Be Appointed.—When an assignee violates the duty of keeping his accounts separate from his individual accounts, to the injury, or the great risk of injury, of those who may be ultimately entitled to the fund, or wastes or misappropriates the fund or a material part thereof, or it is made to appear that there is danger of misappropriation or of loss, from any misconduct of such trustee or his agents, of a material part of such property, such court may and should appoint a special receiver thereof, and cause him to duly administer the same under its directions. Wagner v. Coen, 41 W. Va. 351, 23 S. E. Rep. 735.

Discretion of Court as to Removal.—Whether a trustee, in a deed of trust for the benefit of creditors, shall be removed, is in the sound discretion of the court, even though the deed be sustained. Taylor v. Mahoney, 94 Va. 508, 27 S. E. Rep. 107.

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529 *Stone v. Wilson.

October Term, 1853, Richmond.

1. **Sheriffs—Return — Amendment.***—A sheriff may have leave to amend his return upon an execution, after notice of a motion against him founded on the original return: And the amended return may be made by a deputy who did not make the first return.

2. **Same—Motion against—Notice.**†—A second notice to the sheriff is not necessary after the amended return; but the plaintiff may proceed upon the original notice.

3. **Same—Negligent Escape of Debtor—Action of Debt against Sheriff—Statute.**—Under the act, 1 Rev. Code of 1819, ch. 136, § 3, an action of debt may be maintained against a sheriff for either a wilful or negligent escape.‡

4. **Same—Action of Debt against for Escape of Debtor—What Necessary to Maintain the Action.**—In order to maintain the action, it is only necessary for the plaintiff to show the escape, which may be done by evidence *aliunde* the return on the execution: And to defeat the action the sheriff must show that the escape was tortious, and that fresh pursuit was made.

5. **Same—Same—Presumptions by Jury.**—Upon proof of the escape, the jury are bound to presume all that is necessary, under the statute, to be found in their verdict, unless and until the sheriff negatives by his proofs all consent or negligence on his part, and also shows that he has used due means to retake the prisoner.

6. **Same—Escape of Debtor—Motion against Sheriff—When May Be Maintained—Statute.**—Under the act, 1 Rev. Code of 1819, ch. 134, § 48, p. 542, a motion may be maintained against a sheriff for an escape. 1st. Where the return on the execution states that the officer has taken the body of the debtor and has it ready to satisfy the execution, and the plaintiff can show the escape *aliunde*. 2d. When the return shows such a state of facts as would entitle

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*Sheriffs—Return—Amendment.—On the subject of the amendment of the sheriff's return see *foot-note* to Walker v. Com., 18 Gratt. 13, where the principal case is cited, and among others, the cases that cite the principal case.

†**Same—Motion against—Notice.**—In Lyon v. Horner, 32 W. Va. 435, 9 S. E. Rep. 875, it is said: "The first error assigned by the plaintiffs in error is that the court improperly overruled their motion to quash the notice. In support of this assignment it is claimed that the notice should have been in the name of the state for the use of the plaintiff, because it is provided in chapter 10 of the Code that in all bonds payable to the state 'suits may be prosecuted in the name of the state,' etc. It is true that this proceeding is, in effect, a suit on the sheriff's official bond, which is payable to the state, but the statute is merely permissive, and not mandatory. This proceeding is taken under section 35, ch. 41, Code 1887, which declares that the court may, on the motion of the person entitled to recover, give judgment, etc. The form of the notice is not given, but universal practice, so far as I know or can discover, both in this state and Virginia, ever since said statute was enacted, has been for the notice to be in the name of the plaintiff in the *fieri facias*. Chapman v. Chevis, 9 Leigh 297; *Stone v. Wilson, 10 Gratt. 529*; Bank v. Horner, 26 W. Va. 442. No other objection is pointed out to the notice, and, according to the decisions of this court, it seems to me to be sufficient, and that there was consequently no error in overruling the motion to quash it. Bank v. Horner, *supra*; Board, etc., v. Parsons, 22 W. Va. 308."

See principal case cited in last-named case.

‡See the opinion of JUDGE DANIEL for the provisions of the statutes.

the plaintiff to a verdict in an action of debt for an escape.*

7. **Same—Same—Same—Court Occupies Position of Jury—Presumptions.**—Upon such a motion the court occupies the place of a jury as to the facts, and is bound upon a return of "executed," and upon the proof of an escape, to presume that it was with the consent of the sheriff; unless he proves that it was without his consent or negligence, and that he had used due means to retake the prisoner.

8. **Failure of County to Provide Jail—Duty of Sheriff.**—The fact that the County court has not provided a jail in which a debtor taken in execution may be confined, does not authorize the sheriff who has taken a debtor on an execution, to permit him to go at large: If no jail is provided by the County court, it is *the sheriff's duty to provide one, and to keep the debtor whom he has taken in execution, in custody.

9. **Sheriffs—Return Showing Debtor Permitted to Go at Large—Effect.**—A return by the sheriff that the County court had not provided a jail, and that he had therefore permitted a debtor taken in execution to go at large, itself shows an escape, and will sustain a motion against the sheriff.

10. **Same—Return—Escape of Debtor—Case at Bar.**—A return by the sheriff that the County court had not provided a jail, and that a debtor taken in execution had escaped without his consent or negligence; without adding that he had used due means to retake him, is not sufficient to protect the sheriff; but a motion may be maintained against him upon the return.

This was a motion in the Circuit court of Pittsylvania county by Samuel Stone against Nathaniel Wilson, late high sheriff of the county. The notice was that Stone would ask the court for a judgment for the amount of an execution of capias ad satisfaciendum, and fifteen per cent. damages, which Stone had sued out against Stephen R. Neal, John Royall and Thomas Sutherlin, and on which William B. Townes a deputy of Wilson, had returned endorsed, "Executed on the 25th day of January 1843;" and which said parties the sheriff had suffered to escape.

After the notice had been served on the high sheriff and the case had been docketed, the high sheriff moved the court to be permitted to amend the return; and this motion being sustained, Thomas S. Jones, who had been a deputy of the late high sheriff, made the amended return.

On the trial before the court the plaintiff introduced the execution sued out by him against Neal, Royall and Sutherlin. This execution bore date the 20th of December 1842, and was made returnable to the next February rules. The original return thereon was, "Executed 25th day of January 1843. W. B. Townes, D. S. for Nathaniel Wilson, sh'ff." The amended return was, "The ca. sa. was not executed on John Royall, he being no inhabitant of Pittsylvania county, and residing in the state of Georgia from the issuing of *said ca. sa. till the return day thereof; and it was not executed on the defendant Neal, he having availed himself of the benefit of the bankrupt law of the United States previous to the issuing of said ca. sa. and the sheriff being informed by the plaintiff that he did not wish the ca. sa. executed on said Neal: And it was executed on the defendant Sutherlin only; and there being no jail provided by the County court at the time to confine him in, he made his escape."

There was also parol evidence from which it appeared, that William B. Townes the deputy, levied the execution aforesaid on Thomas Sutherlin, who having a sick family, proposed to Townes when in his custody under the writ, to meet him at the courthouse of Pittsylvania county on a certain day, and yield himself to the custody of the said writ, which Townes, after consultation with counsel, assented to, and thereupon permitted Sutherlin to go at large.

After he was thus permitted to escape, Sutherlin gave notice to the plaintiff that on a certain day he would take the oath of an insolvent debtor; and on the day appointed, Sutherlin appeared at the courthouse, as did the plaintiff and the deputy Jones, but not Townes; that all three met together in the clerk's office, when the plaintiff instituted an enquiry in the office concerning his execution aforesaid. The clerk by mistake had entered the execution on his process book as a fieri facias, and the plaintiff misled thereby, supposing his execution to be a fieri facias, instructed Jones to levy it upon some horses which it was understood Sutherlin then had at the courthouse; and thereupon the parties separated; Sutherlin not taking the oath of an insolvent debtor, not being detained, or claimed to be detained under the ca. sa. by Jones or any body else; but departing to his own house.

After hearing the evidence the Circuit court rendered a judgment for the defendant: And the plaintiff *having spread the facts upon the record, applied to this court for a supersedeas, which was allowed.

Lyons, for the appellant, insisted:

1st. That although a return of a sheriff may be amended in order to state the truth of the case; yet such amended return could not be made by another deputy. Ibbotson v. Tindal, 8 Eng. C. L. R. 279.

2d. That to sustain this motion it is not necessary that the return shall state the escape: The escape may have been after the return was made. But when the sheriff returns that he has taken the body of the debtor in execution, the escape may be proved by parol testimony: And he insisted that it was abundantly proved in this case. He referred to Perkins v. Giles, 9 Leigh 397, 400; Watson on Sheriffs, 132, 148, 7 Law Libr.; 2 Bac. Abr. Escape, letter D, 517; Alsept v. Eyles, 2 H. Bl. R. 108; Day v. Brett, 6 John. R. 22; 1 Saund. Pl. & Ev. 487; Starkie on Evi. part 4, 1342, 1345, 6. And as to the admissibility of parol evi-

*See the opinion of JUDGE DANIEL for the provisions of the statutes.

dence, Starkie on Evi. 1044; 1 Greenl. Evi. § 276.

3d. That the amended return must be held to mean that there being no jail provided by the county, the sheriff permitted the debtor to go at large: And this he insisted was no legal justification. The sheriff was bound to keep him safely; and for this purpose to provide a jail if the county had not done it. But even if this was not so, as the first deputy had permitted the debtor to go at large, that was an escape for which the sheriff was responsible; and what afterwards occurred at the court-house when the parties met there, did not purge the previous escape. Fisher v. Vanmeter, 9 Leigh 18.

Patton, for the appellee, insisted:

1st. That the amended return was properly permitted. That every return 533 was in contemplation of law *made by the high sheriff, and that the deputy had no power to make it except as the agent of the high sheriff. But if this was not so, the objection could not be taken in this collateral proceeding; but the return having been made by the authority of the court having jurisdiction of the subject, it was conclusive. Wadsworth v. Miller, 4 Gratt. 99; Smith v. Triplett, 4 Leigh 590.

2d. That the parol testimony was inadmissible. Carthrae v. Clarke, 5 Leigh 268: And therefore the motion must be sustained if sustained at all, upon the return of the sheriff. To do this he insisted that it must appear that the debtor escaped with the permission of the sheriff; and this even in an action of debt upon the bond. Perkins v. Giles, 9 Leigh 397. That the motion could not be sustained on the first branch of the statute was obvious. The second clause required that the return itself should show the liability of the sheriff; and here clearly the amended return did not state that the debtor escaped with the consent of the sheriff.

MONCURE, J. A court from which process is issued may permit the sheriff's return thereon to be amended at any time, even though a suit or motion founded on the original return be then pending, and even though the proposed amendment be inconsistent with the original return, and take away the foundation of the suit or motion. Wardsworth v. Miller, 4 Gratt. 99; Smith v. Triplett, 4 Leigh 590. See also Bullitt v. Winston, 1 Munf. 269; and Rucker v. Harrison, 6 Id. 181. The sheriff may make the amendment as he may do all, or nearly all, the other acts of his office, by his deputy; and such deputy need not be the same who made the original return. The propriety of permitting such amendment to be made can only be questioned by resisting the motion for that purpose, 534 or by an appeal *from, or writ of error to, the judgment; and not in any collateral proceeding. The amended return takes the place of the original return; and any suit or motion which may be pending, founded on the original return, can proceed further, only on the amended return; but the pleadings may be amended, if necessary, to suit the amended return.

The statute on which the motion in this case is founded, gives a new and summary remedy, highly penal in its nature, and should be strictly construed; especially as it is cumulative, and does not take away the common law action on the case for any official default of the sheriff, nor the old statutory action of debt for an escape.

Regarding this motion as upon the amended return, in which view only it can be regarded, it can be sustained, if at all, only on one of these two branches of the statute, viz: On that which makes the sheriff responsible if he shall return on any writ of ca. sa. that he hath taken the body of the defendant, and hath the same ready to satisfy the money in such writ mentioned, and shall have suffered him to escape with the consent of such sheriff; or, on that which makes him responsible if he shall make any return upon any execution as would entitle the plaintiff to recover from him by action of debt, the debt, damages or costs in such execution mentioned.

It cannot be sustained on the former branch of the statute; because the amended return, though it shows that the sheriff hath taken the body of one of the defendants, does not show that he hath the same ready to satisfy the money, &c.; but on the contrary, shows that he hath not the same ready to satisfy, &c.; the said defendant having made his escape. Even if it showed that the escape was with the consent of the sheriff, the case would not fall under this, but under the latter branch, which 535 was added to the statute at *the revisal of 1819 for the purpose of covering such a case.

Nor can it be sustained on the latter branch of the statute; because the amended return does not entitle the plaintiff to recover from the sheriff by action of debt, the debt, damages or costs in such execution mentioned. It does not show that the sheriff willfully and negligently suffered the defendant to escape, in which case only can the action of debt for an escape be sustained. To sustain the motion under this branch of the statute, everything necessary to sustain an action of debt must appear on the face of the return, which cannot be enlarged, abridged or altered by evidence aliunde. If there be any ambiguity in this case, it is patent and cannot be removed by parol evidence. To make the amended return sufficient to sustain an action of debt, the important words "with the consent of the sheriff," or words of like import, must be supplied by parol and follow the word "escaped" at the end of the return. It is no sufficient answer to say that in an action for an escape, if the plaintiff prove the escape a jury may presume that it was with the assent or through the negligence of the sheriff, unless it be shown by the defendant to have been tortious. That would be a presumption of fact upon the whole case; not only from the affirmative

fact of escape but from the negative fact of the absence of evidence to account for it. No such presumption of fact can be made by the court in a motion under this branch of the statute. There can be no recovery even of nominal damages in any action for an escape, unless the jury who try the issue expressly find that the prisoner escaped with the consent or through the negligence of the sheriff, or that such prisoner might have been retaken and that the sheriff neglected to make immediate pursuit.

This requisite of our statute cannot 536 be supplied *by any intendment or reference whatsoever; therefore, where the declaration charged the sheriff with a voluntary escape, who pleaded not guilty, a general verdict for the plaintiff was held not to warrant a judgment against the defendant. Hooe v. Tebbs, 1 Munf. 501. If the finding of the jury in an action for an escape were merely that the defendant "made his escape," certainly no judgment could be entered for the plaintiff on the verdict. The addition of the words "there being no jail provided by the County court at the time to confine him in," would rather weaken than strengthen the case of the plaintiff. So far from showing what the statute requires to be shown, such a finding would tend to show the contrary. The same observations apply to this case, in which the facts necessary to the sheriff's conviction must appear on the face of the return, as in that they must appear in the verdict of the jury; and the same words should receive the same construction in both cases.

For the foregoing reasons, I am for affirming the judgment.

DANIEL, J. The act of assembly under which the proceedings in this case were had, provides (among other things) that if any sheriff, under sheriff or other officer shall make return upon any writ of capias ad satisfaciendum, that he hath taken the body or bodies of the defendant or defendants, and hath the same ready to satisfy the money in such writ mentioned, and shall have actually received such money of the defendant or defendants, or have suffered him or them to escape with the consent of such officer, and shall not immediately pay such money to the party to whom the same is payable; or shall make any other return upon any such execution as would entitle the plaintiff to recover from such officer by action of debt, the debt in such execution mentioned, and such officer shall not 537 *immediately pay the same to the party to whom it is payable, then or in either of said cases it shall be lawful for the creditor at whose suit such writ shall issue, upon motion, on ten days' notice, to recover of such officer the money in such writ mentioned, with interest thereon at the rate of fifteen per centum per annum, from the return day of the execution until the judgment shall be discharged. 1 Rev. Code of 1819, p. 542.

The writ of capias ad satisfaciendum sued out, was against three defendants, Neal, Royall and Sutherlin: And the original return upon it was "Executed 25th day of January 1843. William B. Townes, D. S. for Nathaniel Wilson, sheriff."

The notice was founded on this return; but after the motion was docketed the defendant asked leave to amend his return, which being granted, an amended return was made in the following words: "The ca. sa. was not executed on John Royall, he being no inhabitant of Pittsylvania county, and residing in the state of Georgia from the issuing of said ca. sa. till the return day thereof; and it was not executed on the defendant Neal, he having availed himself of the benefit of the bankrupt law of the United States previous to the issuing of said ca. sa. and the sheriff being informed by the plaintiff that he did not wish the ca. sa. executed on said Neal; and it was executed on the defendant Sutherlin only; and there being no jail provided by the County court, at the time, to confine him in, he made his escape. Nathaniel Wilson, late sheriff, by Thomas S. Jones, his late deputy."

Upon the trial of the motion the plaintiff introduced the writ of capias ad satisfaciendum, and the original and amended returns thereon, and proved that Townes the deputy, who made the original return, levied the writ on Sutherlin, who, having a sick family, proposed to Townes when in 538 his custody, under the writ, to *meet him at the court-house of Pittsylvania county on a certain day, and yield himself to the custody of the said writ; which Townes, after consultation with counsel, assented to, and thereupon permitted Sutherlin to go at large. That after he was thus permitted to escape, Sutherlin caused a notice to be served upon the plaintiff, that he would, on the —— day of —— in order to be discharged from the ca. sa. avail himself of the benefit of the act for the relief of insolvent debtors; that on the day appointed in the notice, Sutherlin appeared at the court-house; that the plaintiff also attended, and also Thomas S. Jones, another deputy of the defendant; and that all three met together in the clerk's office: Townes not attending. That the plaintiff thereupon instituted an enquiry in the office concerning his execution aforesaid: That the clerk, by mistake, had entered the execution on his process book as an execution of fieri facias, and the plaintiff, misled thereby, instructed Jones to levy it on some horses, which it was understood Sutherlin then had at the court-house; and thereupon the parties separated; Sutherlin not taking the oath of an insolvent debtor, not being detained or claimed to be detained by or under the ca. sa. aforesaid by the said Jones the deputy sheriff, or any one else; the said Sutherlin departing to his own house.

As a preliminary to the task of construing the statute and applying it to the case made by the plaintiff, a brief enquiry into the state of the law of escape as existing at the time when the act was passed, seems neces-

sary. By the common law there were but two kinds of escape of a debtor in execution, voluntary, or negligent. Voluntary escapes are such as are by the express consent of the sheriff or jailor; negligent, where the prisoner escapes without the consent or knowledge of the sheriff or jailor. Sheriffs and jailors were obliged to keep persons in execution "in close and safe custody;" and if a defendant, after having been 539 *taken in execution, was seen at large for the shortest time, the sheriff was chargeable for an escape. Even though the escape was clearly without any default on the part of the officer, such circumstance of itself afforded no justification. Even the rescue of the prisoner from the sheriff by a mob destroying the jail and carrying off the prisoner by a force so great and violent that the sheriff could not resist it, although he did all in his power to prevent it, was, in the case of Elliott v. The Duke of Norfolk, 4 T. R. 789, decided by the Court of king's bench, to be an escape for which the sheriff was liable. The act of God alone or that of the king's enemies would excuse the sheriff on the general issue. It is true that when the escape was without the assent of the sheriff, and he made fresh pursuit and retook the prisoner before action brought, he was permitted to plead such fact specially. The remedy for an escape, whether negligent or voluntary, was by an action on the case, in which all that it was necessary for the plaintiff to show in order to maintain his action, was that the prisoner had been legally arrested by a proper execution, and that he was afterwards seen at large. And under a count for a voluntary escape it was competent for the plaintiff to recover on evidence showing a negligent escape.

By the statutes 13 Ed. 1, ch. 11, and 1 Rich. 2, ch. 12, the action of debt for the escape of prisoners out of execution was given. These statutes gave a new and cumulative remedy, but they imposed no new burden of proof on the plaintiff. The same state of facts that before entitled him to recover in the action on the case now entitled him to recover in the action of debt. There was however one important difference between the judgments authorized by the two actions; for, when the action on the case was brought, the jury were at liberty to give such damages as they thought right under all the circum- 540 stances of the case; *but when the action of debt, the remedy prescribed by the statutes, was resorted to, the sheriff or jailor was placed in the same situation in which the original debtor stood, and the jury could not give a less sum than the creditor would have recovered against the prisoner, to wit, the amount of the debt mentioned in the execution and the costs. Selwyn Nisi Prius, Wheaton's edi. 454, 5, 6, and authorities there cited.

The English laws and decisions on the subject were found by experience, in Virginia, to be too harsh in their operation against the sheriffs; and as early as 1736 an act was passed making an important change in their favor. This act, after reciting that by reason of the situation of most of the county prisons within this colony, some evil disposed persons have had opportunities of breaking the same open, and turning out debtors and others, to the hindrance of justice, the injury of creditors, and ruin of sheriffs, who, upon actions brought for escapes, have been compelled to pay the debts for which such prisoners stood charged, proceeds to declare that no judgment shall be entered against any sheriff or other officer in any suit hereafter to be brought, for the escape of any debtor in his or their custody, unless the jury who shall try the issue, shall expressly find that such debtor did escape with the consent, or through the negligence of such sheriff or officer; or that such prisoner might have been retaken, and that the sheriff and his officers neglected to make immediate pursuit. The influence of this statute on the rights of the parties to an action for an escape was the subject of adjudication in the case of Johnson v. Macon, 1 Wash. 5; 4 Call 370. In that case the Circuit court had instructed the jury that it was necessary for the plaintiff to prove not only the escape of the prisoner, but also to show that it was made by the consent or negligence of the sheriff. Upon an appeal, this court decided that the 541 *instruction was wrong; that whilst it was necessary that the jury should find expressly that the debtor did escape with the consent or through the negligence of the officer; or that such prisoner might have been retaken and that the sheriff neglected to make immediate pursuit; still that it was not necessary for the plaintiff to do more than prove the escape which was still the gist of the action; and that the consent or negligence of the sheriff would and ought to be presumed by the jury, unless the sheriff showed that there was no negligence on his part, and that due means were used to retake the prisoner. The act of 1792, which was re-enacted in 1819 at the same time when the provisions for the summary remedy against the sheriff for an escape by motion were embodied in the section under which the plaintiff proceeded, is made up of the preamble and of the first section of the act of 1736 before cited, and of a proviso in the following words: "Provided always, that when any sheriff shall have taken the body of any debtor in execution, and shall willfully and negligently suffer such debtor to escape, the person suing out such execution, his executors or administrators, may have an action of debt against such sheriff, his executors and administrators, &c. for the recovery of the sum of money mentioned in the execution, and damages for detaining the same.

If this proviso were read alone without any reference to the previous laws on the subject and to the preamble and first part of the section in reference to the requisites of the verdict, it might seem to countenance the idea that it was the purpose of the

legislature to give the action of debt only where the escape was both willful and negligent. This proviso is, however, taken mainly from the 37th section of chap. 1 of the acts of 1753, which gave the action of debt for escape to and against the representatives of the plaintiff and the sheriff, and which declares that when any sheriff
542 shall *have taken the body of a debtor in execution, "and shall willfully or negligently" suffer such debtor to escape, the plaintiff, his executors, &c. may have an action of debt against the sheriff, his executors, &c. Taking the act regulating the action of debt then, as it now stands on the statute book, there can, I think, be no doubt that it was the purpose of the legislature to give the action of debt for an escape in all cases where the escape was willful or negligent; and that in order to maintain his action, it would be only necessary for a plaintiff to show the escape; and that in order to defeat the action, it would be incumbent on the sheriff not only to show that the escape was tortious, but that fresh pursuit was made. That upon the plaintiff's proving the escape, the jury would be bound to presume all that is necessary under the statute, to be found in their verdict, unless and until the sheriff negatived by his proof all consent or negligence on his part, and also showed that he had used due means to retake the prisoner.

Such being the state of the law with respect to the action for an escape, the legislature thought proper to give the still further remedy by motion. The statute which gives it, provides plainly, I think, for two classes of cases, or states of facts, in either of which the motion may be resorted to: First, when the return states that the officer has taken the body of the debtor and has it ready to satisfy the execution, and the plaintiff can show the escape aliunde; and secondly, when the return shows such a state of facts, as would have entitled the plaintiff to a verdict and judgment in an action of debt for an escape.

As the case stood on the original return, (which was, as I conceive, equivalent to a return that the sheriff had executed the writ on all of the defendants, and had their bodies ready to satisfy the debt in the execution mentioned,) the plaintiff had
543 nothing more to do, *in order to sustain his motion, under the first clause of the section heretofore cited, than to exhibit the return, and to prove aliunde that any one of the defendants had been seen at large since the execution of the writ. The court occupying, on the motion, the place, and discharging the functions of a jury, as to all questions of fact, would have been compelled to presume, in obedience to the principles heretofore adverted to, that the escape was with the consent of the sheriff.

In this state of things the defendant asked leave of the court to amend his return. Seeing the danger to which he was exposed, it is but reasonable to suppose that the defendant would, in his amended return, if he could do so consistently with the true state of the facts, set forth in plain and unambiguous terms, all matters of excuse or justification he might have for the escape. The language of the amended return, however, instead of setting forth explicitly the circumstances under which the escape was made, is vague, equivocal and susceptible of either the one or the other of two constructions. It may mean that there being no jail provided by the County court to confine the prisoner in, and not being bound to furnish a place for his confinement, the sheriff had permitted him to escape; or it may mean that there being no jail to confine the prisoner in, he made his escape, notwithstanding the sheriff used such means as were in his power to prevent it. If one of these interpretations can be regarded as more favorable to the sheriff than the other, I know of no rule which would require us, on that account, to adopt it rather than the other; which would make it our duty to infer and imply, from a vague and ambiguous return, made under the circumstances which attended this, a defence which, if it existed, it was no less the duty than the interest of the sheriff to state in a plain, direct and straightforward manner.

544 *The first of these two constructions is, I think, the most reasonable. It approaches nearer the literal meaning of the language employed in the return, and leaves less to inference and implication. And if such be the sense in which the return is to be understood, it shows a plain case of voluntary escape. Precisely such a state of facts, as I construe the return before us as disclosing, were pleaded by the sheriff in the case of Gwinn v. Hubbard, 3 Blackf. R. 14. The substance of the plea in that case being, that the county court had neglected and refused to cause a jail to be erected, and that because there was no jail the sheriff had permitted the prisoner to escape as he lawfully might do. The plea was held to be bad. And the court said that by the common law each county had two prisons: one for the reception of criminals, furnished by the public, and the other for the reception of debtors, furnished by the sheriff. That the sheriff might appropriate his own house for that use, or furnish any other house within the bounds of the county, and that the government would be bound to indemnify him. That the sheriff was bound to keep all such prisoners in safe custody till the debt was paid or the prisoner otherwise legally discharged; and that to enable him to do so, the whole means and power of the county were at his disposal. That nothing but public enemies or the act of God could release him from that obligation. That though by statute the board of the county were required to erect a jail, the time of doing so was left to their discretion, and that no provision had been made for the detention of prisoners until the public prison could be erected. That it could not be presumed that the legislature intended that no debtor should be imprisoned until

it might suit the convenience of the county authorities to erect prisons. That as there was no prison in the county provided by the board, the common law governed, 545 and *that the sheriff ought to have furnished a prison, and detained the debtor in close custody until the debt was paid or the prisoner otherwise legally discharged.

These views apply with full force to the case before us. By our statute it is made the duty of each county court to cause to be erected and kept in good repair in each county a jail well secured, &c. And it is declared that the court failing in its duty in this regard, shall be liable to the action of the sheriff from time to time, for all damages recovered against him for any escape, for want of a sufficient prison. And in cases where a jail is destroyed by fire or otherwise, provision is made for keeping persons committed for crime, in the jail of some adjoining county, but no provision has been made by statute (so far as I have been able to discover), for the custody, in such emergencies, of debtors in execution. Tate's Digest, 463. In such cases I apprehend the common law must prevail, and the sheriff cannot excuse himself for the escape of a debtor once taken into his custody under a capias ad satisfaciendum, by returning or showing simply that there was no jail provided by the county court in which to confine the debtor.

But let it be conceded for the sake of the argument, that the second construction, of which I have supposed the return to be susceptible, is the true one; that the return means, that there being no jail to confine the prisoner in, he made his escape without the consent of the sheriff, and despite the use of means employed for his confinement, which the sheriff reasonably supposed adequate to his safe custody. Still, under the authority of the case of Johnson v. Macon, a state of facts would be shown entitling the plaintiff to recover in his action of debt. To take the return out of the influence of that decision, it is necessary to make a still farther inference in its favor; and to construe it as meaning to aver also that 546 after *the escape the sheriff used all the means required by law and within his power to retake the prisoner. Such an inference would, I think, be altogether out of the language of the return, and wholly foreign to any fair and reasonable interpretation. The return does not allege an immediate pursuit of the prisoner; and it does not say that he might not have been retaken. This is as much a matter of defence which the sheriff is bound to show as that the escape was made without any negligence on his part. At common law and under the English statutes, the making of fresh suit would have been of no avail to the sheriff. He could defend himself in a case of negligent escape only by showing a recaption of the prisoner before action brought. The change made in this regard by our statutes goes to the extent of placing proof by the sheriff of immediate pursuit, or of the fact that the prisoner could not be retaken, when the escape is tortious, on the same footing with a recaption in England: But it goes no farther. It is still for the sheriff to make out his defence; and it is only half completed when he shows a tortious escape; the authority of the case before referred to, requiring him also to show that fresh pursuit was made.

Upon the simple exhibition of the amended return, then, the plaintiff would have been entitled to recover in an action of debt, and his case is, I think, plainly within the provisions of the second clause of the section under which the proceeding by motion was had.

This view of the case precludes the necessity, on my part, of deciding any question with respect to the parol evidence offered by the plaintiff, or of adverting to it at all, further than to observe, that even upon the concession that the defendant might resort to it for any matter of defence which it discloses, although the plaintiff could not use it to contradict the sheriff's 547 *return, it does not, in my opinion, furnish any such matter. It presents no fact which can make the case of Carthrae v. Clarke, 5 Leigh, 268, bear unfavorably upon the plaintiff's case. It does not show any waiver whatever by the plaintiff of his right to proceed against the sheriff for an escape.

There was no necessity of a new notice, on the amended return. The only object of such notice would have been to apprise the sheriff of the plaintiff's demand. This information he had. He had full notice that the object was to hold him liable on motion for the escape as set forth in his own returns.

I think the court erred in refusing to sustain the paintiff's motion.

ALLEN and LEE, Js., concurred in the opinion of Daniel, J.

SAMUELS, J., concurred with Moncure, J.

Judgment reversed.

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548 *Reese v. Hawthorn.

October Term, 1853, Richmond.

1. **Testamentary Papers—Insufficient Attestation—Not Valid as a Nuncupative Will.**—A testamentary paper signed and acknowledged in the presence of witnesses, who are requested to attest it, and attested by them out of the presence of the testatrix, so that it is not good as a written will, cannot be set up as a nuncupative will.

2. **Nuncupative Wills—When Valid.**—A nuncupative will to be valid must be made in the last sickness of the testator, when he is in such extremity that he has not the ability and opportunity to make a written will.

At the December term 1850 of the County court of Lunenburg, a paper was propounded for probat as containing the nuncupative

will of Susanna Reese deceased, by John B. Hawthorn, acting for himself and as the next friend of the other legatees named in the paper. The probat of the paper was contested by the next of kin of Susanna Reese.

It appears from the evidence that three or four days before the death of Susanna Reese, she being then very ill and given over by her physician, the paper was prepared at her request, and was read to her in the presence of the four witnesses who attested it, and that she declared it was correct. Her name was written by one of the attesting witnesses, and she made her mark, and acknowledged the paper as her will. Her physician having directed that on account of her condition, the witnesses should not remain in her room longer than was necessary, the paper was taken by the witnesses, after her acknowledgment, into another house some twenty steps from that in which Miss Reese was, and there they signed their names as witnesses.

The County court admitted the paper to probat as the nuncupative will of Susanna Reese; and upon appeal *to the Circuit court this sentence was affirmed. Whereupon Freeman Reese, one of the next of kin, applied to this court for an appeal, which was allowed.

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Macfarland, for the appellant, insisted:

1st. That as this was a fully perfected instrument, all having been done which it was the intention of the parties to do, it was in this respect distinguishable from Mason v. Dunman, 1 Munf. 456; and Phœbe v. Boggess, 1 Gratt. 129: And not being good as a written will for which it was intended, it could not be set up as a nuncupative will, without violating the policy of the statute, and prostrating all the securities which it was intended should be thrown around dying men.

2d. That the paper was not executed in the last illness of the testatrix in the sense of the statute. That the authority to make a nuncupative will, was intended to be confined to cases in which the person was in extremis, and had not time to make a written will: Whereas in this case the testatrix had made a written will in the mode which she and her friends contemplated. He referred to Boyer v. Frick, 4 Watts & Serg. 357; Prince v. Hazleton, 20 John. R. 502; Werkheizer v. Werkheizer, 6 Watts & Serg. 189.

Bouldin, for the appellee, insisted:

1st. That there was no sound distinction between the absence of one requisite of a perfect written will and another. That a paper intended as a will, but incomplete for want of a signature by the testatrix, had been sustained as a nuncupative will; and here there was the absence of attestation in the presence of the testatrix. The proofs showed the acknowledgment of the testatrix in the presence of the witnesses. And he referred to Mason v. Dunman, 1 Munf. 456; Phœbe v. Boggess, 1 Gratt. 129; Offut v. Offut, 3 B. Monr. R. 162.

*2d. That the statute does not require the testator to be in extremis; and this court had never held this to be necessary. He referred to Weeden v. Bartlett, 6 Munf. 123; Marks v. Bryant, 4 Hen. & Munf. 91; Page v. Page, 2 Rob. R. 424.

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DANIEL, J. This is an effort to set up, as a nuncupative will, an instrument which was executed by a testatrix in her last sickness, as a written will, with all the ceremonies requisite to the validity of a written will, with the exception that the attestation of the witnesses was made not in the presence of the testatrix.

Everything has been done as well by the testatrix as by the witnesses, which either she or they supposed it necessary for her or them to do, in order legally to declare and certify her testamentary purposes in the form of a written will.

The defect in the instrument designed to be executed has grown out of no emergency.

The case is, therefore, plainly distinguishable from the cases of Mason v. Dunman, 1 Munf. 456; Phœbe v. Boggess, 1 Gratt. 129; and Offut v. Offut, 3 B. Monr. R. 162, cited by the counsel of the appellee. In each of these cases, it is true, there was a purpose and an effort to make a written, and not a nuncupative will. But in each of them the noncompletion of the will, in the form contemplated by the testators, resulted from the act of God. In the first case the testator having made known the disposition he desired to make, a friend took notes of them, and retired into another room to draw them out formally, but before the instrument could be finished and presented to the testator for his approval and signature, he had become delirious, and incapable of reading it, or hearing it read. In the second case, the will was written by a friend from the dictation of the testator; and after it *was written, and read to and approved by the testator, he made an effort to sign it; but resisted, saying he could not see, and requested the friend who had drawn it to sign it for him; but before his signature could be thus made the testator swooned. And in the last case, the will was written at the request and in the presence of the testator, and was read to and approved by him; but he died before the paper could either be subscribed by himself or attested by the witnesses.

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The principle to be deduced from these cases is, that testamentary declarations made in the extremities of a last illness, may be established as a nuncupative will, if proved by the requisite number of witnesses who were present when they were made, even though there was a design by the testator to give to those declarations the form of a written will; the completion of such design being frustrated by the act of God depriving the testator of the capacity to perfect the instrument.

Such cases are no precedents for establishing the will here. The testatrix was not stayed or arrested in the execution of

anything which it was her purpose to do. She had ample opportunity to make, and died in the belief that she had made and perfected a written will. The imperfection or fault in the paper left by her arising out of a failure on her part to have it duly attested in her presence, is to be imputed to no visitation of extreme illness or incapacity, but to a mistaken belief on the part of herself and of the witnesses, that an attestation in the mode and place selected by them was sufficient.

The eighth section of our statute on wills declares that no nuncupative will shall be established unless it be made in the time of the last sickness of the deceased, at his or her habitation, or where he or she hath resided for ten days next preceding; except when the deceased is taken sick from 552 home, and dies before he *or she returns to such habitation; nor when the value exceeds thirty dollars, unless it be proved by two witnesses that the testator or testatrix called on some person present to take notice or bear testimony that such is his or her will, or words of the like import. 1 Rev. Code of 1819, ch. 104, § 7.

It will be seen that our statute is nearly a literal transcript of the 19th section of the 29 Charles 2, ch. 3, which, with slight variation, has, I believe, been re-enacted in many, if not in most, of our sister states.

It must be conceded that there has been some contrariety of judicial opinion as to the sense of the words "last sickness" of the deceased, employed in the statute: Some of the decisions maintaining that by the "last sickness" is to be understood (in the language of Woodworth, J., in Prince v. Hazleton, 20 John. R. 502), the sickness immediately preceding the death of the testator, without reference to any precise period of the disease, or any particular apprehensions the testator may be under as to his approaching dissolution; whilst a majority of them will, I think, be found concurring with the conclusions of the court in Prince v. Hazleton, as announced by Chancellor Kent, that a nuncupative will is not good unless it be made by a testator when he is in extremis, or overtaken by sudden and violent sickness. and has not time or opportunity to make a written will.

Prince v. Hazleton has been followed and closely adhered to by the Pennsylvania decisions, as will be seen by a reference to Yarnall's Case, 4 Rawle's R. 46; and Boyer v. Frick, 4 Watts & Serg. 357; and the case of Porter's Appeal, 10 Barr's R. 254. In the last case the court held that the true policy of the law was, that when there is time the will must be written; but when there is not time, a verbal disposition is allowed in extremity; and still farther that in order to constitute a nuncupative 553 will, there should not only be a *purpose on the part of the testator to make a testamentary disposition of his personal property, but a purpose to make that disposition by a nuncupative will; "not only the animus testandi, but the mind and intent to nuncupate."

It is supposed by the counsel of the appellee, that the decisions of this court in the cases of Marks v. Bryant, 4 Hen. and Munf. 91, and Page v. Page, 2 Rob. R. 424, are in conflict with the opinions of Chancellor Kent and the majority of the court in the case of Prince v. Hazleton. Certainly no such conclusion can be fairly drawn from anything said by the judges who delivered their opinions in either of those cases; as in neither of them was any effort to define the "last sickness."

In Marks v. Bryant, the only question discussed by the court was, Whether the testator could be said to have been taken sick from home, in the sense contemplated by the statute? The substance of the evidence, which was reported, shows that the testator was boarding at City Point, and that he left that place the Sunday before his death, on a visit to his sister, a Mrs. Bryant; that he was then very ill, his disorder having begun with the ague and fever, and from that turned to a constant fever and sore throat; that he rode to Bryant's, a distance of twelve miles, and there growing worse, died on the following Sunday; that he had been delirious at times, when the fever was on him before he left City Point; and after his arrival at Bryant's was frequently delirious both before and after his speaking the testamentary words; but was in his senses at the time of speaking them, which was in the presence of three witnesses, on all of whom he called to take notice that what he said was his will. At what precise stage of his last illness the words were spoken, how many days or hours the testator lived after speaking them, no further appears from 554 the *report of the case. Judge Tucker said that as the deceased was not ten days at the place where he died before that event happened, and was proved to have been sick before and even when he left his usual habitation, it seems to be questioned whether he could be said to be taken sick from home. Judge Roane, the only other judge who delivered a written opinion, states the controversy in the case in similar terms. After discussing the objects of the particular portion of the statute bearing on the precise question which they supposed raised in the case, they came to the conclusion that though the testator was not first taken sick from home, yet as he was taken so much worse after reaching Bryant's house than he had been before, as never to leave the house again, the case was within the intent and meaning of the law. This can hardly be relied on with any propriety, as an express adjudication that it is not essential to the validity of a nuncupative will that it should be made in the extremities of a last sickness, and where opportunity is not afforded for making a written will. The same may also be said of the case of Page v. Page, which was also the case of a nuncupative will made away from the habitation of the testator. The depositions in the case showed that the testator was taken sick from home on the 17th of

February; that he grew alarmingly ill on the 23d; and that the testamentary declarations were made on the 24th about 1 o'clock in the day, when the decedent was perfectly in his senses. His physicians did not see him till 4 or 5 o'clock in the evening, when he was worse. His physicians thought it doubtful, when they first saw him, whether he would survive the night or not; and they did not think him then capable of making a will. On the next morning his symptoms had improved, and he was perfectly in his senses; and he was in his senses at intervals every day between the 24th and
555 the day of his *death, which occurred on the 4th March, being usually better in the morning and worse in the afternoon when his fever rose. The testamentary declarations were made in the presence of two witnesses who were called on by the testator to take notice of them; and on the 28th of February, the witnesses made a written certificate or memorandum of what was said by the testator.

I am free to admit that from this report of the substance of the depositions taken in the cause, seeing that some five or six days elapsed between the speaking of the testamentary words and the death of the testator, that a court might have inferred that the testator was not prevented by the exigencies of his condition from reducing his will to writing. But can we say that this court did so infer? There were other questions in the cause, and the one under discussion was disposed of, in the opinion of the court, by the remark that it appeared from the evidence that the will "was made by the testator in his last sickness, when he was of sound, disposing mind and memory, and with the solemnities required by law." What the court understood to be the last sickness in the sense designed in the satute, they nowhere say. And looking to the fact that the depositions do not disclose what was the physical strength or debility of the testator in the interval between 1 o'clock and 4 o'clock of the day when the will was made, or in the interval between that day and his death, when he was in his senses; and that it does not appear of what duration any one of those intervals was; and as it is stated in the memorandum made by the witnesses to the nuncupation, that the testator assigned as a reason for calling on them to bear witness to his verbal disposition of his property, that "he was too sick to have a will written and executed in the customary mode," I cannot undertake to say, in the absence of some express opinion of the court to the contrary, that
556 they *did not pay much deference to the testator's own belief of his condition, and draw the same conclusion which the County court drew from the testimony, as appears from the recitals of its order, to wit, "that the words were spoken by the decedent during his last illness, in extremity and in comtemplation of immediate death."

I think there is nothing said or decided in either of these cases, which does not leave this court, untrammeled by precedent, free to hold, as in my opinion the obvious scope and design of the statute requires us to do, that the exception in favor of nuncupative wills is an indulgence extended only to the emergencies of a last sickness, when the testator has not the ability and opportunity to make a written will.

Certainly no case has been cited, nor do I think any can be found, which would justify us in extending the provisions of the statute to a case like this; when there was not only no purpose to make a nuncupative will, no want of opportunity to make a written one; but where a written will was solemnly and deliberately prepared, signed by the testatrix and subscribed by the witnesses, with all the forms which they supposed the law required to perfect it as a written will. To hold this a good nuncupation would be to obliterate most of the distinctions between written and verbal wills, and to open wide the door to the frauds which it was the object and purpose of our statute on wills to exclude.

For these reasons I think that the Circuit court erred in admitting the paper offered as a nuncupative will to record as such; and without deciding the other questions raised in the petition, I am for reversing the order of the Circuit court, and rejecting the paper.

The other judges concurred in the opinion of Daniel, J.

Sentence reversed.

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557 *Tayloe v. Smith.

January Term, 1854, Richmond.

1. **Appellate Practice—Affidavit That Witness Incapable of Attending Court—Objection—Waiver.**—The affidavit of a witness taken before a justice of the peace, that from his age and infirmities he was unable to attend the court without endangering his life, not having been objected to in the court below for want of notice, that objection cannot be made in the appellate court.
2. **Evidence—Affidavit—Deposition De Bene Esse.**—Such an affidavit taken eight days before a cause is called for trial, is sufficient to authorize the deposition of the witness, which had been taken *de bene esse*, to be read as evidence.

This was an action of ejectment in the Circuit court of Chesterfield by William H. Tayloe and others, the heirs of John Tayloe, against Smith. On the trial of the cause the plaintiffs offered in evidence the deposition of Archibald Freeland taken de bene esse; and to account for the absence of the witness who lived in the county of Chesterfield some miles from the courthouse, they offered his affidavit taken before a justice of the peace, in which he stated that he was in the ninetieth year of his age, extremely enfeebled from the effects of continued disease and great age; that he was unable to take any other than the most moderate exercise without serious risk; and that he did not believe that he

could without probable danger to his life, attend Chesterfield court to give his testimony in this case; nor had he reason to hope he would be in a better condition at any future time. This affidavit was made eight days before the deposition was offered in evidence. The defendants objected to the introduction of the deposition as evidence, and the court sustained the objection; and the plaintiffs excepted. There was a verdict and judgment for the
558 defendant: *And William H. Tayloe then applied to this court for a supersedeas, which was allowed.

Grattan, for the appellant.
Day, for the appellee.

LEE, J., delivered the opinion of the court:

The court is of opinion that the affidavit of the witness Archibald Freeman having been introduced and read to the court upon the question whether the deposition of the witness previously taken should be permitted to be read in evidence to the jury, without objection on the part of the defendant, that the same had been taken without notice, such objection must be regarded as having been waived; and the court therefore deems it unnecessary to express any opinion upon the question whether if formally made it would have served to exclude the said affidavit from being read and considered by the court upon the question aforesaid.

And the court is further of opinion, in conformity to the decisions of this court in the cases of Pollard's heirs v. Lively, 2 Gratt. 216, and Nuckols' adm'r v. Jones, 8 Gratt. 267, that where the deposition of an absent witness is offered to be read in evidence upon the trial of an action at law, the evidence of the witness himself touching his failure or inability to attend the court, and the cause thereof, may properly be heard and considered, and may of itself furnish sufficient grounds for admitting the deposition in question.

And it appearing from the affidavit of the said Archibald Freeland, taken about eight days before the trial, that he was then in the ninetieth year of his age, extremely enfeebled from the effects of age and continued disease, that he was unable to take any other than the most moderate exercise without serious risk, and that he could not as he believed, attend the session
559 *of the court to give his testimony in person without probable danger to his life, nor had he any reason to hope that he would be in a better condition at any future time, the court is of opinion that the absence of the witness was sufficiently accounted for, and that the objection to the reading of his deposition upon the ground that the witness appeared to be still in life and residing in the same county in which the trial was had, should not have prevailed.

The court is therefore of opinion that the Circuit court erred in excluding the said deposition from the jury; and that the said judgment be reversed, and the cause remanded to said court for a new trial to be had therein, upon which, if the plaintiff shall again offer the said deposition, and the absence of the witness shall be then accounted for in the same or a similar manner as upon the former trial, or in any other manner in law equally sufficient, the court shall permit the same to be read in evidence to the jury, unless some objection shall then be made other than that herein declared to be insufficient, and which shall be found good and sufficient in law to exclude the same or some part thereof from being admitted in evidence as aforesaid.

Judgment reversed.

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560 *Nichols v. Campbell.

January Term, 1854, Richmond.

1. **Deeds of Trust—Conflicting Claims between Trustee of One Deed and Purchaser under Another—Evidence—Decree in Chancery Cause*—Case at Bar.**—In detinue for slaves plaintiff claims as trustee in a deed of trust to secure a debt, defendant claims as purchaser under a subsequent trust deed from the same grantor. Defendant offers a witness to prove that the debt secured by plaintiff's deed has been paid by the sale of slaves by the grantor in that deed to the beneficiary therein, to which evidence plaintiff objects, and to sustain his objection, introduces the record of a chancery cause between the grantor and the beneficiary, in which it has been decided that the price of these slaves has been, by agreement between the parties, applied in part discharge of another debt. HELD:
   1. **Same—Same—Same—Same—Effect**—That decree is conclusive, and defendant's evidence is inadmissible.
   2. **Same—Same—Proof of Payment after Debt Due.**—QUÆRE: If proof of payment of the debt after the day of payment, is admissible to defeat the action under the general issue.
   3. **Same—Same—Same—How Proved after Action Commenced.**—If the defendant may prove the payment of the debt before the institution of the suit, and after the day of payment prescribed in the deed, he cannot under the general issue, prove payment after the commencement of the action. If such payment could be a good defence, it could only be under a plea to the further maintenance of the action or *puis darrein continuance*, according as the payment was made before or after the plea pleaded.
   4. **Usury—Question Decided in Chancery Cause—Conclusive.**—The question of usury in the debt having been made in the chancery cause and decided, the defendant is concluded by that decree and cannot set it up in this action.
2. **Deeds of Trust—Sale under—Case at Bar.**—One of three administrators of the creditor in the trust deed, being present when the sale was made to the defendant, and not making any claim to the slaves, or objecting to the sale, even if his conduct was fraudulent, would afford no defence to this action at law; the title to the property not being in the administrators but the trustees in the deed; and the act of the administrator could not divest the title of the trustees.

***Deeds of Trust.**—See monographic *note* on "Deeds of Trust."

3. **Same—Same—Injunction—Effect upon Right to Bring Action at Law to Recover Property.***—An injunction to inhibit the sale of property by trustees, is not a bar to their bringing an action at law to recover the trust property; and even if they are guilty of a contempt, that is to be redressed by the court of chancery, acting upon the parties, and will not prevent the maintenance of the action at law.

561 *4. **Same—Same—Same—Same.**—In such case the pendency of the injunction will not mitigate the damages which the plaintiffs are entitled to recover. If entitled to recover the property they are entitled to recover the hires or profits from the time it or they were held adversely.

5. **Action by Two Trustees—Death of One—Survival.**†—Two trustees having brought an action of detinue to recover the trust property, and one of them dying, the right of action survives Campbell to the other; and he may carry on the suit.

6. **Same—Death of Beneficiary in Deed—Surviving Trustee—Administrator of—Execution of Trust by Sheriff—Effect upon Title.**—In such case pending the act the beneficiary in the deed dies, and the surviving trustee becomes his administrator. A decree is made in a chancery cause in which the grantor in the deed, the administrator and others are parties, directing the sheriff to execute the trust. This decree did not divest the trustee of the legal title, nor destroy his right of action. But the sheriff has the right to control and manage the case in its further prosecution; and to use the name of the trustee in any other suit which may be necessary to recover possession of any part of the trust property.

This was an action of detinue in the Circuit court of Bedford county brought in 1835 by Barnabas A. Eidson and Robert Campbell against Abel B. Nichols, to recover two slaves, Lydia and Moses. The cause was delayed until 1842 by the pendency of a suit in chancery between Charles C. Patterson and Thomas Campbell's executors. In September 1841 the death of Eidson was suggested, and the action was thenceforth carried on in the name of Robert Campbell as plaintiff.

The cause came on for trial in October 1845, when the plaintiff to sustain his action introduced a deed bearing date the 26th day of January 1824, by which Charles C. Patterson conveyed to Eidson and Campbell four slaves, of whom Lydia and Nancy were two, in trust to secure to Thomas Campbell a debt of seven hundred and fifty-two dollars and fifty-seven cents, with interest from the date of the deed; and he introduced a witness to prove that Moses was a descendant of Nancy, and that Lydia and Moses were in the possession of the defendant. Thereupon the defendant proposed to prove by the same witness that Charles C. Patterson had sold to

562 Thomas Campbell in his life *time a family of negroes, viz: Mary, Caleb and Nelson, at the price of nine hundred and fifty dollars, in satisfaction and discharge of said deed, and the debt therein mentioned. To this the plaintiff objected; and to sustain his objection offered in evidence to the court the copy of the record in a chancery cause in which Patterson was plaintiff and Thomas Campbell was defendant, in which as the plaintiff contended, and the court below and this court held, it had been decided that the price of said slaves was properly applied as a credit on another bond of Patterson's for three thousand dollars, held by Thomas Campbell. This case came up to the Court of appeals and is reported in 11 Leigh 113, in the name of Campbells v. Patterson, to which reference is made for the facts. The other additional facts are stated in the opinion of the court. And it being admitted by the defendant that these were the same slaves and the same sum of money in controversy in that suit, the court being of opinion that it was not competent for the defendant to prove anything in conflict with the decree in said cause, sustained the plaintiff's objection, and refused to let the defendant introduce the evidence: And the defendant excepted.

The defendant in order to sustain his defence, offered in evidence a deed bearing date in March 1829, by which Patterson conveyed to Joseph Wilson, among other property, the slaves in controversy in this cause, in trust to secure a debt of seven hundred and three dollars, due on the 1st of January 1830, and also a debt of three hundred and seventy dollars, payable at the same time, due to the defendant; and proved that the slaves in controversy were purchased by him under a sale made by the trustee in this deed. And he then proposed to prove that the debt secured by the deed under which the plaintiff claimed was paid; and as evidence tending to

563 show a partial payment of the *said debt, offered to read the reports of the commissioner and marshal and the orders and decrees, made in the above mentioned suit of Patterson v. Campbell's ex'ors. To this evidence the plaintiff objected; and the court sustained the objection: And the defendant again excepted.

The defendant further offered to prove that the deed of trust of the 26th of January 1824, under which the plaintiff claimed, was made upon a usurious consideration, and for the purpose of securing a usurious debt. To the introduction of this testimony the plaintiff objected, on the ground that the defendant had no right to offer testimony to contradict the record which had been offered by the plaintiff, and referred to in the first bill of exceptions. The court sustained the plaintiff's objection and excluded the evidence: And the defendant again excepted.

The deeds, record and evidence before

*Injunctions.—See monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

†Action by Two Trustees—Death of One—Survival.—For the proposition that where two trustees bring an action and one of them dies, the right of action survives to the other, the principal case is cited and followed in Rowe v. Shenandoah Pulp Co., 42 W. Va. 556, 26 S. E. Rep. 322.

stated having been introduced, and the defendant having offered evidence tending to show that Marquis D. Gray one of the administrators of Thomas Campbell deceased, was present at the time of the sale of the slaves to the defendant by the trustee Wilson, under the deed of 1829, and made no objection to the said sale, moved the court to instruct the jury, that if they should believe from the evidence in the cause, that the said Gray was present and was, as one of the administrators of Thomas Campbell deceased, one of cestuis que trust in the deed of the 26th of January 1824, under which the plaintiff claimed, and made no objection to the sale or the purchase by the defendant, that then they ought to find for the defendant. This instruction the court refused to give: And the defendant again excepted.

In the progress of the trial the defendant offered to read to the jury a decree pronounced in the suit of Patterson v. Campbell, before spoken of, as evidence 564 *tending to show that Eidson and Campbell were not entitled to the possession of the slaves sued for at the time of the institution of this action. The grounds seem to be that in that suit there was at the time the action was brought, an injunction to stay all proceedings upon the said deed of trust and the collection of the debt therein named. The plaintiff objected to the introduction of the evidence, and the court excluded it: Whereupon the defendant again excepted.

The deed under which the plaintiff claimed having been introduced in evidence, the defendant moved the court to instruct the jury, that the said deed conveyed a joint interest to the said Eidson and Campbell, and that neither of them had a right to act under it separately: And that after the death of Eidson, the plaintiff was not entitled to recover and take the slaves mentioned in said deed, and dispose of them as surviving trustee, and by consequence, was not entitled to maintain this suit for the recovery of the same. But the court refused to give the instruction: And the defendant again excepted.

The defendant, in order to show that the plaintiff was not entitled to the possession of the slaves in controversy, offered in evidence a decree made in October 1841, in relation to the same slaves in a cause in which Charles C. Patterson was plaintiff and the plaintiff and defendant and others were defendants. This decree dissolved an injunction which Patterson had obtained in November 1840, to prevent the sale of these slaves by the trustee Eidson and Campbell. The decree then reciting that Eidson was dead, and that Campbell the other trustee was one of the administrators of Thomas Campbell deceased, and objected to by Patterson on that ground, directed the sheriff of Bedford county to proceed to execute the deed in the stead of Eidson and Campbell. The plaintiff objected 565 *to the introduction of the evidence; and the court sustained the objection: Whereupon the defendant excepted.

The jury found a verdict for the two slaves, and five hundred and forty-three dollars damages for their detention; and there was a judgment according to the verdict. Thereupon the defendant applied to this court for a supersedeas, which was awarded.

Patton, for the appellant.
Stanard and Bouldin, for the appellee.

MONCURE, J., delivered the opinion of the court.

The court is of opinion that the court below did not err in excluding the testimony mentioned in the first bill of exceptions.

It may well be questioned whether the mere fact of payment of a debt secured by a deed of trust on personal property, after the estate of the trustee has become absolute by the default of the debtor in paying the debt according to the terms and conditions of the deed, would be a legal defence to an action brought by the trustee to recover the property. The trustee generally knows nothing of the state of accounts between the debtor and creditor, and would be liable to be taken by surprise by such a defence; especially when it is offered, as it was in this case, under the general issue. To ascertain the fact of payment, it might be necessary for the jury, on the spur of the occasion, with defective materials, and without proper explanations, to settle complicated accounts, which could be settled much more conveniently and correctly in a court of equity. Until the act of April 16, 1831, Sess. Acts. p. 63, the defendant in an action at law, brought by a trustee to recover land conveyed by a deed of trust to secure a debt, was not allowed to prove in his defence the payment 566 of the debt. That *act for the first time, allowed him to do so: but, to guard against surprise, provided that he should give notice in writing to the adverse party of his intention to make such defence sixty days before the trial. The provision on this subject in the Code, p. 560, § 21 and 22, extends to property generally; but it does not apply to the case under consideration, having been enacted after the case occurred. It may be important, however, as serving to show the views and policy of the legislature in regard to such a defence. It is said that a difference exists between real and personal estate in this, that the title to the former can only be conveyed by deed, whereas the title to the latter may be transferred without deed, and even without writing. This is true; and there can be no doubt but that a trustee of personal estate may transfer or release the title thereto by act in pais. But it may well be doubted whether the mere fact of payment of the debt secured by the deed of trust, without the knowledge of the trustee and after his estate had become absolute, would amount to a release of the legal title to the estate.

It is unnecessary, however, to decide that question in this case. The record in the suit of Patterson v. Campbell, &c., offered

in evidence by the defendant in error, conclusively shows that the debt secured by the deed of the 26th of January 1824, was not satisfied and discharged by a sale of the slaves Mary, Caleb and Nelson at the price of nine hundred and fifty dollars, as the plaintiff in error offered to prove by parol. It shows that the price of these slaves was applied to the payment of the bond for three thousand dollars secured by the deed of the 22d of December 1822, and not the bond for seven hundred and fifty-two dollars and fifty-seven cents secured by the deed of the 26th of January 1824. When these slaves were sold, Patterson desired to apply the price of them in the first 567 place to the *payment of the small bond. His only motive for this desire seems to have been to take in the small bond, as the payment would have been more than enough to satisfy it, but not enough to satisfy the large bond. It was thus a matter of comparative unimportance to him how the credit was applied. On the other hand, it was a matter of great importance to the creditor Campbell, who "considered the small bond as better secured than the large one, and that by applying the credit to the large one, he would be increasing his security." He therefore insisted on such application, and the debtor Patterson consented to it. This is the statement made in the answer of Campbell's executor, in response to an allegation contained in Patterson's bill, and before the execution by Patterson of the deed of trust under which the plaintiff in error claims. On the application of the credit thus made, the subsequent proceedings in the suit are based; and they are in no respect inconsistent therewith. In the statement made by Commissioner Johnson in 1828, the credit was applied to the large bond. In the decree of the 27th of October 1828, that statement, to which there was no objection by either party, was approved, the injunction was dissolved as to a portion of each bond, and the marshal was directed to sell so much of the property conveyed by each deed of trust as might be sufficient to discharge the respective portions aforesaid and the expenses of the sale. The sale was accordingly made in February 1829, and on the 29th of May 1830, the marshal's report, to which there was no exception, was confirmed, and the money, which had been paid into bank, was ordered to be paid to Campbell's executors. These decrees have not been reversed or annulled by any subsequent proceeding in the suit. The decree of the 25th of November 1831 directed a portion of the money which had been received by Campbell's executors under the 568 former decrees, to be *refunded; but did not disturb the application which had been made of the credit aforesaid. The only object of the statement on which that decree was founded was, to ascertain the amount to be refunded according to the views of the court. But there was an appeal from that decree, which was reversed by this court, in Campbells v. Patterson, 11 Leigh 113; and the court, proceeding to pronounce such decree as the court below ought to have pronounced, dissolved the injunction as to the further sum of one thousand eight hundred and eight dollars and seventy-two cents, with interest from the 23d of February 1829, perpetuated it as to the residue, and allowed the appellants to enforce their deeds of trust on the property not already sold by the marshal, so far as might be necessary for the payment of the said sum and interest and the costs of the sale. That sum appears to have been ascertained to be due by a statement made by President Tucker, referred to but not set out in his opinion in the case. It does not expressly appear of what items the statement was composed. There can be no doubt, however, but that it was composed of the same items which compose the statement made by Commissioner Johnson, under that branch of the decree of the 27th of October 1828, which directed him to state the accounts between the parties allowing the legal rate of interest. The only difference between the two statements being that in that of Commissioner Johnson the interest is brought down to the 1st of May 1830, while in that of President Tucker interest is calculated only to the 29th of February 1829, (probably the day of the marshal's sale,) and the amount made by the marshal is then deducted, leaving due on that day the said sum of one thousand eight hundred and eight dollars and seventy-two cents. It was not stated in the decree of this court what portion of that sum was due on the small bond. But it sufficiently appeared in the 569 *record that such portion was the amount of the bond, seven hundred and fifty-two dollars and fifty-seven cents, with interest from the 26th of January 1824, subject to a credit for three hundred and twenty-two dollars and fifty-three cents, made by the marshal in February 1829, under the decree of the 27th of October 1828 as aforesaid. If no part of the said sum of one thousand eight hundred and eight dollars and seventy-two cents had been due upon the small bond, as would have been the case if the court had intended to change the application which had been made of the credit of nine hundred and fifty dollars, and apply it to that bond, it would not have been proper to have allowed the appellants to enforce the deed securing that bond. But a portion of it being due upon each bond, it was proper to allow them to enforce each deed. The court certainly did not intend to make the property conveyed by each deed liable for the sum due on both bonds; but only to allow the appellants to enforce each deed on the property thereby conveyed for the payment of so much of the said sum as was due on the bond thereby secured.

The plaintiff in error claiming under a deed of trust executed by Patterson in March 1829, pending the suit and after the credit of nine hundred and fifty dollars had been applied as aforesaid, is bound by the

said application and all the other proceedings in the suit. And this observation applies as well to the price of Caleb, though embraced in the deed executed to secure the small bond, as to the price of the other two of the three slaves sold for the said sum of nine hundred and fifty dollars.

The court is further of opinion that the court below did not err in excluding the testimony mentioned in the second bill of exceptions.

Even if a defendant in an action of detinue brought by a trustee to recover the trust subject, would be *permitted to prove, in his defence under the general issue, that he had fully paid the debt secured by the deed before the institution of the suit, but after the period fixed in the deed for its payment, he certainly should not be permitted to prove under the general issue in such an action, that he had paid the debt or any part of it after the institution of the suit. Partial payment, whether before or after the institution of the suit, could afford no defence at law, in any form, to such an action. And if full payment made, in whole or in part, after the institution of the suit, could afford such a defence, it could only be by a plea to the further maintenance of the suit, or puis darrein continuance, according as the payment is made before or after plea pleaded; and the defendant would at least be liable for the costs of the action.

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The record of the suit of Patterson v. Campbell, which is made a part of the bill of exceptions, shows that long after the institution of this action, in October 1835, a large balance was due on the small bond. When the decree of this court was rendered on the 13th of April 1840, the only credit applicable to the debt was the sum of three hundred and twenty-two dollars and fifty-three cents, made by the marshal as before stated; and the amount due on the small bond, as ascertained by the record, was the original principal, with interest from its date, subject to the said credit. The record shows no other payment on account of that bond. The net proceeds of Lucy and her child, sold by the sheriff under the decree of the 23d of October 1841, and purchased by the plaintiff in error at the price of five hundred and ten dollars, would have been applicable to the payment of the said bond. But the sheriff reported that he was enjoined from making the payment; and it does not judicially appear to this court that the injunction has been dissolved; the last proceeding in the case which *the record shows being an order made on the 28th of May 1842, confirming the sheriff's report. Even if the proceeds of that sale were applied to the payment of the bond, a large balance would still remain due thereon. The question as to the balance due on the bond was directly in issue in the suit; and the plaintiff in error, (who claims title as a purchaser under Patterson pending the suit, and was made a party thereto after it went back from this court,) is bound by the proceedings therein. The record showing that a balance was due on the bond when the action was instituted, its payment since, even if proved, would, as we have seen, afford no defence to the action, at least under the general issue.

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The court is further of opinion, that the court below did not err in excluding the testimony mentioned in the third bill of exceptions, the question of usury having been decided in the case of Campbells v. Patterson, 11 Leigh 113, and the plaintiff in error being concluded by that decision.

The court is further of opinion, that the court below did not err in refusing to give the instruction asked for by the plaintiff in error, and mentioned in the fourth bill of exceptions.

Even if the evidence offered by the plaintiff in error had tended to convict Gray, one of the administrators of Campbell, of a fraud, in standing by and making no objection to the sale to the plaintiff in error, it is not perceived that it would have been admissible. Frauds of that kind generally afford defences, and grounds for relief, only in equity. There is a class of cases, to which Pickard v. Sears, 6 Adolp. and Ellis, 469, 33 Eng. C. L. R. 115, belongs, in which it has been held that where a person entitled to personal property (which may pass by sale or delivery without writing) stands by and makes no objection to the sale of it to another, the fact may be left to the jury as *evidence tending to show that he sanctioned the sale, and ceased to be the owner. This case cannot fall within that class, because the title to the property was not in Gray, nor in all the administrators of Campbell; but in the trustees under the deed of trust: and the act of Gray in standing by and making no objection to the sale, could not have the effect of divesting the trustees of the legal title.

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But in truth the evidence offered afforded no ground whatever for imputing fraud to Gray. It does not appear that his presence or silence at the sale misled the plaintiff in error, or in any manner affected the transaction. On the contrary, it appears that the latter must have had notice of the adverse claim, the deed of trust under which the sale was made having been executed after the recordation of the deed of trust under which the defendant in error claims, and pending the suit of Patterson v. Campbells.

The court is further of opinion, that the court below did not err in excluding the testimony mentioned in the fifth bill of exceptions.

There is no such decree in the record as that referred to in the bill of exceptions. It appears, however, from the assignment of errors and argument of the counsel for the plaintiff in error, that the decree intended to be referred to was the order awarding the injunction: and the point intended to be raised is that the action having been brought pending an injunction of proceedings on the deed of trust, there was then no right of action.

The injunction did not have the effect of divesting the trustees of the legal title, and did not in any manner affect it. If the institution of this action founded on that legal title had been a violation of the injunction, the trustees would have been guilty of a contempt of the court which awarded it; and the remedy would have been by a proceeding in that court to
573 punish *the contempt. The court of chancery acts in personam, and not upon the court of law, which must decide all cases coming before it according to the legal rights of the parties.

But in truth the institution of the action at law was no violation of the injunction, which was only intended to stop the sale under the deed of trust. The assertion of the legal title by the trustees, against a person holding and claiming against it pending an injunction of the sale, might be a measure of precaution, necessary to the protection of the rights and interests, both of the debtor and the creditor. The court in which the injunction is pending might in some, and perhaps most cases, afford such protection, but the legal remedy seems to be free from doubt or difficulty.

If the evidence of the award or pendency of the injunction was inadmissible to defeat the action, it was also inadmissible to mitigate the damages. If the trustees were entitled to recover the slaves, they were entitled also to recover the hires of the slaves from the time that they were held adversely, and at least from the time of the institution of the action. They were entitled to recover the slaves, because in law they were theirs: And if the slaves were theirs, so also were the hires. If the injunction of the sale had been still pending when the slaves were recovered in the action, the trustees, after obtaining possession under the judgment, might have hired them out and received the hires until the injunction was dissolved or perpetuated; and it would then have been their duty, in the former case, to apply the trust subject (consisting of slaves and hires) to the purposes of the trust, and in the latter to account for and deliver it to the grantor or his assigns. Where the trust subject is likely to be inadequate to the purposes of a trust, it might be very convenient and proper for the trustee to recover possession, and receive the profits pending an in-
574 junction *of the sale. Whether the whole subject or its profits will be required to meet the purposes of the trust, is a question which cannot be settled or raised in an action at law.

The court is further of opinion, that the court below did not err in refusing to give the instruction mentioned in the sixth bill of exceptions. That the remedy in this case survived to the surviving trustee after the death of his cotrustee pending the action, is shown by the case of Rose's adm'x v. Burgess, 10 Leigh 186, in which the point was expressly decided.

The court is further of opinion, that the court below did not err in excluding the testimony mentioned in the seventh and last bill of exceptions.

The effect of the decree of the 23d of October 1841, in appointing the sheriff of Bedford a commissioner for the purposes therein mentioned, was not to divest the surviving trustee of the legal title; nor to destroy the right of action in this case which had been pending for six years, and thereby, perhaps, secure to the plaintiff in error a title to the subject in controversy under the act of limitations. The sheriff had a right, as commissioner under the decree, to control and manage this case in its further prosecution; and to use the name of the surviving trustee in any other suit which might be necessary to recover possession of any part of the trust subject.

Judgment affirmed.

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575 *Price's Ex'ors v. Ayres.

January Term, 1854, Richmond.

Sale of Land—Injunction against Collection of Purchase Money—Dissolution*—Case at Bar.—W being the owner of a lot in Danville, made a verbal contract for the sale of it to S, and S sold to A, who received a conveyance for it from W with general warranty, and executed his bonds to S for a balance of the purchase money. At the time of the sale the lot was made more valuable by the change in a street, which street was afterwards returned to its original location by the town authorities. S having made no representations on the subject to A, having been guilty of no fraud, and having made no warranty of title, is not liable to A for the damage he has sustained; and A cannot enjoin the collection of the purchase money.

Samuel Ayres filed his bill in the Circuit court of Pittsylvania, in which he charged that in 1840 he purchased of a certain Byrd Smith a lot of ground in the town of Danville for the sum of six hundred and seventy-five dollars, and for a balance of the purchase money he executed to Smith two bonds, one for fifty dollars and the other for one hundred and twenty dollars; and that these bonds had been assigned by Smith to Daniel Price, who had recovered judgments upon them. He further charged that at the time of his purchase, commissioners acting under the authority of the corporate authorities of Danville, had altered the streets which bounded the lot so as to add thereto a corner which had been cut off as the street had been before located, and thus made the lot square or nearly so, in form. That he purchased the lot in this form upon the express assurance and representation of Smith that the street had been so altered and would be permitted to remain by the corporate authorities: But that soon after his purchase the said authorities rescinded their order, and reinstated the street in its former location, and thus cut off one corner of the lot,
576 *greatly diminishing the value

*See monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

thereof; and that the ground thus cut off is no part of the lot in his possession, and conveyed to him by Paul T. Woodward and wife who sold the lot to Smith, and at his request conveyed to the plaintiff. And making Smith and Price parties defendants, he asked for an injunction to the judgments, that the damages he had sustained might be set off against the judgments, and for general relief. The injunction was granted.

Smith in his answer said, that Woodward being indebted to him, proposed to pay him by selling him this lot. That in this state of things defendant proposed to sell it to the plaintiff, who said he was willing to purchase. That defendant referred him to Woodward for the terms of sale, with the assurance that if they agreed Woodward should convey the title, the defendant pay Woodward, and the plaintiff become responsible to him for the purchase money. That plaintiff was better acquainted with the lot than was the defendant, and made the contract with Woodward for the purchase of the lot, and took Woodward's deed for it. That defendant accounted with Woodward for the purchase money, and upon a settlement of accounts with the plaintiff, took his bonds for the balance of the purchase money. He denied that he made the representations stated in the bill, that the lot was in a square form or any particular form.

Price answered, saying that he had purchased the bonds and paid value for them, without notice of any equity or equitable defence which could be set up against them; and that he had no personal knowledge of the facts connected with the sale of the lot, and does not admit them.

Woodward was afterwards made a defendant by an amended bill, which was taken for confessed as to him. And Price dying, the suit was revived against his executors.

577 *The deed from Woodward and wife to Ayres conveys the lot with general warranty. Woodward was twice examined as a witness. He says he sold the lot to Smith, and that Smith afterwards sold it to Ayres; and that Woodward conveyed to Ayres by Smith's direction. He states that the street ran at the time of the sale as the plaintiff states in his bill, and that it was afterwards altered. Other witnesses estimated the injury to the lot by the change at forty per cent. Both Smith and Woodward were insolvent.

When the cause came on to be heard the Circuit court perpetuated the injunction with costs; and gave the executors of Price a decree over against Smith, for the amount of the judgments and costs. From this decree Price's executors applied to this court for an appeal, which was allowed.

Grattan, for the appellant.
Day, for the appellee.

DANIEL, J. The main allegation, in the bill, on which the appellee sought to found an equity against Smith and his assignee Price, is explicitly denied by Smith in his answer; and Woodward, the only witness examined in reference to the contract between the appellee and Smith, is silent as to any assurances or representations made by Smith in reference to the shape of the lot. It is true the witness says that he sold the lot to Smith and by his direction conveyed it to the appellee; and that in the sale and conveyance it was his design to sell and convey the lot as being nearly in a square form, and as bounded by Wilson street, according to its new course as directed by the corporate authorities of Danville; but he does not state that Smith made any representation to the appellee with respect to the form of the lot, the course of Wilson street, or the action

578 of the common *council of Danville, past or prospective, in regard to the alteration of said street.

There is thus an entire absence of all proof of fraud or misrepresentation on the part of Smith; and the case made as to the bargaining and contracting between the parties seems to be nothing more than this: that Smith having agreed verbally with Woodward his debtor to take from him a lot in discharge of his debt, agreed with the appellee to sell it to him, with an understanding between the parties that Ayres should become bound to Smith for the purchase money, that Smith should become paymaster to Woodward, and that the latter, who held the title to the lot, should make the deed for it to Ayres.

In a sale of real estate no warranty of title is implied; and in the absence of fraud or concealment by the vendor, he cannot be visited with losses arising from defects of title, except so far as he has bound himself by covenant or warranty to protect his vendee against them. Commonwealth v. McClanachan's ex'ors, 4 Rand. 482.

Smith made no warranty, entered into no covenant. He has failed in no engagement with Ayres. He bound himself to nothing more than that Woodward should convey the lot to Ayres. That has been done. Woodward has made a deed with general warranty to Ayres, and he has accepted it.

If therefore the appellee had succeeded in establishing a clear defect of title in a portion of the lot, he would have shown no equity to enjoin the collection of the purchase money he agreed to pay Smith; but his recourse would have been against Woodward upon his warranty: Holman v. Maupin, 3 Monr. R. 380; Koger v. Kane, 5 Leigh 606.

The language employed by Tucker, judge, in delivering the opinion of the court in the case last cited, (with a mere change of the names of the parties,)

579 *describes forcibly the position of the parties here. As to Smith, the appellee has no claim against him for any defect of title, as we have shown: And as to Woodward, he could have no claim till

eviction, in as much as Woodward is asserting no demand, taking no steps which could be enjoined.

In the view I have taken of the case, there is nothing upon which the jurisdiction of a court of equity can be founded. The remedy of Ayres, if any, is at law by suit on Woodward's warranty. Whether he could probably make a case at law, is a matter about which we do not deem it necessary to express an opinion. We think he has failed to make any case calling for the interference of a court of equity, and that the chancellor, instead of perpetuating the injunction, ought to have dissolved it, and dismissed the bill, with costs, without prejudice to any suit at law that the appellee might be advised to institute against Woodward on his warranty.

The other judges concurred in the opinion of Daniel, J.

Decree reversed.

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580 *McCance v. Taylor.

January Term, 1854, Richmond.

1. **Judgment Liens—Discharge of Debtor in Bankruptcy—Effect—When Enforced.***—The lien of a judgment is not defeated by the discharge of the debtor as a bankrupt: And it may be enforced in the state courts.
2. **Same—Same—Writ of Elegit—Upon What Levied.**—In such case the *elegit* sued out upon the judgment may be in the usual form; and in executing it the sheriff must take notice of the bankruptcy of the debtor, and disregarding all property of the debtor not subject to the lien, levy it upon that which is so subject.
3. **Same—Statute of Registry—Application to Purchasers before Act.**†—The act of March 3d, 1843, Sess. Acts 1842-3, p. 51, does not apply to purchasers before the passage of the act. As to such, the lien of a prior judgment is valid though not recorded.‡
4. **Prior Unrecorded Trust Deed—Void as to Subsequent Judgment.**—A prior deed of trust unrecorded is null and void as to a subsequent judgment; and the judgment is a lien upon the land embraced in the deed.

The case is stated by Judge Samuels in his opinion.

Caskie and Macfarland, for the appellant.
Brooke and G. N. Johnson, for the appellee.

581 *SAMUELS, J. This cause is brought here by supersedeas to a judgment of the Circuit superior court of law and chancery for the county of Henrico and city of Richmond. The suit was an action of ejectment, in which Taylor's lessee was plaintiff, and McCance was defendant. The jury empaneled for the trial rendered a special verdict.

The facts found by the jury present this case:

Thomas Green, on the 24th day of October 1836, executed a deed of trust to William S. Scott, whereby he conveyed to him for certain purposes, a lot of land in fee simple, lying in the city of Richmond, one moiety whereof is the subject of controversy in this suit. This deed of trust was delivered to the clerk of the Hustings court of the city of Richmond on the 24th of March 1841 to be recorded. George Taylor, the lessor of the plaintiff, on the 3d of March 1838, recovered a judgment against Thomas Green, in the Circuit superior court already mentioned, for damages, interest and costs. This judgment was taken by Green, by supersedeas to the Court of appeals on the 11th of April 1838. On the 31st of March 1840, Green executed another deed of trust to James Lyons and William S. Triplett, embracing the same property to secure certain debts due to the president, directors and company of the Bank of Virginia, and to the president, directors and company of the Farmers Bank of Virginia: This deed was delivered to the clerk of the Hustings court of the city of Richmond, April 10th, 1840, to be recorded. On the 21st of April 1841, Thomas Green executed another deed, conveying the same property to Jones Green, as trustee to secure Bernard Peyton against certain liabilities therein specified. This deed was recorded April 21st, 1841.

The jury find certain facts in regard to Scott, Lyons and Peyton, respectively, touching the question of *notice of Taylor's judgment; and upon 582

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*Bankruptcy—Right of Judgment Creditors of Bankrupt.—On this subject, see *foot-note* to Spilman v. Johnson, 27 Gratt. 33, citing the principal case. In addition to authorities there cited, see, citing the principal case, Beall v. Walker, 26 W. Va. 745.

†Statutes—Retrospective Effect.—On this subject, see, citing the principal case, Duval v. Malone, 14 Gratt. 29, and *foot-note*; *foot-note* to Price v. Harrison, 31 Gratt. 114; Hoge v. Brookover, 28 W. Va. 313; Murdock v. Ins. Co., 33 W. Va. 417, 10 S. E. Rep. 780; State v. Mines, 38 W. Va. 184, 18 S. E. Rep. 473.

‡Sess. Acts 1842-3, p. 52, § 3. "That hereafter, no judgment or decree of any court within this commonwealth, heretofore rendered, for the payment of money or tobacco, and no forthcoming bond or recognizance, or other bond having the force of a judgment, heretofore executed or acknowledged, shall bind the lands of any party to the same, against a *bona fide* purchaser for valuable consideration, without notice, unless the same shall be docketed in the manner provided in the first section of this act, in the county or corporation in which such land may lie, within twelve months after the passage of this act, or ninety days before such land shall have been conveyed to such purchaser.

§ 4. "That no judgment or decree, bond or recognizance, hereafter rendered, executed or acknowledged, shall bind the land of any party to the same against a *bona fide* purchaser, for valuable consideration, without notice, unless the same shall be in like manner docketed in the county or corporation in which the land may lie, within twelve months after the rendition or forfeiture of such judgment, decree, bond or recognizance, or ninety days before such land shall have been conveyed to such purchaser." Recognizances in favor of the commonwealth are excepted out of the operation of the act.

the facts so found, submit the questions of law to the court. In my opinion it is wholly immaterial to the decision of this case, whether the trustees and cestuis que trust, or any of them had notice or not, it is therefore unnecessary to state the facts found.

The deed of trust for the benefit of Peyton was assigned to the banks above mentioned, on the 28th February 1842; and on the 14th of May 1842, Thomas Green, William S. Scott, James Lyons and William S. Triplett united in a deed, whereby the legal title to the lot mentioned was vested in the said banks. This deed on the 23d of May 1842, was delivered to the clerk of the Hustings court for the city of Richmond to be recorded. On the —— day of May 1842 the banks conveyed to McCance, the plaintiff in error, the lot of land conveyed to them by the deed of May 14th, 1842; a moiety of which lot is the subject of controversy in this suit. The deed was delivered to the clerk of the Hustings court of the city of Richmond, May 27th, 1842, to be recorded. The jury find that the banks and McCance had notice of Taylor's judgment at the time they took their conveyances respectively.

Thomas Green was declared and decreed a bankrupt on the 25th day of March 1842, and discharged as such July 11th, 1842. The judgment obtained by Taylor against Green was affirmed in the Court of appeals April 4th, 1845, with costs to Taylor; the affirmance was entered in the Circuit court May 22d, 1845. On the 13th of June 1845, Taylor sued out an elegit on his judgment. On the 18th of the same month the judgment was docketed according to the statute of March 3d, 1843, Sess. Acts, p. 51.

The sheriff, under authority conferred by the writ of elegit, with the aid of
583 a jury, amongst other things, *delivered to Taylor possession in law, of that moiety of the lot of land which is in suit here; and for recovery of actual possession this action of ejectment was brought and judgment rendered for the plaintiff.

The counsel for the plaintiff in error assail this judgment upon various grounds. These objections may be classed thus: Against the legal existence of Taylor's judgment against Green, and against the lien incident thereto; against the validity of the writ of elegit under which the land recovered was extended; against the validity of the inquest taken under that writ; against the liability of the subject taken in execution to be so taken.

It is useless to consider whether certain objections made in the argument here could have been sustained on the trial, or in some other mode perhaps more appropriate. The parties, by an order entered of record, consented that certain objections might be made notwithstanding the verdict, yet no one of these objections was made. The case therefore stands before us upon the facts found by the jury; and we can only look to the question whether Taylor's title or that of McCance as found by the jury, is the better title.

The first link in the chain of Taylor's title is his judgment against Green; this gave Taylor a lien on the real estate whereof Green was seized at the date of the judgment. It is objected that this judgment and of consequence the lien its incident, ceased to exist by operation of Green's discharge as a bankrupt under the act of congress approved 19th of August 1841, entitled an act to establish a uniform system of bankruptcy throughout the United States. In reply to this objection it may be said, that the lien in question is preserved by the express terms of the last proviso in § 2. That proviso, so far as applicable to our case, is in these words, "that nothing
584 in this act contained *shall be construed to annul, destroy or impair any liens, mortgages or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act:" (Taylor's lien is not affected by the exception.)

The Supreme court of the United States, in Ex parte Christy, 3 How. S. C. R. 292, 318, 319, and in Norton's assignee v. Boyd, 3 How. S. C. R. 426, 436, 437, declare that the liens mentioned in the proviso remain in full force, and may be made available by the state courts; that the United States district courts in bankruptcy should not interfere with their execution except under peculiar circumstances in those cases mentioned. In this case the court in bankruptcy did not take cognizance of the subject, but left it to the state courts. It may be safely said that these decisions of the Supreme court have not placed limits too narrow upon the power of the federal judiciary. It must therefore be held that the judgment and the lien incident thereto, were not discharged by Green's bankruptcy. They are left to the cognizance of the state courts to be enforced by appropriate remedies.

These authorities also sufficiently answer the objection that the form of the execution should have been varied to meet the change of circumstances produced by Green's discharge as a bankrupt.

It is alleged that Taylor's lien was lost by his omission to docket his judgment, according to the provisions of the statute, March 3d, 1843, Sess. Acts, p. 52, § 3. Before considering this objection, it must be observed that the estate held by McCance, before that statute took effect, was subject to the lien of Taylor's judgment in case it should be affirmed. It was insisted, nevertheless, that Taylor, to preserve his priority,
585 *should have docketed his judgment; that the statute operates retrospectively and gives a new rule of priority between lienors by judgment and purchasers before March 3d, 1843. This construction I hold to be in contravention of a well settled rule; to be at war with the obvious purpose of the statute. The rule referred to is, that statutes should be construed prospectively. See Dwarris on Statutes, 9 Law

Lib. p. 34, 35; Elliott's ex'or v. Lyell, 3 Call 234, (Tate's edition); Williams v. Lewis, 5 Leigh 686. There are two classes of judgments mentioned in the statute; to wit, those theretofore rendered, and those thereafter to be rendered; to protect purchasers against either class was the purpose of the legislature. The question recurs, What purchasers? The answer is obvious: Such purchasers as might be warned against making their purchases by the means provided; that is, docketing within one year after the statute, or after the judgment, as the case may require; or ninety days before the purchase; or by giving notice. Two of these modes are impracticable in the case of a purchase before the statute; that is, giving notice, or docketing ninety days before the purchase made. An ex post facto statute requiring notice to have been given or docketing to have been done, would be to require the party to foresee the passage of the statute and to conform to its provisions. To docket the judgment within one year after the passage of the law could be of no service to the previous purchaser. It will not do to ascribe to the legislature a merely capricious exercise of authority, interfering between parties whose relative rights were fixed according to law at a time already passed, requiring one party to do something, which, if done, could be no benefit to the other.

The provisions of section 4, in re-
586 gard to judgments *rendered after the statute, can only apply to purchases thereafter, because previous purchases duly made would take precedence of the judgment without this aid; yet the provisions of section 3 and section 4 are identical as to the mode of giving notice or warning to purchasers. It must therefore be held that the purchasers to be protected are those only who became purchasers after the statute took effect.

There are peculiar circumstances in this case which must be decisive, if the reasons already given will not do. McCance claims as a purchaser with notice of Taylor's judgment; he seeks to defend himself, however, upon the alleged ground that some parties through whom he derives title, were purchasers without notice and should be protected; and that the protection given to them should enure to his benefit. All parties through whom McCance derives his estate had conveyed their titles before the enactment of the statute of 1843, and, such as they were, they vested in McCance. The parties alleged to have had no notice conveyed without warranty or covenant of any kind; they acquired their titles subject to the lien, and conveyed them subject to the lien as the law then was, and are in no wise responsible for the title. They can gain no advantage even if the lien be lost; and as between them and Taylor it would be most capricious and arbitrary to set aside Taylor's lien when no good can result to them; to sacrifice his prior right on their account, when they are beyond the reach of loss or profit.

The objection to the writ for including the costs in the Court of appeals is answered by the case of McClung v. Beirne, 10 Leigh 394.

The objections to the form and substance of the writ of elegit, as against the real estate, so far as they are founded on the law for relief of bankrupts, have
587 *been already sufficiently considered when looking to the operation of that law upon the judgment and its incident lien; the authorities show that the lien is left intact. The lien in this case is the right to sue out the writ of elegit. The whole subject is left as if the act of congress had not passed so far as this portion of Green's real estate is involved. Nor is there any well founded objection to the form of the writ as against the goods and chattels of Green. The act of assembly prescribes the form of the writ used in this case; limitations and exceptions to the general terms of the writ are prescribed by other statutes; yet these limitations and exceptions are not noticed in the writ, nor is it necessary to apply to the court for a new judgment or for a special or limited execution; the exceptions in favor of landlords for rent, or in favor of poor debtors or other exceptions, the sheriff must respect at his peril, when informed of them. There is no reason why he should not respect all exceptions when prescribed by competent authority; as by the act of congress establishing a system of bankruptcy.

The objections to the inquest have been in effect disposed of in considering the form and substance of the writ under which the inquest was held. It has been shown that the writ is valid; the inquest held under it and in accordance with its terms, except so far as varied by laws which must be obeyed, must also be held valid.

It was further objected that the subject taken in execution is not liable to be so taken; in as much as previous to the date of Taylor's judgment, Green had executed a deed of trust conveying the property to Scott, and therefore was not seized thereof at that date. The reply is obvious. This deed of trust was not delivered to the clerk to be recorded until after the judgment was rendered; and thus as against
588 Taylor it *was not valid. It is to be treated as if it had not been made, so far as Taylor the judgment creditor is concerned. 1 Rev. Code, p. 364, 5, § 12.

I am of opinion the judgment should be affirmed.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

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589 *Claycomb's Legatees v. Claycomb's Ex'or.

January Term, 1854, Richmond.

1. **Executors and Administrators—Division of Slaves among Legatees—Commissions.***—Where the condi-

*Executors and Administrators—Commissions.—In Buxton v. Shaffer, 43 W. Va. 299, 27 S. E. Rep. 320, it

tion of the estate does not require a sale of the slaves, and they are divided among the legatees or distributees, the executor is not entitled to a commission upon their appraised value.

2. **Same—Division of Perishable Property—Commissions on Appraised Value.**—But where grain or other perishable property, which by the law the executor is directed to sell, is divided in kind among the legatees, the executor is entitled to a commission upon the appraised value.

3. **Joint Executors—Labors Performed by One—Compensation.**—Where one of two executors performs all the labor of the administration, he may be allowed all the compensation; and it is not for the legatees to object to this.

This was a bill filed in the Circuit court of Berkeley county, by John Green, one of two executors of Conrad Claycomb deceased, against the other four legatees of Claycomb, to recover a balance appearing to be due to him upon his account as executor settled in the court of probat. The plaintiff and the defendants were the residuary legatees of Claycomb, and one of the defendants was an executor, but lived out of the state, and was proceeded against as an absent defendant. The only question made in the pleadings or in the Circuit court was as to the right of the plaintiff to have commissions upon the assessed value of the slaves belonging to the testator's estate, which were divided in kind among the legatees, including the plaintiff. These slaves were valued at five thousand four hundred and five dollars, and in the account settled in the court of probat he was allowed a commission of five per centum on that sum. A quantity of grain was also divided among the legatees, and a like commission thereon was allowed. These items constitute more than two-thirds of the estate; and the 590 *debts due from the testator were little over one hundred dollars.

The court below held that the plaintiff was entitled to the commissions, and made a decree against each of the defendants for one-fourth of the balance found due to the executor on the account. From this decree the three defendants living in the state applied to this court for an appeal, which was allowed. The errors assigned in the petition of appeal are, 1st. For the allowance of commissions on the value of the slaves, and of the grain divided. 2d. That the commission should have been allowed to both executors. 3d. That the decree was against each of the defendants, for one-fourth instead of one-fifth of the amount found due to the plaintiff.

Brooke, for the appellant.
Faulkner, for the appellee.

MONCURE, J., delivered the opinion of the court.

This is a suit in chancery brought by an executor, who in right of his wife was also one of five residuary legatees of his testator, to recover of the other residuary legatees their respective proportions of a balance reported to be due to the executor from the estate of his testator in an account settled by commissioners appointed by the court of probat. The court below rendered a decree in favor of the executor against each of the defendants, for one-fourth of the balance, with interest, and against all of the defendants, for costs; and from that decree an appeal was taken by three of the defendants; the other, (who was also coexecutor with the plaintiff,) having been proceeded against as an absent defendant. The only question about which there was any controversy in the court below, was as to the right of the executor to a commission of five per cent. allowed him by the 591 commissioners, *on the appraised value of the slaves divided in kind among the legatees. And that question is involved in the first assignment of errors.

We are of opinion that the executor was not entitled to commission on the appraised value of the slaves; and that the court below erred in sustaining his claim for the same. It was not necessary to sell any of the slaves for the payment of debts, legacies or expenses of administration. The executor was not authorized by law or by the will to sell, and did not sell, any of them. They were directed by the will to be divided in kind among the residuary legatees, and they were divided accordingly. There was no necessity, and no propriety, in debiting and crediting their appraised value in the executorial account. A commission on the value of slaves delivered by an executor or administrator to legatees or distributees, has never been allowed or sanctioned by this court. Our statute provides that executors and administrators "may be allowed such recompense for their personal trouble as the court on passing

is said: "A commission on actual receipts is, under the practice long established in Virginia and this state, the mode of compensation to personal representatives for their services, as laid down in Kester v. Lyon, 40 W. Va. 161, 20 S. E. Rep. 933; Estill v. McClintic, 11 W. Va. 399, and Hoke v. Hoke, 12 W. Va. 429. The cases of Farneyhough v. Dickerson, 2 Rob. (Va.) 582, and Hipkins v. Bernard, 4 Munf. 88, are referred to to sustain this claim for commission. They held that where a personal representative turned over to legatees bonds on their legacies or shares the executor would be entitled to commission. But in those cases they were personal assets, vested wholly in the representative, and when he turned them over they were received as money. But in *Claycomb's Legatees v. Claycomb's Ex'or*, 10 Gratt. 589, it was held that where the executor turned over slaves to legatees or distributees he was not to be allowed commission on their value. The title to them was vested in him, but he was not to sell them unless required by the demands upon the estate. He was really liable, chargeable with them, and yet was allowed no commission,—a much stronger claim for commission than here."

If a guardian appear to have converted the property of his ward into money, with the view to commissions, where there is no sufficient reason therefor, commissions will be denied to him. Gregory v. Parker, 87 Va. 455, 12 S. E. Rep. 801, citing Bank of Va. v. Craig, 6 Leigh 437; Farneyhough v. Dickerson, 2 Rob. 582; *Claycomb v. Claycomb*, 10 *Gratt.* 589; 1 Minor's Inst. (2d Ed.) 460, 502.

their accounts shall judge reasonable." But that recompense has generally, if not always, been measured by a commission upon actual receipts; and such commission has generally been five per cent. upon the receipts; which was considered adequate even in a case in which the testator by his will directed his executors to be handsomely paid. Waddy's ex'or v. Hawkins' adm'r, 4 Leigh 458. In some cases a larger commission has been allowed; but in all of them the extra compensation has been under peculiar circumstances. For a reference to the cases on the subject, see 2 Robinson's Practice 370, and 2 Lomax on Executors 329. In this case there are no peculiar circumstances to require an extra compensation. The estate was unembarrassed, its transactions few and simple, and its administration very easy.

592 *Besides the slaves, the grain on the farm was divided in kind among the residuary legatees, and a commission of five per cent. was also allowed on the value of the grain. This may have been proper, as the statute directs executors and administrators, whether it be necessary for the payment of debts or not, to sell all such goods of their testator or intestate, specific legacies excepted, as are liable to perish, be consumed, or rendered worse by keeping. If the grain in this case had been sold under the directions of the statute, the executor would have been entitled to commission on the amount of the sale. The residuary legatees preferred a division in kind, and to receive their portions in grain instead of money. It would seem to be unreasonable that the effect of such preference should be to deprive the executor of his commission. The difference between the grain and the slaves is that the executor was required by law to sell the one, but had no right to sell the other. In Farneyhough's ex'ors v. Dickerson, 2 Rob. R. 582, it was decided that though some of the credits were for bonds due the estate that were passed over by the executor to legatees and voluntarily received by the latter, the executor was nevertheless entitled to commission on the amount of such bonds. But no question was raised in the court below as to the right of the executor to commission on the value of the grain, and none should be permitted to be raised in this court.

In the balance reported to be due, and decreed to be paid, to the executor, some small payments of debts and expenses of administration are included. But these payments were made after the residuary estate had been paid and delivered to the legatees. So that the doctrine recognized in Davis v. Newman, 2 Rob. R. 664, can have no application to this case. We mean, however, to indicate no opinion upon

593 the *question whether that doctrine would apply to the case if the facts were otherwise.

There is nothing in the objection taken in the second assignment of errors, that the whole commission was allowed to one executor when there were two. The other executor did not appeal, and could not, being an absent defendant; and the appellants would have no right to make the objection if there were anything in it.

The objection taken in the third and last assignment of errors is well founded. The burden of the balance due to the executor should have been equally borne by all of the five residuary legatees, including the executor himself; and a decree rendered against each of the appellants for one-fifth, instead of one-fourth of said balance.

We are of opinion that the sum of two hundred and seventy dollars and twenty-five cents, being the commission on the appraised value of the slaves, should have been deducted from the balance of four hundred and twenty-one dollars and twelve cents claimed by the appellee; and a decree should have been rendered against each of the defendants for one-fifth of the residue, with interest from the 11th day of November 1844, instead of one-fourth of said balance, with interest from that day.

Therefore, so much of the decree appealed from as is inconsistent with the foregoing opinion is, as to the appellants, (but not as to the absent defendant,) reversed with costs, and the residue thereof affirmed; and the cause is remanded to be further proceeded in accordingly.

Decree reversed.

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594 *Parker & als. v. McCoy & als.
Same v. Same.

January Term, 1854, Richmond.

(Absent DANIEL, J.)

1. **Sale of Small Inheritance—Statute—Construction.**—The act, 1 Rev. Code of 1819, ch. 96, § 20, p. 358, Supp. Rev. Code, ch. 149, § 2, p. 208, authorizing the sale of lands, where the interest of each joint owner is less than three hundred dollars, refers to the estimated value of each interest if the land is divided, and not the value of each interest in the estimated value of the whole.
2. **Same—Same—Same—Case at Bar.**—If the value of each interest in the land divided in kind is less than three hundred dollars, the court has authority under the statute, to sell the land, though the estimated value of the whole land will give to each owner more than three hundred dollars.
3. **Infants—Estimation of Interest in Land—Dower Interest of Widow—When Infant's Land Sold.**—The land in the possession of a widow for life as her dower, need not be estimated in ascertaining the value of infants' interest in land; but the land in possession of the infants may be valued, and if of less value than three hundred dollars, may be sold, without selling the land in possession of the widow.
4. **Same—Sale of Small Inheritance—Service of Process** *—It is not necessary to summon the infant owners in a proceeding to sell their land under this

*Infants—Condemnation of Land—Service of Process.—In condemnation proceedings under the statute, ch. 42, Code of W. Va., it is not necessary for infant owners to be served with notice of the application.

statute; but the court may appoint a guardian *ad litem* to defend them.

5. **Same—Same—Decree Binding without Day in Court.**†—In the proceeding under this statute the order or decree of the court is conclusive upon the infant, and he has no day in court to show cause against it upon coming of age.

6. **Same—Same—Decree Giving Infant Day in Court—Bona Fide Purchaser.**—Though the final decree gives the infant a day in court, this will not entitle him as against a *bona fide* purchaser of the land under the decree of the court, to disturb the sale.

7. **Same—Same—Procedure.**—Though the proceeding under this statute may be and usually is by bill, it is not necessarily so, but may be by petition or motion, and the parties being summoned the evidence may be heard in court, and the necessary orders and proceedings may be made and had thereon.

Some time previous to May 1834 William C. Burton of Albemarle county de-
595 parted this life, leaving a *widow, and four children, Frances who was married to Daniel E. McCoy, Susan, William and Elizabeth Burton; all of whom were infants; and Joseph Bishop qualified as his administrator. In May 1834 Mrs. Burton filed her bill in the County court of Albemarle for an assignment of her dower; and the commissioners who were appointed to lay it off, reported that the real estate consisted of two lots of ground in the town of Charlottesville, on one of which there was a brick house valued at seven hundred dollars, and on the other there was also a brick house and tan yard valued at two thousand dollars: and they allotted to the widow the brick house on the last lot, by metes and bounds; and there were three slaves of which they allotted one to the widow. This report was afterwards confirmed by the decree of the court in August 1834.

In the same month of August 1834 Daniel E. McCoy and Frances his wife filed their bill in the County court of Albemarle against Bishop the administrator and the heirs of William Burton, for a sale of the real estate and slaves belonging to the heirs of Burton not assigned to the widow. They charge that the real estate is incapable of division without great injury to the parties; and if divided the share of each heir would be of less value than three hundred dollars.

The administrator answered consenting to a sale of the slaves; and a guardian ad litem was appointed to defend the infants, who filed an answer for them submitting their rights and interests to the protection of the court. The bill and answers seem to have been filed at the same term of the court; and no process was issued or served upon the infant defendants. At the same time two commissioners were appointed to value the real estate, except that assigned to the widow, and to report whether it could be divided into four equal parts: And Bishop was directed to sell the slaves.
596 *During the same term of the court the commissioners returned their report, in which they say that it is certainly true that the lots can be divided into four equal parts: But that in their opinion, the interest of all the parties concerned will be injuriously affected by such a division. They estimate the house and lot at five hundred dollars, and the balance of the tan yard lot at eight hundred dollars; but if the property is divided into four equal parts, it will not be worth more than one thousand dollars. This report was confirmed, and a

but the court may appoint a guardian *ad litem* to defend the interests of the infant. Charleston, etc., Bridge Co. v. Comstock, 36 W. Va. 263, 15 S. E. Rep. 69, citing the principal case at page 72. See also, Alexander v. Davis, 42 W. Va. 465, 26 S. E. Rep. 291.

In Myers v. Myers, 6 W. Va. 370, it is said that an infant can only make defence by a guardian *ad litem*, and one should be appointed by the court for that purpose, citing *Parker v. McCoy, 10 Gratt. 594.*

See monographic *note* on "Infants" appended to Caperton v. Gregory, 11 Gratt. 505.

†**Same—Sale of Small Inheritances—Decree Binding.**—In Zirkle v. McCue, 26 Gratt. 529, it is said: "In this state the rule seems to be well settled, that whenever the court is asked to sell and convey an infant's inheritance, he is entitled to an opportunity of making a defence at any time within six months after he arrives at full age. The only exception to this rule is found in those proceedings in equity under the statute for the sale of small inheritances of less value than three hundred dollars. *Parker & als. v. McCoy & als., 10 Gratt. 594.*"

See monographic *note* on "Infants" appended to Caperton v. Gregory, 11 Gratt. 505. See principal case cited in Lafferty v. Lafferty, 42 W. Va. 785, 786, 26 S. E. Rep. 263.

Judicial Sales—Setting Aside—Purchaser Must Be a Party.—In Estill v. McClintic, 11 W. Va. 424, it is said: "The purchasers at such sales (sales under decree of court), or their representatives, should be summoned to answer these petitioners; all the evidence bearing on the justice or propriety of the sales should be heard, including evidence as to the value of said lands when sold, and what improvements on them had been made by the purchasers, and what taxes paid by them, as also what rents and profits had been received from them; and the court should then, with all the facts and parties before it, do justice by setting aside the sales on such terms as are right, or by refusing to set them aside. This was the course pursued in Londons v. Echols *et al.*, 17 Gratt. 15; Hughes *et ux.* v. Johnston, 12 Gratt. 479. See also, as indicating that this is the proper course to be pursued, Pierce's Adm'rs v. Trigg's Heirs, 10 Leigh 406; *Parker v. McCoy, 10 Gratt. 594;* and also, the cases Bank of the United States v. Ritchie, 8 Pet. 128; Coger v. Coger, 2 Dana 270; McKee's Heirs v. Hamm, 9 Dana 520; Parker's Heirs v. Anderson's Heirs, 5 Mon. 445. In Huston's Adm'r v. Cantril, 11 Leigh 136; Cocke's Adm'r v. Gilpin, 1 Rob. 26; and Buchanan v. Clark, 10 Gratt. 164, no supplemental proceedings were taken, because the purchasers were in those cases already parties in the causes. Here they are not, and supplemental proceedings must be had, before their rights as purchasers can be adjudicated."

The principal case is also cited in Londons v. Echols, 17 Gratt. 19, and *foot-note*; Heermans v. Montague, 2 Va. Dec. 18; Dunfee v. Childs, 45 W. Va. 165, 30 S. E. Rep. 106.

commissioner was appointed with directions to sell the property in the mode and upon the terms stated in the decree.

At the November term of the court the commissioner reported that he had sold the tan yard lot to Marshall & Bailey at the price of nine hundred dollars, and that Bishop had purchased the other house and lot for seven hundred and eighty-five dollars. This report was confirmed, and afterwards in October 1835, the purchasers having paid the purchase money, the commissioner was directed to make to them conveyances; which was accordingly done; and a day was given to the defendants to show cause against the decree.

William Burton having come of age in 1844, Mrs. McCoy having died without children surviving her, Susan having attained age and married Isaac Ong, and Elizabeth being still a minor but married to John W. Parker, the children then living applied for leave to file answers in the cause and impeach the proceedings. The County court overruled the motion; and they obtained an appeal to the Circuit court, where their motion was sustained; and the cause was retained in that court to be proceeded in there. They then filed a cross bill in the cause. Both in their answer and in the cross bill they object to the proceedings on various grounds: First. That the sale showed that the share of each infant was worth more than three hundred 597 *dollars. Second. The property allotted to the widow was not taken into the estate, and that William C. Burton held another lot at his death, for his death, for which he had paid, but had not received a conveyance; and Bishop had sold it to Hawkins, and had directed the conveyance to be made to him. Third. That the heirs had not been summoned to show cause against the sale as is required by the statute.

There were other matters alleged in relation to certain deeds executed by McCoy and wife to Bishop and Bailey, but they are of no importance as to the questions considered by the court. The purchasers and Bishop were made defendants, and the purchasers answered; and a good deal of testimony was introduced into the cause, which however it is unnecessary to state. The cause came on to be heard in December 1846, when the court affirmed the proceedings and decrees in the cause in the County court, and dismissed the cross bill, with costs in both cases. From this decree the heirs applied to this court for an appeal, which was allowed.

Stanard and Bouldin, for the appellants.
Patton, for the appellees.

LEE, J. The proceeding complained of in these causes was one taken under the second section of the act of January 14, 1829, authorizing in certain cases, the sale of small inheritances. Supp. Rev. Code 208. It provided for a sale by order of the court, where any one of the heirs of any estate descended should be an infant, feme covert, non compos mentis or beyond sea, and the dividend of each heir, in the opinion of the court, should not exceed the value of three hundred dollars; the proceeds of sale to be distributed among those entitled. This provision was first enacted in 1790, and constituted the first section 598 of an act amendatory of *the law of descents. 13 Hen. Stat. 122. By this act the sale was authorized where the dividend of each heir did not exceed thirty pounds. It was re-enacted in 1792, (the sum named being one hundred dollars,) and constituted the twentieth section of the act of descents then passed. 1 Rev. Code 1814, p. 237. At the revisal of 1819, it was again enacted in nearly the same terms; but the power to sell was extended to all cases in which the dividend of each heir should not exceed three hundred dollars; and it constitutes the twentieth section of the act of descents. 1 Rev. Code 1819, p. 358. By the act of February 27, 1828, the section was repealed; but in the following year it was re-enacted in the same terms. Supp. Rev. Code, p. 208, 224.

The construction of the clause defining the cases in which the power to direct the sale is to be exercised, is now presented for consideration for the first time in this court; and the question arising in this case is, Whether by the "dividend of each heir," which is not to exceed the value of three hundred dollars in the case in which a sale is authorized, is meant the share of each heir in the estimated value of the property taken as a whole, or the estimated value of each share of the estate, if the same were to be equally divided among the heirs of the decedent.

It appears that the commissioner to whom the subject was referred by the court, reported that the property of which Burton the intestate died seized, (excluding the part assigned to the widow for her dower,) was in their opinion taken as a whole and undivided, worth thirteen hundred dollars; a sum which, divided among the four heirs, would give to each more than three hundred dollars. But they stated in addition, that while the property was susceptible of being divided into four equal parts, yet by such a partition the interest of all parties 599 would be injuriously affected, *because in their opinion each share, if so divided, would not be worth more than two hundred and fifty dollars.

In many cases of estates descended, the estimated value of the shares of all the heirs, supposing an equal partition to be made, is greater than that of the whole property divided. In others, there is little or no sensible disparity in the estimated values of the property, divided and undivided. This case falls within a third class, in which the value of the estate is so lessened by partition, (according to the estimate made,) that each heir would get a portion of property worth less than three hundred dollars, while if a sale of the whole be made, he will get upwards of that sum in money.

It is possible that the policy which the framers of this section had in view may have been, in part, to avoid the evils which have been elsewhere, and especially in France, so sensibly felt, of minute subdivisions of lands by repeated and successive partitions of small inheritances among the heirs of those dying possessed of the same. But it cannot be doubted, I think, that the chief object was to promote the interest of the heirs; it being assumed that where an estate descended was of so inconsiderable value as those contemplated by the provision, it would be more to their interest to sell it and divide the money than to make partition. Now where the estimated value of all the shares, if the property be divided, would be equal to what it would bring if sold under the order of the court, no question could arise if each share were less than the prescribed sum. But where the estimated value of each share, if partition be made, would be greater than the amount which each heir would receive if the property were sold, if the former exceeded three hundred dollars, though the latter might be less than that sum, I think it
600 would be clearly not a case in *which the court would be authorized to direct a sale; because the main object of the law, to wit, to promote the interest of the parties entitled, would be thereby defeated. On the other hand, where the share of each heir, if partition were made, would be of less value than three hundred dollars, I think the court might properly direct a sale, notwithstanding it might be of opinion it would bring a sum which would yield more than three hundred dollars to each party entitled to distribution. Nor would the validity of the sale be in any manner affected if it should turn out that the land actually did bring such a sum. It was clearly not the intention of the act that the land should be sold for less than the greatest sum it would bring; and although this might be sufficient to yield more than three hundred dollars to each heir, that amount would not be the test of the court's jurisdiction; the true criterion being the opinion of the court before the sale is ordered as to the probable value of each share of the land, if the same were divided in kind, when sold separately. And although it might be made to appear in some subsequent proceeding that the court was mistaken in its opinion, and that each share, if sold separately, would have been worth more than three hundred dollars, yet, assuming that no fraud is justly imputable to any party, and that that opinion was fairly formed upon reasonable grounds, and with such lights as were before the court, I cannot think that a fair purchaser should be afterwards disturbed.

The cases to which I have thus referred as constituting the third class, are, I think, peculiarly fit for the exercise of the power conferred by the statute, and present a state of facts to which the law was exactly intended to apply. Not only the supposed general advantage of converting an inconsiderable real property into money is secured to the parties, but the particular
601 *advantage of an enhancement of the value of their estate. And that their interest is mainly to be consulted, as has been already intimated, I can perceive no reasonable ground to doubt. If it were made to appear, in any given case, that it would be plainly to the interest of the heirs that the property should be retained, surely the act is not so imperative in its terms that the court would feel itself required to direct a sale.

The case put by the counsel, in illustration of what he regards as the fallacy of the construction he is resisting, is not, I think, at all apposite to the present case. He puts the case of a manufacturing mill worth thousands, if sold entire, but which, if divided in kind among several parties, would be rendered valueless. Such a property is not susceptible of a division in kind, in any just or beneficial sense, and a different mode of making partition must be adopted. Whether in the case put a sale could be resorted to, I undertake to express no opinion. In the case we have it abundantly appears that a division of the property in kind might have been made, though such a division would have been attended with a sensible diminution of its value.

The interpretation of this statute thus indicated is, I think, the soundest and most rational, and so far from doing violence to its terms, will be found to be in perfect accordance with them. The term "dividend" is perhaps more frequently used to signify by an extension of its primary meaning, a share in money of a common fund, but it may with perfect correctness be applied to land or any other subject held by several in joint ownership. And if it were intended to use it in this act in the sense of a share in a moneyed subject, (the estimated amount of the proceeds of sale,) the expression would perhaps have been "and the dividend of each heir shall not exceed
602 three hundred dollars," *or "the sum of three hundred dollars," or some similar phrase; whereas it is "and the dividend of each heir shall not exceed the value of three hundred dollars:" thus importing a share in kind or thing of a certain value, rather than a sum of money which is itself the very measure and expression of value.

But it is said, the portion assigned to the widow for dower was excluded from the estimate of value made by the court; and that it is now shown there was another lot belonging to the estate, which was not brought to the notice of the court, and its value therefore not estimated; and that before the court could direct a sale, it was bound to estimate the value of the whole estate descended.

Whether the act only authorizes a sale where the share of each heir in the whole estate descended does not exceed the prescribed sum, or whether a parcel such as a particular tract separated from the residue of the lands, may be sold under its provi-

sions, is a question which may not be altogether unworthy of consideration. Cases may arise in which it might be highly beneficial to the heirs that a detached parcel of property might be sold and the residue equally divided. But without intimating any opinion on this point, and although the part assigned to the widow for her dower is of course part of the estate descended, it is to be observed that the interest of the heirs in it is but a dry reversion the sale of which could scarcely be contemplated under the provisions of this act. What was intended to be sold, was the subject of which the heirs were entitled to the immediate possession and enjoyment for present comfort and subsistence as soon as partition should be made. Now, whether the case of McClintic v. Manns, 4 Munf. 328, is to be understood as affirming the legal right to demand partition of dower lands among the heirs during the life of the tenant
603 in dower or not, certainly *it has not been the usage in Virginia to make partition of such lands until after the death of the doweress. And it would be extremely difficult if not impossible for the court to form any correct estimate of the value of the reversion in such a case. Besides, the sale of a reversion would generally be at a serious loss, and frequently a great sacrifice, thus defeating what, as already intimated, I take to be the great object of the law. I think the widow's dower land is, according to general usage throughout the state, properly regarded as not a fit subject of partition, either in kind or by a sale, and that the other lands may be sold by order of the court, without taking the former into the estimate, leaving it to be the subject of future disposition, when it falls in upon the death of the tenant for life.

The omission to include in the estimate the lot near Charlottesville does not appear on the face of the proceeding in the county court prior to the sale, but is set up in the petition to open the order of sale, filed by the appellants, and in their answers tendered therewith, and in their cross bill and supplemental. It is new matter of defence now set up after the sale has been made and confirmed, by virtue of which it is sought to annul the whole proceeding and reclaim the property.

There would seem to be some want of precision in the authorities as to the extent to which an infant is entitled to avail himself of the right to appear and make defence after he attains full age, even in those cases in which it is absolutely required that time should be reserved to him for that purpose. In 1 Daniel's Chy. Pract. 205, it is laid down in general terms, that an infant defendant is as much bound by a decree in equity as a person of full age. Therefore, says the author, if there be an absolute decree made against a defendant who is under age, he will not be
604 *permitted to dispute it unless upon the same grounds upon which an adult might have disputed it, such as fraud, collusion or error. And in the case of a decree of foreclosure, although a day must be given the infant to show cause against it, he can only do so by showing error. He may not unravel the account, nor is he even entitled to redeem by paying the amount due. Mallack v. Galton, 3 P. Wms. 352; Bishop of Winchester v. Beavor, 3 Ves. R. 314; Williamson v. Gordon, 19 Ves. R. 114. In other cases, it would seem he may obtain leave to amend the answer filed for him, or to put in a new one, showing grounds of defence not before the court, or not insisted on at the former hearing. Bennett v. Lee, 2 Atk. R. 531; Napier v. Lord Effingham, 2 P. Wms. 401; Fountain v. Carine, 1 P. Wms. 504; Stephenson v. Stephenson, 6 Page's R. 353; James v. James, 4 Page's R. 115.

But if this matter were now available to set aside the decree, the appellants have failed to make out the case which they allege. There is no sufficient evidence that there was such a lot belonging to the estate as that charged to have been improperly omitted from the estimate. No written evidence of title is exhibited, nor any contract of purchase proven. They prove the execution of an order to Marchant by Bishop as administrator of Burton to make a deed to Hawkins for a lot he had previously conveyed to Marchant. Whether the lot had in fact been purchased by Burton, and if purchased, whether paid for or not, or whether the claim of Burton was in the nature of a lien for a debt which had been paid, or what was the nature of his claim, is nowhere explained. The commissioners, in their report, seem to regard the property valued by them as the whole of the estate. And certainly this order is insufficient of itself to prove that Burton died seized of an estate of inheritance in this lot, which, upon his death, passed to his heirs.
605 Nor *is there any evidence as to the value of this lot, or to show that the value of each heir's share, added to the estimated value of the share in the other property, would make the value of each share in the whole estate greater than three hundred dollars. The appellants allege, it is true, that this lot was worth about two hundred and twenty-five dollars, and that Bishop had sold it to Hawkins at about two hundred dollars. Of this, however, there is no proof: and even if the sum for which it is said Bishop sold it to Hawkins be assumed as the value at the time of the order for the sale, one-fourth of that sum added to the estimated value of each share in the other property, if divided, would not make it exceed the prescribed amount. If the price at which the appellant Burton states in his answer his father had purchased the lot of Marchant shortly before his death, be assumed as the fair value, the shares of each heir in the whole estate would still be less than the three hundred dollars. And moreover, if all this were otherwise, yet here the interest of a fair purchaser under the decree is involved, and a grave question arises as to how far his rights are to be affected by any error or irregularity in

the proceedings. There are strong authorities to show that a purchaser under a decree will not be affected by such errors or irregularities; and that he is not bound to go through all the proceedings and look into all the circumstances, and see that the decree is right in all its parts, and that it cannot be altered in any respect. He cannot of course be protected against a title not in issue in the cause, nor against the claims of persons not parties to the cause, and therefore not bound by the decree; but it should seem that he has the right to presume the court has taken the necessary steps to investigate the rights of the parties, and upon such investigation has properly decreed the sale. Bennet v. Hamil, 2 Sch. & Lef. 566; Lutwych v. Winford, 606 *2 Bro. C. C. 248; Lloyd v. Johnes, 9 Ves. R. 36, 65; Curtis v. Price, 12 Ves. R. 89, 101. See also Booth v. Rich, 1 Vern. R. 295; Mills v. Dennis, 3 John. Ch. R. 367. I do not deem it material however to the decision of this case further to prosecute this enquiry, or to express any definitive opinion upon the point involved.

I think there is nothing in the objection that a summons had not been served upon the heirs before the order of sale was made. They were all under age; and it can hardly be supposed the legislature intended that process should be served upon infants. There can be no discrimination between minors of different ages, and none is made by the act; and if it be necessary to serve a process upon any, it must be equally so to serve it upon those of the most tender years, and who would of course be utterly unable to comprehend what was intended, or to make any response after they were so summoned. So idle a form it cannot be supposed was intended to be observed, and we must infer that the heirs intended to be summoned were such of them as should be of full age and qualified to make defence. And this derives countenance from the provision of the act of March 3d, 1827, (Supp. Rev. Code 134,) concerning the sale of the lands of infants at the instance of guardians. This act requires the adult heirs only, in terms, to be summoned.

But if these infant heirs had been summoned they could only have made defence by a guardian ad litem, and one must have been appointed by the court for that purpose. This has been done, and an answer filed submitting the rights of the infants to the protection of the court. This defence was made for the infants in the only way in which it could be made, and it is now wholly immaterial whether a summons had been previously served upon them or not.

There is yet another view of this 607 case going beyond *those which have been already presented, which I think fatal to the pretensions of the appellants.

At common law in actions against infant heirs for debt, at the suit of specialty creditors of their ancestor, either party might pray that the parol might demur: and a similar practice obtained in equity where a suit was brought to enforce the legal liability of the heir to pay specialty debts of the ancestor out of the assets descended, whether the suit were brought by the specialty creditor or by a simple contract creditor to marshal the assets. In such a case no decree for relief would be pronounced during the infancy of the heir. Courts of equity went further and extended this protection to the infant in other cases besides those in which the parol could demur at law; and they adopted a general rule by which in cases of foreclosure and partition, and other cases in which the courts were asked to sell and convey the real estate of an infant, and in which the execution of the conveyance was necessarily to be deferred until the infant attained his age, he was entitled to an opportunity after that period, to show cause against the decree; and a provision was accordingly inserted in the decree reserving the right so to do. By the English statute abolishing the rule for the parol demurring, (1 Will. iv, ch. 47,) provision is made empowering the court in certain cases to compel an immediate conveyance from an infant heir; and there are other statutes giving the court jurisdiction to order the immediate conveyance of an infant's estate. And in such cases, as well as those in which no conveyance, either in form or in substance, is directed, the infant is held bound by the decree, and no day is given him to show cause after he becomes of age. In all other cases it seems to be agreed, the general rule is that time must be given him after he becomes of age to show cause against the decree. And even in a 608 case of foreclosure as we *have seen, time must be given; though in that case, the only cause that can be shown is error in the decree. See Tuckfield v. Buller, Amb. R. 197; Eyre v. Countess of Shaftsbury, 2 P. Wms. 102; Booth v. Rich, 1 Vern. R. 295; Cooke v. Parsons, 2 Vern. R. 429; The Duchess of Buckingham v. Sheffield, Amb. R. 586; Price v. Carver, 3 Myl. & Cr, 167; Mills v. Dennis, 3 John. Ch. R. 367. And such I suppose is the general rule in Virginia where the rule of the parol demurring has been also abolished; for although by the act of December 21, 1818, (1 Rev. Code, p. 204, § 41,) the superior courts of chancery, and by the act of January 1828, (Supp. Rev. Code, p. 178, § 5,) the County courts are authorized to make immediate conveyance of the estate of an infant or any other person, in a proper case, yet by the proviso contained in the first mentioned act it is expressly declared that it was not to be construed to affect the right of an infant or any other person to show cause against the decree within the same time as if it had never passed. But this rule I apprehend is properly applicable to chancery suits proper, inter partes, in which the heir stands as defendant and relief is sought in invitum in respect of property vested in him by grant, devise or descent, and should not be applied to the peculiar statutory proceeding for the sale of small inheritances which we have under consideration. It must be the intention of

this act to make an immediate conveyance of the infant's estate, and to bind him by the order which it makes for the sale. A different construction would defeat the object which the legislature must be supposed to have had in view. It is of course to the interest of the infant that the property should bring the best possible price, and it is to the public interest that the real estate of the citizen should be properly cultivated and improved. But who would be willing to purchase the land of an in-
609 fant at a fair price, or to *improve it after he should purchase it, if at a remote period when the infant attained his age, he could come in, rip up the whole proceeding and reclaim the property? The effect must be either to put an end to such sales altogether, or to occasion ruinous sacrifices, still further impoverishing the helpless and needy object of the court's protection.

There is nothing in this act stamping the measure which it provides with the distinctive character of a chancery suit. The form of proceeding by bill and answer may be a very convenient as it has been a very common one, to obtain the order for the sale; but there is nothing to make it necessary to adopt it. It is true it is to courts possessing chancery jurisdiction the power to direct the sale has been confided: But this may be because it more conforms to those which such courts usually exercise and to their manner of proceeding than to those of the law courts, or because the care and management of infants and their estates seems more appropriate to the former than to the latter. But this act, unlike that concerning sales of infants' estate at the instance of guardians, does not require that a bill be filed setting forth the facts of the case, on oath, nor that an answer shall be filed on oath by a guardian ad litem, and in certain cases by the infant himself. It does not in terms require any bill or answer to be filed, or any pleadings whatever. The process which it directs to be issued is not the usual subpœna in chancery to answer a bill, but a special summons to the heir to appear and show cause against the sale. The order of publication against any heir that may be absent, is to be inserted in a newspaper; but it is not required to be posted at the court-house door, as in chancery cases proper. No provision is made as there is in the act just referred to, requiring the testimony to be taken and filed in writing; and the minute directions
610 contained in that act are all *omitted in this. Nor is any day directed to be given the infant after he attains his age to show cause against the decree. I think the proceeding is not to be regarded as a chancery suit proper; and that although the form of filing a bill in which the infant heirs may be named as defendants be adopted, yet they are in fact to be regarded as equally actors in the matter, under the protecting care of the court; and indeed I perceive no sufficient reason why the court may not upon a simple suggestion ore tenus, after having caused the proper parties to be summoned, proceed to hear the testimony generally at bar, and if satisfied that the estate is one of the inconsiderable value contemplated by the statute, make the order for the sale in a summary way. In short I regard it as one of those special cases in which by statutory provision, authority and jurisdiction are given to the court for special reasons and purposes, to order the immediate conveyance of an estate vested in an infant, and in which he is bound by the order, and entitled to no day after he attains his age to show cause against it. The court judges for the infant and must be presumed to have exercised its judgment honestly and discreetly; and the infant must be concluded unless he can show fraud, collusion or error. Cases of this character occur in England under the statutes, 1 Will. iv, c. 47, (concerning the parol demurring); 2 Geo. iv, and 1 Will. iv, c. 60, (concerning conveyances of trust estates in certain cases); 4 and 5 Will. iv, c. 23, (concerning escheats and forfeitures of property holden in trust); and 2 Vict. c. 69, (concerning transfers of estates vested in the heirs and devisees of mortgagees). They are the same referred to in 1 Daniel's Chy. Pract. 208, as cases in which no clause giving the infant a day to appear need be inserted in the decree. In Virginia, besides the act under consideration, similar cases would occur, I presume, under the 13th sec-
611 tion of the act of 1819, (1 *Rev. Code 408,) providing for the conveyance of estates vested in infants, in trust or by way of mortgage; also under the 14th section of the same act providing for the making or taking on behalf of an infant, the surrender of a former lease or the making or taking a new one, as the case may require, and perhaps under other provisions of that and other acts.

It is true that by what seems to be the final order made in this cause upon the coming in of a report of the commissioner directed to collect and distribute the proceeds of the sale, time is given the infant defendants after they should attain their age to show cause against the decree. But this will not vary the case. This order was not made until more than a year after the purchasers had bought the property, and the sale had been confirmed by the court. And if the infants were not entitled under the law to such a reservation, this order cannot have the effect to confer the right to it upon them, nor are the purchasers at the sale to be affected by it.

The decree should perhaps be corrected by declaring it to be without prejudice to the right of the heirs at law of Frances McCoy to require security to be given for the forthcoming of her share of the proceeds of the sale at the death of the said Daniel E. McCoy, if they would otherwise be entitled to demand the same, or to any suit which they may be advised to institute for the recovery of her share in that portion of the

estate assigned to the widow for her dower; and so amended, I think it should be affirmed.

MONCURE and SAMUELS, Js., concurred in the opinion of Lee, J.

ALLEN, J., dissented.

Decree affirmed.

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612 *Michaux's Adm'r v. Brown & als.

January Term, 1854, Richmond.

1. **Judgments—Equity of Redemption—Subject to Lien of—Subsequent Purchaser of—Priority.***—A judgment is a lien upon an equity of redemption in land, and will be preferred to a subsequent purchaser of the equity of redemption not having the legal title. And the lien of the judgment extends to the whole equity of redemption.
2. **Same—Injunction against—Dissolution—Effect upon Lien.**†—Though the judgment was enjoined at the time of the purchase, yet upon the dissolution of the injunction, the lien relates back to the date of the judgment, and so has priority over the equity of the purchaser.
3. **Same—Same—Same—Damages Become Part of Judgment.**—The damages on the dissolution of an injunction to a judgment become, as to the party obtaining it, a part of the judgment; and are embraced in the lien of the judgment upon the equity of redemption.
4. **Bonds—Judgment for Penalty—To What Lien Extends**‡**—Case at Bar.**—A judgment being rendered for the penalty of a bond, to be discharged by the payment of the principal sum due and interest; and the payment of the money having been delayed by an injunction until the principal sum due and the interest exceed the penalty, the lien of the judgment only extends to the penalty, the damages upon the dissolution of the injunction, and the costs at law, without continuing interest.
5. **Equity Practice—Purchase of Land from Judgment Debtors—Bill Asking Relief against Judgment—Case at Bar.**—Purchasers of land from a judgment debtor file a bill, making the judgment creditor and other purchasers of land from the debtor, parties, assailing the judgment, setting out the different purchases, and insisting that if the judgment is valid the plaintiffs are entitled to have it paid ratably by the purchasers; and they ask for this and for general relief. The creditor answers, maintaining the validity of his judgment and claiming to have his debt paid out of the lands held by his debtor at the date of the judgment. The purchasers who are defendants, make no objection to the jurisdiction, but claim exemption from liability to the judgment; and one of them insists that a fund in court arising from the sale of lands conveyed in trust for his benefit shall be paid to him. HELD:
   1. **Same—Same—Same.**—It is a proper case for the jurisdiction of a court of equity, which should settle the rights and liabilities of the parties and decree between them.
   2. **Same—Same—Same—Case at Bar.**—Though the plaintiffs ask for a ratable contribution by the parties, yet as they set out all the facts and ask for general relief, and it appears that the fund in court is primarily liable to satisfy the judgment, that fund will be so applied to the relief of the plaintiffs.

613 *On the 18th of June 1819, Benjamin Mosby, surviving executor of L. H. Mosby deceased, who sued for the use of Joseph Michaux, the intestate of the appellant, recovered a judgment in the County court of Powhatan against Wade Mosby and Littleberry H. Mosby his appearance bail, for eight hundred pounds, to be discharged by the payment of four hundred pounds, with interest at five per cent. from the 21st of October 1796 until paid. A fi. fa. issued on the judgment on the 24th of June 1819, which was levied, and a delivery bond executed. On the 19th of August 1819 proceedings were stayed by an injunction awarded to said Wade Mosby. On the 26th of July 1826 the injunction was dissolved with damages, for a failure to give additional security. On the 28th of September 1826 a fi. fa. issued for the debt, and damages sustained in consequence of the injunction amounting to five hundred and fifty-five pounds nine shillings and ten pence, and was returned no effects: And on the 30th of June 1828 two writs of elegit were issued on the judgment for the same amount as the last execution, and the costs, one of which was directed to the sheriff of Powhatan and was returned enjoined by the Superior court of chancery; the other directed to the sheriff of Henrico, was delivered to the appellant's intestate, and has never been returned. After these executions were issued a bill of injunction was filed by a portion of the appellees, averring, amongst

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***Judgments—Equity of Redemption—Subject to.**—The equity of redemption in land conveyed in trust to secure debts is subject to the lien of judgments subsequently obtained. Hale v. Horne, 21 Gratt. 112, citing the principal case at page 122.

†**Injunctions—Dissolution.**—In Bloss v. Hull, 27 W. Va. 510, it is said: "Some objections are also made by the appellant to the form of the decrees dissolving the injunctions awarded on his original and amended bills. I do not regard it important to notice these objections. They are not sustained by an inspection of the decrees themselves, but moreover, if there had been any irregularities in them, they could not operate to the prejudice of the appellant, if the final decree dismissing the plaintiff's bill was right, as we have seen it was. The said decrees must be construed with reference to the final decree, and so construed, they do not prejudice the appellant. Claytor v. Anthony, 15 Gratt. 518; Bentley v. Harris, 2 *Id.* 357; *Michaux v. Brown, 10 Id. 612.*"

See monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

‡**Bonds—Judgment for Penalty—To What Lien Extends.**—If the judgment does not carry interest on its face, it can only be recovered by action or suit upon the judgment; it is not a part of the judgment and of course cannot be recovered by execution thereon, nor does the lien of this judgment extend to it. Tazewell v. Saunders, 13 Gratt. 368, citing Mercer v. Beale, 4 Leigh 189; *Michaux v. Brown, 10 Gratt. 612;* Mower v. Kip, 6 Paige's R. 88.

See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

other things, that they were respectively purchasers of various tracts of land in Powhatan county after the judgment, some from Wade Mosby the principal debtor, others for Littleberry H. Mosby his appearance bail, which they had purchased pending the injunction. That Wade Mosby had also executed three deeds of trust conveying his landed estate in Henrico county, called Old Curles, to secure the creditors therein named; that a sale had been made
614 *under the last deed of trust, with the consent of all the creditors interested in the other deeds of trust; that William Allen was the purchaser at the sale, and the proceeds, after satisfying a debt having priority, was equally liable to the lien of the judgment with the lands in Powhatan which they held, if the judgment was under the circumstances, a lien on said lands. And after setting out the reasons upon which they relied to show there was no lien on any of the land, for the judgment or any part of the money claimed by the execution, they insisted that if there was a lien for anything, that all the lands should be made to bear an equal share; and that the proceeds of the sale of Curles, which still remained due from William Allen, who had not paid it or received a conveyance, should be subjected to a ratable proportion. The bill made the appellant's intestate the plaintiff in the suit at law, the debtors, the creditors secured by the deeds of trust, the trustees and the purchaser at the sale, defendants.

The appellant's intestate answered, insisting at great length upon the justice of his judgment, a matter now no longer in controversy, asserting the validity of his lien on all the legal and equitable estates of the debtors, claiming priority over the purchasers of the lands in Powhatan, and over the incumbrancers in the deeds of trust to the surplus of the purchase money due from the purchaser of Curles, and contending that so much of such surplus in the hands of Allen the purchaser, as would be necessary to discharge his debt should be so applied; expressing his willingness to receive it, and praying that it should be decreed to him. The defendant Allen answered, setting forth the different deeds of trust on Curles, his purchase, the payment of the debts secured by two of the deeds, and showing the balance in his hands, which he was ready to pay to either of
615 the parties entitled, *or into court; and submitting the question whether the judgment was a lien upon the whole or any part of the fund, to the consideration of the court, he contended that the lien for the ten per cent. damages awarded upon the dissolution of the injunction, dated only from the time the injunction was dissolved.

The conveyances from Wade and Littleberry H. Mosby to the plaintiffs in the bill of injunction, do not appear in the record. The bill avers that Littleberry H. Mosby conveyed a tract of land in Powhatan county to Daniel Brown, one of the plaintiffs, by deed dated the 31st of August 1821, recorded the 28th of January 1822, and another tract to John W. Nash trustee, by deed of trust recorded the 22d May 1826, under which a sale was made, and Thomas Meaux another of the plaintiffs, became the purchaser. That Wade Mosby the principal debtor, by two several deeds of trust recorded the first on the 30th January 1821, and the second recorded the 19th February 1824, conveyed a tract of land called Lethe to P. N. Nicholas and William Nekervis, to secure the Farmers Bank, under which Mary G. Morrison became a purchaser of part of the tract conveyed, who is also a plaintiff; and that Benjamin Palmore another of the plaintiffs, became a purchaser of the residue of the tract called Lethe under a deed of trust from Wade Mosby to William W. Mosby, recorded on the 9th of May 1826. The tract in Henrico appears from the exhibits filed, to have been encumbered by four several deeds of trust executed by Wade Mosby, the 1st dated the 4th of May 1814, to Adams and Miller to secure the purchase money due to his vendor; the 2d on the 13th of April 1821 to D. Call, to secure a debt due to John Buchanan; the 3d on the 16th of September 1824, to Joseph W. Tate, to secure a debt due to Bouldin, and to indemnify William Trueheart and others his securities for
616 the payment thereof; the 4th *on the 5th of May 1826, to William W. Mosby and others trustees, to secure and indemnify a number of creditors and securities.

By an agreement between the said Wade Mosby and the trustees and beneficial parties, William W. Mosby one of the trustees in the last deed, was empowered to sell and to apply the proceeds arising from the sale to the various deeds of trust in the order of their dates successively. The land was sold, Allen became the purchaser, and on the 28th of July 1828, a conveyance was made to him by Wade Mosby, the said William W. Mosby and several of the trustees and beneficiaries secured by the deeds of trust. On the 6th of September 1828 the trustees in the deed to secure Buchanan's debt and his personal representatives, in consideration of the payment of that debt, united in a release of that deed.

It would thus appear from the averments of the bill and the exhibits filed with the answers, that all the conveyances made by Wade Mosby the principal debtor, and Littleberry H. Mosby his appearance bail, whether made absolutely or in trust, (with one exception, the deed of trust on Curles, dated the 4th of May 1814, to secure the purchase money), were subsequent to the judgment of the 18th of June 1819; and all except the conveyance to Allen were prior to the dissolution of the injunction on the 20th of July 1826.

In this state of the case the cause came on for hearing on the 23d of June 1832, when an interlocutory decree was pronounced by the consent of the plaintiffs in the court below and the appellant's intestate, directing the representative of Allen the purchaser, who had died after filing his answer, to pay into court the sum of

four thousand two hundred and eighteen dollars and seventeen and a quarter cents, the balance due on his purchase, with interest, which payment was to be taken in full satisfaction of all claims and 617 *demands which the plaintiffs in the chancery court and the appellant's intestate had or could ever have against Allen's estate, for or on account of any matter alleged in this cause by these parties respectively. And on motion of the appellant's intestate, it was further ordered that upon the payment of said money into bank, the sum of eight hundred pounds should be paid over to him, which sum at least it was declared the appellant's intestate was entitled to receive out of the money due from the estate of Allen. The residue of the money was held by the court subject to its future order. The eight hundred pounds so directed to be paid to the appellant's intestate was the principal of the bond upon which the original judgment at law was rendered, and satisfied said judgment except as to the costs at law and the damages included in the execution on the dissolution of the injunction. The residue of the money being deposited was loaned out.

On the 21st of July 1840, by consent of the plaintiffs in the suit and the representatives of William Trueheart deceased, they were admitted parties defendant; they having previously filed a petition to be made such defendants. An amended bill was filed making them defendants formally; and on the 15th of June 1842 they filed their answer, setting forth that their testator was security in the bond for four thousand dollars, executed to Bouldin by Wade Mosby, secured by the deed of trust of the 16th of September 1824, to Joseph W. Tate, on the Curles property. That their testator had paid the debt, of which payment they filed the evidence. They insist that they were not bound by the interlocutory decree of the 23d of June 1832, as neither they or their testator were parties. They deny that the judgment was any lien on the equitable interest of Wade Mosby covered by the deed for the indemnity of their testator, which could be asserted against them; that the debtors had other lands then 618 *held by the plaintiffs which should be first applied to the judgment. That if liable at all, it was only for a ratable portion with the lands held by the plaintiffs; and that there was no lien for the damages which accrued on the dissolution of the injunction.

On the 30th of March 1846 the cause was again heard, and an interlocutory decree was pronounced, by which the court, being of opinion that the fund under its control arising from the sale of Curles ought not to be subjected to the claim asserted in this suit by the appellant, but should be applied in conformity with the provisions of the deed of trust of the 16th of September 1824, to reimburse the estate of said Trueheart for the amount paid in discharge of the bond to Bouldin as surety for Wade Mosby, gave a decree that the money should be called in and paid over to Trueheart's executors in part satisfaction of the amount due to their testator; and without expressing any opinion as to the liability of the appellant to refund the eight hundred pounds received by his intestate under the decree of the 23d of June 1832, on the motion of Trueheart's representatives, gave them leave to file a cross bill in the cause. From this decree the appellant has obtained the present appeal.

Brooke, Irving and Steger, for the appellant.

Stanard and Lyons, for the appellees.

ALLEN, J., after stating the case, proceeded:

The first question presented by these proceedings is whether the lien of the judgment, supposing nothing has occurred to affect its validity, would entitle the judgment creditor to charge the fund under the control of the court. The appellees the representatives of Trueheart, do not occupy the position of bona fide purchasers of the equitable estate of the debtor who have afterwards acquired the legal title. Their 619 testator *and the creditors, whose debt Trueheart paid, were mere incumbrancers of the equity of redemption held by Wade Mosby when he executed the deed of trust of the 16th of September 1824. Allen the purchaser has acquired the legal title, and having discharged the previous incumbrances, the unpaid purchase money in his hands, represents and stands in the place of the equity of redemption remaining in Wade Mosby, and charged by his incumbrance of the 16th September 1824. The judgment was prior to that incumbrance, and as was held in Coutts v. Walker, 2 Leigh 268; Haleys v. Williams, 1 Leigh 140; and Buchanan v. Clarke, supra 164, although this equity of redemption could not be taken in execution at law, it was upon the general principles of a court of equity, bound in equity, as it would have been bound at law, if it had been a legal estate. And amongst incumbrancers, having nothing but equities, and none the legal title, their equities being equal, they are entitled to satisfaction according to the priorities of their incumbrances in point of time: and in equity the judgment is a lien on the whole of the debtor's equitable estate, and the whole fund and not a moiety, must be applied to the satisfaction of the prior judgment before the subsequent incumbrance can be let in.

The judgment being a lien and charging the whole of the equitable estate, has any thing occurred to displace it? It constituted a lien at the time of its rendition. The creditor then had the capacity to take out an elegit, and that right was never lost or even suspended through any act or omission of his own. Even if as was argued, there had been any necessity for a scire facias to revive the judgment the lien would have continued so long as the capacity to revive existed, and would have related to the date of the judgment. Taylor v. Spindle, 2

Gratt. 44. But there was no necessity
620 to revive. The judgment was *rendered on the 18th of June 1819, and on the 24th of June 1819 there was an execution and return. The injunction was dissolved on the 20th of July 1826, and on the 28th of September 1826 another execution issued. Upon such dissolution the party was remitted to the lien of his original judgment. Whilst the creditor could get, or as in this case had, the capacity to issue an elegit, the lien of the judgment having once attached, continued to operate, notwithstanding any supervening suspension interposed by the injunction. Taylor v. Spindle, ubi supra.

It is furthermore insisted, that although the lien of the judgment did once attach and has not been lost, that lien did not extend to the damages on the dissolution of the injunction; that they formed no part of the judgment, and were only a consequence of the dissolution of the injunction; and that prior to that time all these conveyances and incumbrances were executed and recorded. It seems to me there can be no distinction in principle between damages upon affirmance in case of appeals and damages to be paid on the dissolution of an injunction. In respect to the first, the question has been settled by the case of McClung v. Beine, 10 Leigh 394. The provision in regard to damages on the dissolution of an injunction is contained in 1 Rev. Code of 1819, p. 209, § 61, following almost in juxtaposition the 59th section of the same act concerning damages awarded on the affirmance of a decree. That section provides that upon an affirmance of a decree the court shall award damages, &c. The act in regard to writs of error and supersedeas to judgments at law, 1 Rev. Code, p. 240, § 61, provides that on an affirmance the damages shall be ten per centum, &c.; and the act in relation to injunctions provides that where the injunction shall be dissolved damages at the rate of ten per centum shall
be paid to the party. It will be seen
621 that in *the case of appeals from decrees, the law provides the court shall award damages, &c.; on writs of error to judgments the damages shall be at the rate of ten per centum, &c.; and on the dissolution of an injunction damages at the rate of ten per centum shall be paid to the party, &c. In practice damages are always awarded in the decree or judgment of affirmance; in case of injunctions dissolved no entry is made awarding them; they are the legal consequence of the dissolution of the injunction unless the order dissolving directs otherwise. But the slight verbal variations in the sections referred to do not change or affect the principle; they were all in pari materia, and it is manifest the legislature intended to place the damages whether awarded on an affirmance of an appeal or to be paid on the dissolution of an injunction, on the same ground. The judgment of affirmance is to be certified to the court below; the order of dissolution to the clerk of the court wherein the judgment enjoined was rendered. In each case the clerk calculates the damages and the execution issues including them.

The argument that a purchaser who had purchased with notice of a judgment and subject to it, would have no means of protecting himself against the act of his vendor who could enjoin the judgment against his consent, applies equally to the case of an appeal. The vendor could appeal without the consent of his vendee, and the damages on affirmance become part of the judgment, which in the language of Tucker, president, in McClung v. Beirne, opens to receive them.

Nor, as was contended, does the fact that upon obtaining the injunction the party must give bond affect the question. The party appealing if the judgment or decree is superseded, must do the same. The bond
gives additional security for the judg-
622 ment, but does *not vary its effect. When it opens to receive the damages they become, as it respects the party obtaining the injunction, a component part thereof; and the execution of elegit must have directed a levy for all by extent of the lands whereof such party was seized at the date of the judgment or had subsequently acquired. I think therefore the damages constituted a lien on the equity of redemption in this case as much as the original judgment.

The lien of the judgment however can only embrace the penalty of the bond, the costs at law, and the damages. The judgment was for eight hundred pounds the penalty of the bond, and the costs, to be discharged by the payment of four hundred pounds, with interest at the rate of five per cent. from the 21st of October 1796, until paid and the costs. The debt and interest exceeded the penalty; and though a jury might have given interest by way of damages up to the time of finding the verdict, that has not been done, and the debt must be measured by the penalty. That has been paid under the interlocutory decree of June 23d, 1832. The lien of the judgment exists for five hundred and fifty-five pounds nine shillings and ten pence; the damages to be paid on the dissolution of the injunction, and the costs of the judgment at law, but not for any continuing interest.

It is argued however that whatever might have been the legal rights of the parties upon a proper case, yet in the condition of the cause as it stood when the interlocutory decree appealed from was pronounced, no other decree could have been rendered. That the incumbrancers on Curles were brought into court by strangers; that the creditor who alone could assert his right to charge this equity had not done so by the mode in which alone he could do it; and that the relief already given to the appellant's intestate is more than he was entitled to
claim under the pleadings.
623 *The bill in this case was filed by several purchasers from Wade Mosby the principal debtor and Littleberry H. Mosby his appearance bail. It assailed the original judgment upon grounds not now

necessary to examine. It, moreover, set forth the various incumbrances created by said Mosby on his estate called Curles in Henrico, his conveyances of his lands in Powhatan, and the conveyances of Littleberry H. Mosby, and the facts in regard to the Curles land. It controverted the lien of the judgment; but insisted, that if it were a lien, there should be a ratable contribution by all the purchasers and incumbrancers after the judgment. This portion of the bill is nothing more than a bill convening all who are responsible to a common creditor, to ascertain whether any, and if so which, is primarily liable; or whether the burden should be apportioned amongst all. The creditor is not the party complaining here of being arrested by this proceeding, although he had the right to charge the whole of the estates of his debtors. That he looked to all for satisfaction appears from the fact of his suing out elegits directed to the sheriff of both Powhatan and Henrico counties. But although all were liable to the creditor at least for part of the judgment, as between themselves they occupied different relations. If the principal debtor Wade Mosby alone retarded the execution by the injunction, the appearance bail Littleberry H. Mosby, and the purchasers from him, might, under the authority of Garnett v. Jones, 4 Leigh 633, have contended that his estate was not liable for the damages. If the principal's estate was sufficient to pay the judgment, they had a right to insist on its being so applied in exoneration of the bail and his vendees; especially as a portion of it had been sold and the fund not then appropriated. All the subsequent purchasers from Wade Mosby were made parties, but none have ob-
624 jected to *the jurisdiction: And the appellees, the representatives of Trueheart, who were made parties after the fund was brought into court, do not controvert the right of the court to dispose of it; but set forth the grounds on which they claim it. I think the case was one proper for the jurisdiction of a court of equity; and that as each party was asserting distinct grounds for a total or partial exemption from responsibility, all questions as to the validity and extent of the lien, and what fund was primarily liable, were submitted for decision. The creditor in regard to these matters occupied the position of a party who has filed a bill of interpleader. All and each being liable to him, it was upon the case made by the bill and pleadings, competent to decree between him and any codefendant what fund should be primarily applied to his satisfaction. The plaintiffs supposing that the decision of Beverley v. Brooke, 2 Leigh 425, gave the rule of law, prayed for a ratable contribution; but the bill set forth all the facts and contained a prayer for general relief; and they should not be concluded by an erroneous impression of the law, when the facts showed they were entitled to a different relief. Still less should their mistake as to law conclude the creditor. In his answer he contends that the whole of the equity of redemption remaining in Wade Mosby was subject to his claim, and asked that it might be decreed to him. I think there is nothing in this objection, and that the case, as it stood when the interlocutory decree was pronounced, was in a condition to dispose of the fund in controversy according to the rights of the parties.

It has been further argued, that Mary G. Morrison, one of the plaintiffs suing by her next friend William W. Mosby, is precluded from shielding her own property by subjecting the equity of redemption in Curles to the lien of the judgment, to the
625 prejudice *of the incumbrancer under the deed of trust, because she united with her husband in the deed to Allen of the 28th July 1828. In that deed it was recited that the various parties secured by the said deeds of trust had agreed, that William W. Mosby, one of the trustees named in the last deed of trust on the Curles property, should make sale thereof and apply the proceeds of sale to the purposes of the said several deeds of trust in the order of their dates respectively. Without stopping to enquire into the effect of such a recital in reference to a claim not alluded to or probably in contemplation of the parties when executing that conveyance, or its bearing upon the rights of a feme covert uniting with her husband in the deed; it is sufficient to say it can have no influence on the rights of the appellant. His lien on the equitable estate represented by the fund in court is paramount to that of the creditor secured by the deed under which the representatives of Trueheart claimed, and could not be impaired by any agreement of the various incumbrancers by deeds of trust to distribute the proceeds arising from the sale of the property.

Upon the whole, it seems to me that the interlocutory decree of the 30th March 1846 was erroneous in holding that the representatives of William Trueheart were entitled to the fund in court in preference to the appellant; and without considering any other question in the case, the decree should be reversed with costs; that the cause should be remanded with instructions to enter a decree declaring that the appellant is entitled to subject the fund under the control of the court arising from the sale of the land called Curles in the proceedings mentioned, to the satisfaction of the claim asserted by him, amounting to the sum of five hundred and fifty-five pounds nine shillings and ten pence and the costs of the suit at law, and his costs in the Chancery court ex-
626 pended; and that the *appellees the representatives of said William Trueheart deceased, are entitled to the residue of said fund; and to call in and distribute the fund according to the principles aforesaid; and for further proceedings according to the rights of the parties, in order to a final decree.

The other judges concurred in the opinion of Allen, J.

Decree reversed.

627 *Archer v. The Commonwealth.

January Term, 1854, Richmond.

1. **Criminal Proceedings—Recognizance*—Scire Facias—Plea of Acquittal of Prisoner—Effect—Case at Bar.**—In the case of a *scire facias* against bail upon a recognizance in a case of felony, a plea which alleges that at the time the recognizance was entered into the principal was by law acquitted and discharged of the said several supposed offences of which he stood charged, presents no defence for the bail: And this whether the plea is to be considered as averring an acquittal of the principal upon a trial had, or his discharge by operation of law for the failure to try him within three terms of the court.

2. **Same—Same—Plea of Duress—Effect.**—In such case a plea that at the time of entering into the recognizance the principal was unlawfully imprisoned by the commonwealth, and detained in prison until by force and duress of imprisonment he and his security entered into the recognizance, presents no defence for the bail.

3. **Same—Same—Conditional—Allegation of Authority of Officer.***—Where a recognizance has a condition to do some act for the doing of which such an obligation may be properly taken; and the court or officer taking it had authority of law to act in cases of that general description, the recognizance is valid though it does not recite the special circumstances under which it was taken: And in declaring upon such a recognizance it is not necessary to aver the existence of the particular facts which show that the court or officer had authority to take it.

4. **Same—Same—Appearance and Pleading—Case at Bar.**—The condition of the recognizance being that the principal shall make his personal appearance on the first day of the next term of the court, and not depart thence without the leave of the court, a plea that the principal did appear on the first day of the term of the court to which he was recognized; but that the judge who presided on the said first day of the court would not sit in his case or make any order therein, does not present a defence for the bail.

5. **Same—Same—Plea of Nolle Prosequi.**—A plea that a previous prosecution against the principal for the same offences to which by the recognizance he had undertaken to appear, had been terminated by a *nolle prosequi*, presents no defence to the action.

6 **Same—Same—Scire Facias—When Both Returnable.**—Where by law separate terms of a Circuit court are appointed for the trial of civil and criminal causes, the recognizance is properly made returnable to a term for the trial of criminal causes, and the *scire facias* is properly made returnable to the term for the trial of civil causes, or to the rules; the first being a criminal and the other a civil proceeding.

*Recognizance—Sufficiency of.—In Allen v. Com., 90 Va. 358, 18 S. E. Rep. 437, it is said: "Here the language of the order of the court, for in practice the recognizance is not usually written out in full when it is merely a renewal recognizance taken during the term of the court, while certainly general, is sufficiently definite, as it points to the only offence with which the prisoner stood charged. *Archer v. Com., 10 Gratt. 627;* Bolanz *et al.* v. Com., 24 Gratt. 31."

628 *In August 1850 a scire facias was issued from the clerk's office of the Circuit court of law for the county of Henrico, against Junius L. Archer as the bail of William B. Archer. It recited that these parties on the 11th day of December 1849, by a recognizance entered into in the General court of Virginia, acknowledged themselves to be indebted to the commonwealth each in the sum of five thousand dollars; with a condition that if the said William B. Archer should make his personal appearance before the judge of the Circuit superior court of law and chancery for the county of Henrico and city of Richmond on the common law side, on the first day of the then next term of that court to be held for the trial of criminal causes, to answer the commonwealth of the felonies whereof he stood indicted by four several indictments pending in the said court, and should not depart thence without leave of the said court, then the said recognizance was to be void; as appeared by a copy of the recognizance remaining filed in the clerk's office of the Circuit court of law for the county of Henrico, which court under the act passed on the 11th of March 1850, concerning the twenty-first judicial circuit, succeeded to the jurisdiction of the said Circuit superior court. And it was averred that William B. Archer did not make his personal appearance before the judge of the said Circuit court of law at the first term of that court held for the trial of criminal causes; but on the contrary thereof, was in the said court, on the 26th of April 1850, solemnly called and came not, and his default was recorded in said court. Therefore, &c.

Junius L. Archer appeared, and filed three pleas. The first was "nul tiel record," to which the attorney for the commonwealth replied that there was such a record of the said recognizance in the said scire facias mentioned, in manner as stated and alleged in said scire facias: And to this replication the defendant demurred.

629 *The second plea alleged, that at the time the said recognizance of bail was entered into by the defendant, the said William B. Archer was by law acquitted and discharged of the several supposed offences with which he stood charged.

The third plea alleged, that at the time of entering into the said recognizance, to wit, on the —— day of ——— aforesaid, the said William B. Archer was unlawfully imprisoned by the said commonwealth, and then and there detained in prison, until by force and duress of imprisonment of him, the said William B. Archer, he, and the defendant as his security, entered into the said recognizance.

To these pleas the attorney for the commonwealth demurred; and the cause coming on upon the issues made upon the three pleas, the court overruled the defendant's demurrer to the replication to the first plea, and sustained the demurrers to the second and third pleas.

The defendant then tendered two other pleas. The first which was the fourth plea, alleged, that the said William B. Archer did make his personal appearance before the judge of the Circuit superior court of law and chancery for the county of Henrico and city of Richmond, on the common law side, on the first day of the then next term of that court to be held for the trial of criminal causes, as by the recognizance he was required to do; but that the judge who presided on the said first day of said court, who was the judge of said court, would not sit in his case, or make any order therein whatever, because he, the said judge, had been the prosecuting attorney in the said court, and had prosecuted the said William B. Archer for the said supposed felonies aforesaid.

The second, which was the defendant's fifth plea, alleged that the said William B. Archer was ready to appear, and would have made his personal appearance 630 *on the said first day of the then next term, &c., but that there was no court before which said appearance could be made on the said first day, because the judge of said court who presided on the said first day, who was the regular judge of said court, would not sit in any of the said cases pending against the said William B. Archer, or make any order therein, he having been before that time the prosecuting attorney in said court, and having prosecuted the said William B. Archer for the said several supposed felonies; and so, there was no court to which the said William B. Archer could appear agreeably to the terms of the said supposed recognizance, on the said first day of the then next term aforesaid.

The attorney for the commonwealth objected to the filing of these pleas; and the court sustained the objection, and rejected them; and the defendant excepted.

The defendant then moved the court to quash the scire facias; but the court overruled the motion; and the defendant again excepted.

The defendant then tendered a sixth plea. In this plea it is alleged, that William B. Archer had been duly examined before an examining court according to law for the felonious offences mentioned in the recognizance and scire facias, and remanded to the circuit court of Henrico for trial; that he had been indicted in the Circuit court for the same felonious offences; and that afterwards by the judgments and orders of the said Circuit court the said prosecutions against the said William B. Archer for the felonies and forgeries aforesaid, were ended and determined, and he the said William B. Archer therefrom forever discharged. And, that when the said recognizance was entered into by the said William B. Archer and the defendant as his bail, the said William B. Archer was by law acquitted and discharged of the felo- 631 nies in the said indictments *in the said recognizance mentioned, and the said recognizance was and is void. In this plea the records of the proceedings in the Examining and Circuit courts are set out at length; and it appears that there was a motion by the prisoner in the Circuit court to quash the indictment and the several counts thereof, on various grounds, one of which was that as to the offence charged in some of the counts, the prisoner had not been duly examined before an examining court. This motion the court overruled except as to the second count, which was quashed; and the prisoner excepted. The attorney for the commonwealth then entered a nolle prosequi in the cases; and the court made an order directing the sheriff to take the prisoner before the mayor or some other magistrate of the city of Richmond in order that he might be examined touching the said felonies, and dealt with according to law. This plea was objected to by the attorney for the commonwealth, and was excluded by the court; and the defendant again excepted.

There was a judgment for the commonwealth for the sum of five thousand dollars, and costs: and thereupon the defendant applied to this court for a supersedeas, which was allowed.

Lyons, for the appellant.

The Attorney General and Young, for the commonwealth.

DANIEL, J. The first question presented by the petition, is one arising out of the action of the Circuit court on the demurrer to the second plea. The allegation of the plea is that at the time the recognizance was entered into, the principal, William B. Archer, "was by law acquitted and discharged of the said several supposed offences with which he stood charged." The court has, I think, very properly decided 632 *that this plea presented no legal bar to the scire facias. To allow the plea of a former acquittal of the principal, as a bar to the action on the recognizance, would be to assign to that plea an office for which it was never designed. The plea of autre fois acquit is one of the defences which the law allows to a person charged with crime, on his appearing to answer to the charge. The object of the recognizance is to procure the personal appearance of the accused at court, to answer to the charge. Supposing it to be true that the principal had been formerly acquitted of the offences with which he stood charged, the existence of such fact showed he had a defence to the present prosecution, of which he might have availed himself on appearing to it. And if he had appeared and pleaded and proved it, he would have been discharged of all further prosecution: As would also the bail of any action on the recognizance. But in such case the exoneration and discharge of the bail would have been, in legal contemplation, the result, neither of the first nor of the last acquittal of the principal, but of the appearance of the latter to answer to the charge. For the situation of the bail is not affected either by the acquittal or the conviction of the principal; the condition of the recognizance being, not

that the principal shall make good his defence to the prosecution, but that he shall appear and answer to it. The bail having thus no legal concern in the acquittal or condemnation of his principal, it is difficult to perceive how any answer is made to the complaint in the scire facias, by showing that the principal was armed with a defence which, if he had appeared and presented it, would have protected him against further prosecution for the offences with which he was charged. It is true that the supreme law protects the citizen against being twice placed in jeopardy for the same offence. But he who, charged with
633 crime, seeks the benefit of the *exemption, must do it in the mode which the law has pointed out, to wit, by appearing and pleading the fact that he had been before tried and acquitted or convicted of the same offence. The principal, by complying with the condition of the recognizance, would not have exposed himself to any of the hazards against which the provision invoked was designed to shield him. He would thereby have only placed himself in a position to avail himself of it. The consequences of a failure on the part of the principal to appear cannot be avoided by a defence allowed only as a privilege on his appearing and pleading it to the prosecution.

The plea, from its very nature, necessarily confesses the allegation in the scire facias, that the recognizance was entered into before the General court; a court having by law a broad jurisdiction over the subject of bail; and that the recognizance was conditioned for the appearance of the principal before the Circuit superior court of law and chancery for the county of Henrico and city of Richmond; a court vested by law with full power to try felonies, to answer to certain felonies whereof he stood indicted by several indictments pending in said court. And yet it seeks to defeat the scire facias, not by alleging anything which has occurred since the recognizance was entered into, but by alleging a matter existing before. I do not think that the recognizance can be thus avoided.

But it is argued that the allegation of the plea is broad enough to embrace not merely the case of an acquittal of the same offence by the judgment of the court in a former prosecution, but also a discharge by operation of law in the same prosecution wherein the recognizance was taken; that three regular terms of the court in which the indictments were pending, may have passed since the examination of the principal, without a trial; and under such circumstances as, by the terms of the statute, entitled him to be discharged
634 *from the prosecution; and that the recognizance may have been entered into thereafter: And Green's Case, 1 Rob. R. 734, is relied on as authority to show that a recognizance entered into under such circumstances would be void.

To sustain the validity of the recognizance here does not make it necessary to call in question the propriety of the action of the court in Green's Case. In that case the recognizance was not entered into after the discharge; but was taken during the third term of the Circuit court, after Green's examination. After the adjournment of the court without a trial, Green being taken into custody by his bail, applied to the General court for a habeas corpus. It was allowed, and a judgment was rendered by a majority of the court discharging him from custody. In their opinion they said that the right of Green to his discharge upon the adjournment of the Circuit court at its last term, became complete and was consummated; that that court, however, upon its adjournment, ceased to have a capacity to pronounce by its order, the discharge to which the prisoner was entitled by law; and that as the right of the prisoner to his discharge from the crimes imputed to him was given him by law, under the circumstances provided for, as a paramount right controlling and terminating all the proceedings by which he had been held in custody before the end of the term of the Circuit court, he was entitled to be discharged from the custody of his bail, which ought no longer to be allowed, after the law had forever discharged him of the crimes with which he was charged in the Circuit court.

The fact on which Green relied as entitling him to his discharge transpired after he had given his recognizance; and upon the legal effect of that fact on the rights of Green, the Circuit court, after its happening, passed no judgment, and had
635 no opportunity of passing *judgment; that fact, being the adjournment of the court at its third term without a trial of the prisoner. I do not understand the opinion of the majority of the court in that case, as going to the extent of declaring that if the Circuit court at some subsequent term, had decided that its adjournment at the third term, without a trial, did not under the circumstances, amount to a discharge of the prisoner, and had thereafter committed the prisoner to custody, that the officer to whose custody he might have been committed might not have been justified under such commitment: Nor do I understand the opinion as necessarily announcing the proposition that if Green at the third term of the court, had failed to give bail, and in default thereof had been committed to the custody of the jailor by order of the court, and his cause continued to the next term; that the jailor would not have been justified in detaining him in custody until discharged by some subsequent order of a court of competent authority.

Whatever difference of opinion there may be as to the extent of the powers of the court to relieve from custody by means of the habeas corpus, I take it to be well settled, that when an order for the arrest or detention of a party, has issued in the ordinary course of justice from a court having undisputed jurisdiction of the subject mat-

ter, the officer arresting or detaining in custody under such order, will be justified in making the arrest and in holding the prisoner in custody till he is discharged, notwithstanding the court may have committed error in issuing such order. 2 Wms. Saund. 101 y; 1 Watts 67.

With this principle I do not understand the opinion of the court in Green's Case to conflict. Placing William B. Archer, therefore, in the position, supposed by his counsel, at the time he entered into the recognizance, his detention in custody would
636 have been lawful, *till terminated by some order of a court having jurisdiction over the matter; and I cannot see how a recognizance (by which that custody was substituted by the friendly custody of the bail), entered into before a court having full authority to let to bail, could be regarded as void. And I think the demurrer to the plea was properly sustained.

In the case of Stepney v. Lloyd, Croke Eliz. 647, it was decided that if a man be arrested by process from a court which had no authority to grant it, and gives bond for his appearance, he may avoid it by plea of duress. And in Thompson v. Lockwood, 15 John. R. 259, it was held that, though it was true as a general proposition that one obligee in a bond could not invalidate the bond as to himself, by pleading the duress of a co-obligee, yet that the rule did not apply to a statutory bond of a principal and surety, taken by a sheriff when he had no right to hold the principal in custody; and that the surety, in a separate action against him, might avail himself of the defence of duress. I am therefore not prepared to say that in an action or scire facias against bail, on a recognizance to the commonwealth, entered into in a criminal prosecution, he might not plead the fact that the recognizance was given to procure the enlargement of the principal from an unlawful custody.

It is insisted by the counsel of the plaintiff in error that the third plea properly tenders such an issue. I do not think that it does. The scire facias in substance alleges the pendency of indictments for felony against William B. Archer, in the Circuit court of Henrico and city of Richmond, and the entering into of the recognizance before the General court for his appearance to answer to them; and as was said by the court in the case of Tyler v. Greenlaw, 5 Rand. 711, the very act of letting to bail, supposes a previous commitment to
637 prison. And the averment of *the plea is simply that the said Wm. B. Archer was unlawfully imprisoned by the commonwealth, and detained in prison, until by the force and duress of imprisonment of him the said Wm. B. Archer he and his security entered into the said recognizance. The plea, therefore, whilst it confesses all the facts alleged in the scire facias, avers no new facts, tenders no independent matter, in avoidance. That Wm. B. Archer was in custody when he entered into the recognizance is virtually alleged in the scire facias, and the averment in defence, is that he was imprisoned unlawfully. The plea, therefore, tenders no issue of fact, but presents a question of law, whether the imprisonment alleged in the scire facias and confessed in the plea, was unlawful, and the recognizance consequently void for duress. The plea, therefore, is but a plea in name, as it seeks to effect what could be done only by a demurrer. But if we treat it as a plea of duress, and regard the demurrer as admitting any state of facts with respect to the imprisonment of William B. Archer, not inconsistent with those alleged and confessed, the plea would still, I think, be radically defective. For as there were indictments depending against him in a court having jurisdiction to try them and to detain him in custody to answer to them, and the recognizance was entered into before a court having authority to let to bail, it is difficult to conceive of any state of facts in regard to his custody, when he entered into the recognizance, of which duress of imprisonment could be predicated.

Such a state of facts, it is argued by counsel, might be found in the adjournment of the Circuit court at its third term without a trial, and a consequent discharge of the prisoner by operation of law, before the recognizance was entered into. The effect of such a state of facts has already been considered in disposing of the second
638 plea. The jurisdiction and *authority of the court by whose order he was detained in custody being shown, the officer detaining him in custody would be protected by the order. And a recognizance entered into (before a court of competent authority) for his ease and to procure his enlargement from custody, could not be regarded as obtained by duress. There was no error, I think, in sustaining the demurrer.

The demurrer by the attorney for the commonwealth to these pleas necessarily raised the question as to the sufficiency of the scire facias; and I have had some doubt whether it was not defective in failing to set forth the facts by which the General court acquired jurisdiction to take the recognizance. But I believe it is now well settled that where the recognizance has a condition to do some act, for the doing of which such an obligation may be properly taken, and the court or officer before whom it was acknowledged, had authority by law to act in cases of that general description, the recognizance is valid, though it does not recite the special circumstances under which it was taken; and that in declaring upon such a recognizance it is not necessary to aver the existence of the particular facts which prove that the court or officer had authority to take it. People v. Kane, 4 Denio's R. 530; People v. Millis, 5 Barb. R. 511.

The fourth and fifth pleas aver, one of them, the appearance of Archer, and the other his readiness to appear, on the first day of the term of the court to which he was recognized, and the refusal of the judge

who presided on that day to sit in the cause, or to make any order in it, he having been formerly the prosecuting attorney in said court, and having acted as such in prosecuting Archer. Neither of these pleas furnish any answer to the undertaking in the recognizance, and the default al-
639 leged in the scire facias. The *condition of the recognizance was not merely that the prisoner should make his personal appearance on the first day of the next term of the court, but also that he would not depart thence without the leave of the court. He was bound to appear not only on the first day, but during the term, till he had the leave of the court to depart. And the breach assigned in the scire facias is, that he did not appear at the first term of the court, but on the contrary was, on a certain day of the term, solemnly called, and came not; and that his default was recorded in the court. Each of these pleas was, I think, properly rejected.

The sixth plea is substantially nothing more than a plea that a previous prosecution against William B. Archer, for the same offences to which by the recognizance he had undertaken to appear, had terminated by a nolle prosequi: And that the recognizance having been entered into after such discharge, was void. Such a plea would present no bar to the indictment in the present proceedings, and avers nothing which could be received in avoidance or discharge of a recognizance to appear and answer to the indictments. 1 Chitty's Criminal Law 327; 2 Va. Cases 345.

After the court had pronounced its opinion sustaining the demurrer to the second and third pleas, the plaintiff in error made a motion to quash the scire facias, which was overruled; and he excepted. The ground of error assigned in the petition is, that the court ought to have quashed the scire facias because the civil court had no jurisdiction of the case: And that the scire facias should have been made returnable to the court before which the party was held to appear, and none other. I do not perceive any force in this objection to the scire facias. It will be seen by a reference to the act concerning the twenty-first judicial circuit, passed March 11th, 1850, that it does not provide for a criminal court
640 as distinct and separate *from the court for the trial of civil causes. But after providing for a Circuit court of law and a Circuit court of chancery, the fifth section of the act declares that after the first day of April 1850, there shall in every year be of the said Circuit court of law two regular terms for the trial of criminal causes, and also two regular terms for the trial of civil causes. The terms for the trial of criminal causes are just as much
Circuit court of law as are the
e trial of civil causes: They
of the same court. The pris-
perly recognized to appear at
trial of criminal causes, and
as was just as properly made
the rules of the said Circuit court, the scire facias being a civil and not a criminal proceeding. Wood v. Commonwealth, 4 Rand. 329. The criminal cause and the civil cause were both proceeded in, in the same court, and were conducted with a reference to the separate and appropriate terms at which, under the provisions of the act, they were to be respectively tried and disposed of.

I have not been able to discover any error in the judgment of the Circuit court, and am for affirming it.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

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641 *Levy v. Arnsthall.

January Term, 1854, Richmond.

1. **Statute Authorizing Security from Defendant*—Effect.**—The act of March 31st, 1851, Sess. Acts 1850-51, p. 36, which authorizes a plaintiff in an action to require security in certain cases from the defendant, constitutes the relation of principal and bail between the defendant and his surety; and it is the right of the surety to surrender his principal.†

2. **Interrogatories—To Defendant in Custody—Statute—To What Applies.**—By the act of April 16th, 1852, Sess. Acts, ch. 92, § 4, p. 77, which authorizes the plaintiff to file interrogatories to a defendant in custody, and authorizes the court upon notice to the plaintiff or his attorney, to discharge a defendant from custody, applies to a defendant in custody of his bail, as well as a defendant in jail.†

On the 22d of December 1853 C. D. Arnsthall presented his petition to the judge of the Circuit court of the city of Richmond, stating that he had been sued in said court by Miguel Angulo, and compelled to give bail; that a judgment had been rendered against him in the suit, and that he had been taken into custody and was then detained by Jacob A. Levy, his bail; and praying that a writ of habeas corpus might be awarded to bring him before the said judge, in order that the said Angulo might be compelled to file his interrogatories, and the petitioner discharged from custody. The writ was accordingly awarded and issued, and was executed on Levy, who

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***Statute—Security—Bail—Relation of Principal and Bail—Interrogatories.**—In the principal case it is held that, under act March 31, 1851 (Code 1860, sec. 33), authorizing the plaintiff in an action to require security in certain cases from the defendant, constitutes the relation of principal and bail between the defendant and his surety, and by act April 16, 1852 (Code 1860, sec. 35 *et seq.*), which authorizes the plaintiff to file interrogatories to a defendant in custody, and authorizes the court upon notice to the plaintiff, or his attorney, to discharge the defendant from custody, applies to a defendant in custody of his bail, as well as a defendant in jail. This ruling is approved in Trimble v. Shaffer, 3 W. Va. 621; State v. Peck, 32 W. Va. 611, 9 S. E. Rep. 921.

†See the opinion of JUDGE MONCURE for the provisions of these statutes.

returned that being the bail of said Arnsthall at the suit of Angulo for Hernandes in the said court, as would be seen by a copy of the bail bond annexed to the return, he had taken him, as he had a right to do, into custody, and then had his body before the court in obedience to the writ.

It appeared from evidence before 642 the judge, and *made a part of the proceedings, that the petitioner had entered into a bail bond as required by the statute, with the said Jacob A. Levy as surety; that there was then pending upon the common law docket of the court a motion by the petitioner to be discharged from the custody of the said bail, unless the plaintiff in the action at law should in a reasonable time file his interrogatories in pursuance of the statute; and also that the counsel for the plaintiff in the said action had had notice of the application set out in the petition. On consideration whereof, the judge, being of opinion that the surety in the bond aforesaid had no right to arrest and detain the petitioner, ordered that he should be released and discharged from the said arrest and detention by the said Levy. And the judge, being further of opinion that the motion of the petitioner to be discharged from custody unless the plaintiff in the action at law should file his interrogatories, was not proper unless the petitioner was in the actual custody of the officer making the arrest, or committed by virtue of such arrest, overruled the said motion. The proceedings were signed by the judge, and certified to the clerk of the said court, and entered among the records thereof. From the judgment so entered of record, an appeal was taken to this court by the said Levy.

Lyons, for the appellant.
Stanard for the appellee.

MONCURE, J., after stating the case, proceeded:

The first question to be considered in this case is, Whether Levy had a right to arrest and detain Arnsthall? And that question depends upon whether the relation of principal and bail existed between them. Bail are so called, because the defendant is bailed or delivered to his sureties upon their undertaking that he shall be in place; and he is supposed to continue 643 *in their friendly custody instead of going to jail. 3 Bl. Com. 290; 1 Rob. Pr. 179. The principal is always considered to be in the actual or potential custody of the bail who are in contemplation of law his jailers. Petersdorff on Bail, p. 405, 10 Law Libr. 225. If therefore Levy was the bail of Arnsthall, he had a right to arrest and detain him.

I think that Levy was the bail of Arnsthall. The act under which the bond was given is entitled "An act allowing bail in certain cases." Act of March 31st, 1851, Sess. Acts, p. 36. The first section authorizes the court, judge or justice, in proper affidavit, to direct the defendant in any action or suit to be held to bail for such sum as the said court, judge or justice may think fit; and thereupon the plaintiff may sue out a writ of capias ad respondendum against the defendant. The second section provides, that under such capias the defendant shall be arrested and committed to jail, unless bond be given in the sum aforesaid, with sufficient security, that in case there shall, in the action or suit, be any judgment, decree or order on which a writ of fieri facias may issue, and within four months thereafter interrogatories be filed, under the fifth section of chap. 188 of the code of Virginia, with a commissioner of the court wherein such judgment, &c. is, the said defendant will, at the time the commissioner issues a summons to answer such interrogatories, be in the county or corporation in which such commissioner may reside, and will, within the time prescribed in such summons, file proper answers upon oath to such interrogatories, and make such conveyance and delivery as is required by the said chapter; or in case of failure to file such answers and make such conveyance and delivery, that the said defendant will perform and satisfy the said judgment, &c. The surety in the bond is expressly referred to in the body of the act, as well as in its title, by the 644 *name of bail. The legislature knew what was the meaning of bail, and it is to be presumed used the word in its ordinary and well understood signification. The Code, which went into effect a few months before the passage of the act, had abolished bail in civil cases as a consequence of the abolition of the writs of capias ad respondendum and ad satisfaciendum; and instead of the benefits afforded by the writ of ca. sa., had very much extended the lien of the fi. fa.; and to make that extended lien effectual, had provided means of compelling the judgment debtor by attachment if necessary, to discover and surrender his estate. Code, ch. 188, p. 716-719. But the debtor could not be so compelled, unless he were within the jurisdiction of the state; and it might happen that after being sued, he might remove from the state, and thus evade the law. The legislature designed to remedy this defect by the act of March 31st, 1851; and for that purpose restored the right to sue out a capias, and require bail on affidavit verifying the cause of action, and showing probable cause for believing that the defendant would quit the state unless forthwith apprehended. They did not intend to restore the writ of ca. sa. on such cases, nor require that the bail should be bound to render the body of the principal in execution for the debt. They did not intend to change the law in regard to executions, but merely to insure the personal appearance of the debtor after judgment, in order that the lien of the fi. fa. might be enforced. Therefore the obligation of bail, as it formerly existed, was so varied as to conform to the existing law. But this in nowise varied the relation of principal and bail, or the right of the bail to the custody

of the principal. That is a common law right, which attaches to the relation of bail wherever it exists, whether created by the common or the statute law, unless there be something in the latter to take it 645 away. The right to *require bail in certain civil, and most criminal cases, existed at common law. The statute gave the right in other cases. The obligation of bail in different courts and under different laws, has been somewhat variant, according to the different modifications made by practice or by law. But the right of the bail to the custody of the principal is a feature common to all the cases. It exists wherever the principal is in jail, or in the custody of an officer, and to obtain his release therefrom, the bail or surety becomes bound for his personal appearance in future; unless, as before said, there be something in the law to take it away. The purpose for which the appearance is required is immaterial. The statute need not expressly give or recognize the right. It never does give the right, though it sometimes regulates its exercise, or at least prescribes the mode of making the surrender of the principal. Our statute law formerly did this in regard to special bail. But if it had not done this, the common law right of the bail would still have existed. Our statute has never prescribed any regulations in regard to the right of the bail in criminal cases to the custody of his principal. And yet nobody ever doubted the existence of that common law right in such cases. That the right exists in criminal, as well as civil cases, may be seen by reference to Petersdorff on Bail, p. 514, 10 Law Libr. 290. In criminal cases indeed, this writer says, the power possessed by the bail in obliging the accused to fulfill the terms of the recognizance, should be even more unlimited than in civil cases. This right in criminal cases has been recognized by our courts in proceedings by habeas corpus by the principal to obtain his discharge from the custody of the bail; Green's Case, 1 Rob. R. 731; and was recognized by the legislature in the act of March 10th, 1852, authorizing bail in criminal cases to obtain bail pieces. Sess. Acts, p. 77. The bail piece 646 does *not give the right to arrest, but is merely evidence of such right already vested in the bail. 1 Rob. Pr. 181. The bond prescribed by the act of March 31st, 1851, is essentially a contract of bail. A writ of capias is given under which the defendant is to be arrested and committed to jail, unless bond with security be given for his appearance at a certain time and place, and on a certain contingency, to do and perform certain acts prescribed by law. If the bond be given, he is in effect "bailed to his sureties upon their undertaking that he shall be in place;" and he may well be supposed "to continue in their friendly custody instead of going to jail." I therefore think that the act creates the relation of principal and bail, with the incidental common law right of the bail to the custody of the principal; and that in this case Levy was the bail of Arnsthall, and entitled to his custody.

The next question is, Whether Arnsthall was entitled to be discharged from the custody of his bail, under section 4th of the act passed April 16th, 1852, entitled "An act amending an act passed the 31st of March 1851, allowing bail in certain cases." The chief object of this act of 1852 was to remedy a defect of the act of 1851 in making a defendant liable to be detained in custody until the expiration of four months after judgment obtained, without any power on his part to prevent it, and though he might be insolvent or ready to make the discovery and surrender required by the Code. The 4th section, therefore, provides that "while a defendant is in custody, whether under an arrest made heretofore or hereafter, the plaintiff, without having a judgment against the defendant, may file interrogatories to him in like manner as might be done under the 5th section of chapter 188 of the Code, if such judgment had been obtained and a fieri facias thereon delivered to an officer. And the court wherein the case is pending, or a 647 judge of a Circuit *court, &c. &c. after reasonable notice to the plaintiff or his attorney or counsel, may discharge a defendant from custody, unless interrogatories be filed within such time as the said court, judge, &c. &c. may deem reasonable; or though interrogatories be filed, may discharge him when proper answers thereto are filed, and proper conveyance and delivery made." The defendant Arnsthall complied with the requisitions of this section in regard to notice, and moved the judge to discharge him from the custody of his bail on the terms prescribed by the said section; which motion, as before stated, the judge overruled, because the petitioner was not in actual custody of the officer making the arrest, or committed by virtue of such arrest. The question is, Whether Arnsthall, being in the custody of his bail, was not in custody under an arrest, in the meaning of the said section? I think that he was. The section does not require that the defendant should be in close jail to obtain the benefit of its provisions: It merely requires that he should be in custody under an arrest. A defendant in custody of his bail, is in custody under an arrest; and under the original arrest under the capias. The custody is continued from the time of that arrest, and so long as he remains either in close jail, or in the friendly custody of his bail which is substituted therefor. The case therefore comes within the literal terms of the section. It is also within its spirit and meaning. It can matter not to the plaintiff whether the defendant be in close jail, or in the friendly custody of his bail; so that he be ready to comply with the requisitions of chap. 188, § 5 of the Code. The plaintiff can be subjected to no more inconvenience in the one case than the other, by being required to file his interrogatories. On the other hand, the defendant

might be subjected to the same, or nearly the same, inconvenience in the one
648 case as the other, *by not being allowed to require the interrogatories to be filed. By not being so allowed, where he is in the custody of his bail, he might be kept in this state for four months after the judgment obtained; although he might, as in this case, be a resident of another state, and have his family and business therein. This would be a great hardship, which the legislature could not have intended to impose upon him without any corresponding benefit to his creditor. The act of 1852, instead of relieving the defendant according to its obvious design, might do him an injury, if that were its true construction. The effect of the bond might be to confine him to the custody of his bail until the expiration of four months after the judgment; whereas by remaining in close jail, he might in a short time procure his discharge from all custody by pursuing the mode prescribed by the act.

The word custody in English statutes has been construed to embrace the custody of the bail. The statute 5 Geo. 2, ch. 30, § 5, is an instance of this. That statute enacts that a bankrupt in coming to surrender, shall be free from all arrests or imprisonment of any of his creditors, and after his actual surrender for forty-two days, &c. provided he was not in custody at the time of his surrender. A defendant in custody under the common law right of his bail has been held to be in custody in the meaning of that statute. Petersdorff on Bail, p. 91 and 406, 10 Law Libr. 50 and 226.

I think that Arnsthall, in being in the custody of his bail, was in custody under an arrest, in the true intent and meaning of the 4th section of the act of April 16th, 1852, and that he was entitled to the benefit of the provisions of that section.

I am therefore of opinion that the judgment is erroneous and ought to be reversed; and the cause remanded, with directions to the Circuit court to discharge
649 *the defendant from custody unless interrogatories be filed within such time as the said court may deem reasonable; or though interrogatories be filed, to discharge him when proper answers thereto are filed and proper conveyance and delivery made.

The other judges concurred in the opinion of Moncure, J.

Judgment reversed.

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650 *Barnett v. Meredith, Judge

January Term, 1854, Richmond.

Appellate Court—Jurisdiction—Mandamus to Compel Court to Try Cause.*—The Supreme court of appeals has no jurisdiction, whether under the constitution or the statute, to issue a *mandamus* to a judge of a Circuit court, to compel him to try a cause depending in his court.†

This was an application to the Supreme court of appeals by Joseph Barnett for a mandamus to the judge of the Circuit court of the city of Richmond to compel him to try a cause. On the 3d of January 1854, Jacob A. Levy sued out an attachment against the estate of A. Kraker, returnable to the next May term of the Circuit court for the city of Richmond, which was levied on certain property claimed by Joseph Barnett; and, the court being then in session, Barnett applied by petition to the judge of the court under the act, Code, ch. 151, § 25, p. 606, to cause a jury to be empaneled to try the title to the property. This application the court refused. Barnett thereupon applied to this court for a mandamus to compel the judge to try the case; and a rule was made upon the judge, to which he made return. That the court is of opinion that there is no authority in law which authorizes it, whilst sitting in causes already matured and awaiting its action, to suspend the trial and consideration of such causes, to take up and try an attachment issued by a justice of the peace during its term, and made returnable to its next succeeding term. And he objected that the Supreme

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*Appellate Court — Jurisdiction — Mandamus.—This court refused to award the *mandamus* applied for in *Barnett v. Meredith, 10 Gratt. 650*, on the grounds that, neither the constitution of 1850 nor the statute then in force conferred the jurisdiction to award the writ. The provisions of the present constitution in relation to the awarding of such writs are substantially the same as those contained in the constitution of 1850, but the present statute expressly confers the jurisdiction which the former statute did not. Page v. Clopton, 30 Gratt. 417. See Va. Code 1887, § 3086.

Court of Appeals—Jurisdiction—How Conferred.—The constitution does not *proprio vigore* confer jurisdiction upon this court, and, therefore, whatever jurisdiction it exercises must be by virtue of statutory authority made in pursuance of the constitution. Price v. Smith, 93 Va. 15, 24 S. E. Rep. 474, citing the principal case. See also, citing the principal case, Page v. Clopton, 30 Gratt. 417; Gresham v. Ewell, 84 Va. 786, 6 S. E. Rep. 134; Prison Ass'n v. Ashby, 93 Va. 671, 25 S. E. Rep. 898. See also, the principal case cited in McIntosh v. Braden, 80 Va. 220.

Pleading and Practice—Mandamus.—In Fisher v. City of Charleston, 17 W. Va. 610, the court after stating that the practice in *mandamus* cases differs much in England and in the different states in this country, says: "Without undertaking to point out or comment on these diversities of practice I will simply state, that the usual practice in this state, and the most usual practice in this country, is to begin the proceedings by presenting to the court an application in the form of a petition setting forth in detail the grounds, upon which the petitioner asks a writ of *mandamus*. This petition in this state is usually *ex parte*, no notice that it will be filed being given to the defendants, and it is always supported by affidavit, when presented by a private person. Goshorn *et al.* v. Supervisors of Ohio County, 1 W. Va. 312; Board of Supervisors of Mason County v. Minturn, 4 W. Va. 302; Shields & Preston v. Bennett, Auditor, 8 W. Va. 76; *Barnett v. Meredith, Judge, 10 Gratt. 651;* Sights v. Yarnalls, 12 Gratt. 293."

†For the provisions of the constitution and of the statute, see the opinion of JUDGE ALLEN.

court of appeals had no authority to issue the mandamus asked for.

651 *The only question considered in this court was the question of jurisdiction.

Lyons, for the petitioner.

ALLEN, J., delivered the opinion of the court.

The 2d section of the act regulating the jurisdiction of the District courts and Court of appeals, passed June 5th, 1853, Sess. Acts, p. 53, provides that "the said Supreme court, besides having jurisdiction of all such matters as are now pending therein, shall have jurisdiction to issue writs of mandamus and prohibition to the District courts. It shall also have jurisdiction to issue a writ of mandamus to a Circuit court when "necessary to carry into effect any judgment or decree of its own or of any Special court of appeals." The 3d section provides that each District court shall have jurisdiction to issue writs of mandamus and prohibition to a Circuit court held within the district." The petition in this case alleges that one Jacob A. Levy lately issued an attachment against the goods and chattels of one A. Kraker, and the same was levied on the goods of the petitioner which were taken possession of by the sheriff of the city of Richmond, to whom the attachment was directed, it being returnable to the Circuit court of the said city. That the petitioner immediately filed his petition, claiming the property, and asked the court for an immediate trial of his right by a jury, under the Code, p. 606, § 25. That the attachment was returnable to the next term of the court which would not be held until May; and the court refused to allow the petitioner to have a trial until that term. That the petitioner was advised that his remedy was by mandamus to compel the Circuit court to hear and try his case; and therefore he prayed that a mandamus be awarded him, directed to the judge of said

652 *court, commanding him to proceed to hear and try said question.

It thus appears that the application is not for the exercise of appellate but original jurisdiction; and a mandamus is asked to a Circuit court, not for the purpose of carrying into effect any judgment or decree of its own or of any Special court of appeals, jurisdiction to do which, if not inherent in this court so far at least as it respects its own judgments and decrees, was expressly conferred by the act of June 5th, 1852. There being no law conferring jurisdiction on this court to award a writ of mandamus to a Circuit court in such case; the act referred to, giving general jurisdiction to issue writs of mandamus and prohibition to the District courts only; this court, when the application was first presented, declined, for that reason, to award the rule. But as the counsel of the petitioner contended that this jurisdiction was conferred by the constitution, and that this court was bound to exercise it in a proper case, notwithstanding the omission of the legislature to give or regulate it, in the law regulating the jurisdiction of the court, the rule was awarded in order that the question might be argued and considered.

The former constitution provided that the judicial power should be vested in a Supreme court of appeals and such Superior courts, &c., and declared that the jurisdiction of these tribunals and of the judges thereof, should be regulated by law. Thus vesting in the courts enumerated and to be established, and the judges and justices, all the judicial power, with the capacity to receive such appropriate jurisdiction as the legislature might confer. The present constitution does not, in the terms of the former, declare that the judicial power shall be vested in the tribunals named. The 1st section of article 6 declares, that "there shall be a Supreme court of appeals, District courts and Cir-

653 cuit *courts. The jurisdiction of these tribunals, and of the judges thereof, except so far as the same is conferred by this constitution, shall be regulated by law." The 9th section declares "that the District courts shall not have original jurisdiction except in cases of habeas corpus, mandamus and prohibition." And the 11th section that "the Supreme court of appeals shall have appellate jurisdiction only, except in cases of habeas corpus, mandamus and prohibition. It shall not have jurisdiction in civil causes where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in controversies concerning the title or boundaries of land, the probat of a will, the appointment or qualification of a personal representative, guardian, committee or curator, or concerning a mill, road, way, ferry or landing, or the right of a corporation or of a county to levy tolls or taxes; and except in cases of habeas corpus, mandamus and prohibition, and cases involving freedom or the constitutionality of a law."

The two clauses respecting the jurisdiction of the District courts and this court, although in one negative words, and in the other affirmative, are used, yet mean the same thing; and are an illustration of the rule that negative words may imply an affirmative, and the reverse. When it is said the District courts shall not have original jurisdiction except in cases of habeas corpus, the capacity to receive appellate jurisdiction is thereby affirmed; and when it is said that this court shall have appellate jurisdiction only, except in cases of habeas corpus, &c. the power of the legislature to confer original jurisdiction except in the specified class of cases is thereby negatived. But though by each form of expression the power to exercise appellate jurisdiction only is conferred on each court except in the particulars enumerated, the exercise of that jurisdic-

654 tion *must according to the 1st section of article 6th be regulated by law. Otherwise, if all appellate jurisdiction attached to each court by the impera-

tive language of the constitution, (subject only, as to this court, to the limitation as to amount contained in the 11th section,) there would be an unlimited right of appeal to one or both courts from all the tribunals of the country. This is not the meaning of the constitution. As has been remarked, the constitution has not in terms vested the whole judicial power in the tribunals enumerated. It declares that there shall be certain courts, the jurisdiction of which should be regulated by law, except so far as the same was conferred by the constitution. Jurisdiction is not conferred over any particular case by the constitution. It regulates the character of the jurisdiction whether original or appellate, which the District court and this court may exercise; and restricts the power of the legislature so as to prevent it from conferring original jurisdiction of any other character upon them. The cases in which the jurisdiction, whether appellate generally, or original of the character mentioned, must still be designated and regulated by law.

The constitution of Virginia differs very materially from the constitution of the United States in respect to the judicial department. By the latter, article 3, § 1, the judicial power of the United States is vested in one Supreme court and in such inferior courts as congress may from time to time ordain and establish. The 2nd section enumerates the cases to which the judicial power so vested in the courts shall extend. The 3rd section regulating the jurisdiction of the Supreme court, directs that in a portion of the cases, those affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, it shall have original jurisdiction, and in all the other 655 *cases before mentioned it should have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

In 2 Story on the Constitution, § 1773, it is said, "that there is certainly very strong ground to maintain that the language of the constitution meant to confer the appellate jurisdiction absolutely on the Supreme court, independent of any action by congress; and to require this action to divest or regulate it. The language as to the original jurisdiction of the Supreme court, admits of no doubt. It confers it without any action of congress." In Wiscart v. Dauchy, 3 Dall. R. 321, it was held that if congress had provided no rule to regulate the proceedings of the Supreme court, it could not exercise an appellate jurisdiction. But in the case of Durousseau v. The United States, 6 Cranch's R. 307, it was said that the appellate powers of the Supreme court are not given by the judicial act: They are given by the constitution; and had the judicial act created the Supreme court without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. This construction of the constitution of the United States rests upon the express grant of original jurisdiction in the enumerated cases, without reference to the mode in which that jurisdiction may be exercised, and of appellate jurisdiction in all the other cases mentioned, subject to such exceptions and regulations as congress may make. The constitution of Virginia does not prescribe any case in which the appellate powers of the court shall be exercised, or affirm that it shall exercise original jurisdiction in all cases of habeas corpus, mandamus and prohibition. No appellate jurisdiction attaches proprio vigore to the District or to this court, although the capacity to exercise such appellate jurisdiction when given, is conferred by 656 affirmative words as to this *court, and negative words implying the affirmance as to the District court. And the exception as to original jurisdiction in cases of mandamus, habeas corpus and prohibition serves to remove a restriction on the powers of the legislature, and to endue the court with the capacity to receive original jurisdiction when conferred in such cases as the law should prescribe, and to which the remedy by habeas corpus, mandamus or prohibition was appropriate.

Similar terms are used in the second clause of § 11, limiting the jurisdiction of this court in civil causes where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in controversies concerning the title or boundaries of land, &c., and embracing in this exception also cases of habeas corpus, mandamus and prohibition. If the exception is to be construed as amounting to an affirmative and direct grant of jurisdiction in all the controversies enumerated, without regard to the amount involved, it would be imposing a limitation on the power of the legislature by mere implication, and would preclude it from withdrawing from the appellate or original jurisdiction of this court many controversies which, from the amount involved, or the business of this court, or from other causes, should be left to the final determination of other tribunals. The object of the exception was not to confer jurisdiction in all controversies of the kind enumerated, but to except such controversies from the operation of the provision limiting the jurisdiction where the matter in controversy was less in value or amount than five hundred dollars. The function of the exception in this as in the other clause of the 11th section, and of the exception in the 9th section, is, to remove a restriction which, but for the exception, would have been imposed on the legislature; and to enable it to confer, under its general power to regulate the 657 jurisdiction *of the courts, appropriate appellate or original jurisdiction in the controversies mentioned, without regard to the value or amount in controversy: giving to the court the capacity to receive and exercise such jurisdiction in

such cases, and in conformity with such regulations as the legislature may prescribe.

We are therefore of opinion that legislation is necessary to authorize this court to award a writ of mandamus to a Circuit court in a case like that set forth in the petition; and no law having conferred such jurisdiction, the rule awarded must for that cause be discharged.

Rule discharged.

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658 *Wormeley v. The Commonwealth.

April Term, 1853, Richmond.

1. **Coroners—Authority to Commit to Jail.**—QUÆRE: If a coroner has authority to commit to jail for trial a person charged by the inquest with felony.
2. **Same—Same—Objections—Waiver.***—If he has not such authority, it is too late to object to it after the prisoner has been regularly examined and sent on for trial, and has been indicted for the felony in the Circuit court.
3. **Same—Justices of Peace Acting as—May Commit to Jail.**—A justice of the peace acting as coroner, and having as coroner committed a person to jail for felony, may certify the fact of such committal as a justice of the peace.
4. **Criminal Proceedings—Change of Venue—Affidavit of Prisoner Not Sufficient.**†—Upon an application of a prisoner charged with murder, for a change of the venue, his affidavit alone, of his fears or belief that he cannot obtain a fair trial in the county, is not sufficient to sustain the motion; but he should be required to show by independent and disinterested testimony such facts as make it appear probable at least that his fears and belief are well founded. But where such facts are shown by the prisoner, and are not successfully repelled or explained by the commonwealth, no argument of inconvenience or delay should be permitted to stand in the way of the great end to be attained, a fair and impartial trial.
5. **Same—Same.**—What is insufficient to sustain a motion for a change of venue by a prisoner in a prosecution for murder.
6. **Same—Continuance—Absence of Witness.**—The court being satisfied from the evidence that a witness is absent with the connivance of the prisoner, her absence is not ground for a continuance on his motion.
7. **Same—Venire Summoned from Other Corporations—Case at Bar.**—The regular term of the court having been spent, and only one of the veniremen summoned to try a prisoner, having been found free from exception, the court discharges him, and being of opinion that jurors qualified to serve cannot be gotten in the county, makes an order directing the sheriff to summon thirty persons from each of two corporations, to attend as jurors for the trial of the prisoner at a special term of the court appointed to be held, and to which time the court adjourns. HELD: It was not necessary to have another *venire facias* for summoning jurors from the county, returnable to the special term, before making the order to summon jurors from abroad; and there was no error in directing jurors to be summoned from two counties or corporations at the same time.
8. **Jurors—Failure to Appear—Later Appearance under Rule to Show Cause—Competency.**—A juror summoned for the trial of a prisoner, fails to
659 appear on the *day to which he is summoned, but appears at another day under a rule to show cause why he shall not be fined for failing to appear. If in other respects qualified, he may be put upon the panel; that not having been completed when he appears.
9. **Venire—Failure to Obtain a Jury—Court May Summon Others.**—After the original *venire* is exhausted without completing the panel, the court may order any number of persons to be summoned it may think necessary; and if the sheriff for want of time or other cause, fails to summon the whole number, his return is valid for as many as are summoned.
10. **Jurors—Objection to—Overruled—Case at Bar.**—The prisoner objects to a juror, and his objection is overruled; and he excepts. After the panel is made up but before the prisoner has exercised his right of challenge, the court, on the motion of the attorney for the commonwealth, out of abundant caution, sets aside the juror. This is not error.
11. **Same—Opinion Formed—Competency.**‡—What is not such an opinion as will disqualify a juror for serving on a trial for felony.
12. **Criminal Proceedings—Witnesses—Contradiction of by Deposition Taken at Inquest.**—On a trial for

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***Criminal Proceedings—Commitment of Prisoner—Objections—Waiver.**—For the proposition that after the prisoner has been regularly examined and sent on for trial and has been indicted for the offence by the grand jury it is too late to object to the regularity of his commitment, the principal case is cited and approved in Kemp v. Com., 18 Gratt. 975; Chahoon v. Com., 20 Gratt. 761, 784. See *foot-note* to this case upon the right to examination before trial. See also, Clore v. Com., 8 Gratt. 606; Com. v. M'Caul, 1 Va. Cas. 271; Murray v. Com., 2 Va. Cas. 504.

†**Criminal Proceedings—Change of Venue—Affidavit of Prisoner.**—Upon an application of a prisoner charged with murder, for a change of venue, his affidavit alone, that he cannot obtain a fair trial in the county, is not sufficient to sustain the motion; but he should be required to show by independent, and disinterested testimony such facts as make it appear probable at least that his fears and beliefs are well founded, and the commonwealth may repel such facts, by testimony on her part. For this proposition the principal case is cited and approved in State v. Greer, 22 W. Va. 806; State v. Douglass, 41 W. Va. 538, 23 S. E. Rep. 725; Muscoe v. Com., 87 Va. 462, 12 S. E. Rep. 790. See *foot-note* to Com. v. Bedinger, 1 Va. Cas. 125. In Chahoon v. Com., 21 Gratt. 822, it is said that the court, in such cases, that is, where application is made for change of venue, exercises a large discretion. See monographic *note* on "Homicide."

‡**Jurors—Opinions Formed—Competency.**—Upon this question, see the principal case cited in the following cases: Jackson v. Com., 23 Gratt. 931. See also, *foot-note* to same case where there is a discussion of the subject. Lyles v. Com., 88 Va. 397, 13 S. E. Rep. 802; Hall v. Com., 89 Va. 175, 15 S. E. Rep. 517; State v. Baker, 33 W. Va. 324, 10 S. E. Rep. 641. In addition, see Mendum's Case, 6 Rand. 704; Bristow's Case, 15 Gratt. 634, and *note*; Hailstock's Case, 2 Gratt. 564; Cluverius' Case, 81 Va. 787. See monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

murder, to contradict a witness for the prisoner, it is competent to introduce in evidence a deposition given by him before the inquest, taken down at the time by the coroner and read to the witness, and signed by him.

This is the sequel of the case of the Commonwealth v. Wormeley, reported in 8 Grattan 712. The prisoner was again tried at a special term of the Circuit court of Chesterfield, held in January 1853, was found guilty of murder in the first degree, and was sentenced by the court to be hung on the 15th day of April following. The prisoner thereupon applied to this court for a writ of error to the judgment; and in his petition set out twelve grounds of error.

When the prisoner had been arraigned for trial originally, he filed a plea in abatement, that he had not been regularly and legally examined by a competent court of justices. The ground of this plea was that the certificate of the committal of the prisoner for examination was by Samuel H. Royall a justice of the peace, who acted as coroner upon the inquest, and that he made the certificate as acting coroner. The attorney for the commonwealth filed a replication to this plea, setting out the record of the proceedings of the examining court, in which the certificate is given. It commences as follows:

660 *"Chesterfield County, to wit: To the Clerk of the County Court of said County. I, Samuel H. Royall, a justice of the peace of the said county, do hereby certify that on the 17th day of July 1851, acting as coroner in the absence of the coroner, I committed to the jail of the said county, by my warrant, John S. Wormeley and James Reid, that they may be examined before the County court of the said county for a felony by them committed, in this," &c., setting out the offence charged. To this replication the prisoner demurred, and the court overruled the demurrer. This was the first ground of error assigned.

The judgment of the General court directing that the prisoner should have a new trial was entered at the November term 1852 of the Circuit court of Chesterfield. At that term of the court the prisoner twice moved for a change of venue on the ground that a violent prejudice existed against him in the county, which would prevent his having a fair and impartial trial, even though the jurors should be brought from another county. Both of these motions were overruled by the court, and the prisoner excepted. These constitute the second and fourth grounds of error assigned by the prisoner. The evidence is sufficiently stated in the opinion of the court. The prisoner also moved for a continuance of the cause, on the ground of the absence of material witnesses, which was refused; and he again excepted. This constitutes the third ground of error assigned by the prisoner.

The cause, however, was not tried at the November term of the court, the whole term having been spent before a jury could be obtained; and it was therefore adjourned to a special term to be held on the 11th day of January 1853. And but one juror having been found qualified to serve on the panel, he and those who had been subsequently summoned as veniremen, were discharged; and the sheriff of the county

661 *was directed to summon from each of the cities of Richmond and Petersburg, thirty jurors qualified as the law directs, to attend court on the first day of the special term; of whom to form a jury for the trial of the prisoner.

On the calling of the cause for trial at the special term of the court in January, the prisoner again moved for a continuance, on account of the absence of material witnesses; but the court overruled the motion; and he again excepted. This constitutes the twelfth ground of error assigned by the prisoner. The evidence on this and the third error assigned is stated in the opinion of the court.

The court having overruled the motion for a continuance, and the sheriff having returned that in obedience to the order made at the November term of the court he had summoned thirty persons from each of the cities of Richmond and Petersburg, the prisoner by his counsel moved the court to quash the order and return of the sheriff in obedience thereto, on the ground that the court had no authority to make the order until an ordinary venire facias had been first awarded to summon jurors to the special term of the court; and that it was error to direct jurors to be summoned from two counties or corporations at the same time. But the court overruled the motion; and the prisoner again excepted. This constitutes the fifth assignment of error.

The sixth error complained of is for overruling the motion of the prisoner to exclude one of the veniremen, Peter R. Davis, from the panel, for cause; and the tenth error assigned is for overruling a like motion to exclude another venireman, William H. Brown. Davis, who had been summoned from Petersburg, when examined on his voir dire, said, "That he had not expressed any opinion in relation to the guilt or innocence of the prisoner, but that he had heard

662 opinions *expressed by persons in whom he had great confidence, which had produced some prejudice and feeling upon his mind. That he had had no conversation with any of the witnesses or any of the jurymen who sat upon the former trial, and had not read or heard any statement of the facts of the case; but what he had heard had been the opinions or conclusions of those with whom he talked, without any statement of the facts on which their opinions were founded; but they gave some history of the parties."—"By prejudices he meant the impression on his mind. He did not know the prisoner, and had no personal ill will against him or his cause. That he had rather formed an opinion upon the case, but believed he might trust himself to try the case according to the evidence developed on the trial. That he had not determined that no evidence

should shake the prejudice and impression on his mind, but that it would require evidence to dispel or remove them; and that he did not stand upon that footing on which he would stand if he had never heard of the case; that he could not try the case as if he had never heard of it; nor does he believe that any body else could; but that his mind is open to conviction."

Brown stated, "That he had received representations of the case from rumor, upon which he had formed an opinion, if the representations were true. That he knew neither the prisoner or the deceased, nor had heard any evidence or had any representation from such as had. That the accounts he had of it, contained the circumstances of the case at the time of the offence, which circumstances he believed covered the offence at the time of its perpetration, but not the evidence. That he thought he could try the case and be governed by the testimony. That he hoped he could try the case without influence from such representations, and thought he could. 663 That what he had *heard of the case was from a lady who had been on a visit to this county, (Chesterfield,) whom he had known for a long time, and in whom he had confidence, and who did not profess to have any personal knowledge of the facts. That he believed her statement to be true as to what she had heard. And being asked by the prisoner's counsel, whether it would not require evidence to remove his opinion, he answered, that it would. And being asked if his opinion was not a decided and pretty substantial one, he answered that it was."

Some of the jurors summoned from Richmond and Petersburg did not appear on the first day of the court, and a panel not having been made up out of those that did appear, rules were made upon them returnable to the next day, to show cause why they should not be fined for failing to attend the court in obedience to the summons. Several of these persons appeared in answer to the rule, which was then discharged; and thereupon being called as jurors, the prisoner objected to them as being then incompetent jurors; but the court overruled the objection, and decided that they might then be impaneled on the jury if in other respects they should be found qualified to be sworn as jurors to try the prisoner. To this opinion of the court the prisoner excepted. And this constitutes his eighth ground of error assigned.

The panel not being completed from the persons summoned from Richmond and Petersburg, the sheriff was directed to summon thirty persons from each of the counties of Dinwiddie and Amelia. The return of the sheriff showed that he had summoned but twenty-three from the county of Dinwiddie; and thereupon the prisoner moved to quash each of the orders and returns, because of the illegality appearing upon the face of each of them; and especially to quash the order and return of the offi- 664 cer for summoning persons *from the county of Dinwiddie, because he had summoned but twenty-three. But the court overruled the motion; and the prisoner again excepted. This constitutes the ninth error assigned.

Richard Coleman, one of the persons summoned from the county of Amelia, stated that he was a resident in the county of Amelia, but was not a freeholder of that county; but that he was a freeholder in the county of Nottoway. And thereupon the prisoner objected to him as not being qualified according to law. But the court overruled the objection, and proceeded further to interrogate the said Coleman, who, being in other respects found qualified, was ordered by the court to be placed upon the panel: And the prisoner excepted.

After the twenty-four jurors had been obtained, and the panel made up, but before the prisoner had exercised his right of challenge, or any ballot had been taken, or any one had been sworn on the jury, the attorney for the commonwealth moved the court to set aside Richard Coleman, to whom the prisoner had objected as not being qualified according to law, and to strike his name from the panel, because there might be a doubt about his being legally qualified to set as a juror in this case. And the court, out of abundant caution, sustained the said motion, and directed the name of Coleman to be struck from the panel: and the prisoner again excepted. This is the eleventh error assigned.

The last error assigned is the admission of the deposition of James Reid, a witness for the prisoner, taken before Samuel H. Royall, acting as coroner upon the inquest held upon the body of Anthony T. Robiou, for the murder of whom the prisoner was upon his trial, for the purpose of showing that the witness had made a different statement of a fact then from that which he had given on the trial. On the examination in 665 chief *the witness stated a fact; and upon his cross examination he was asked if he was not examined as a witness before the inquest, and if he had not then stated the fact differently, stating the answer supposed then to have been given by the witness. He replied that he had been examined before the inquest, but that his testimony then corresponded with his testimony given on the present trial. Thereupon Samuel H. Royall was introduced, and the deposition of Reid was handed to him, and he was asked whether the question put to the witness Reid upon his cross examination, as to the fact to which he had testified, had been put to him before the inquest. He answered, that upon looking at the deposition he remembered that the question had been put to Reid. Being asked what was Reid's answer, he said he did not remember except from the deposition itself; and that he was unable to give the answer except by reference to the deposition. He stated that that part of Reid's deposition was reduced to writing at the time by himself the said Royall; that he was particular in giving the answer of each

witness in the very words of the witness; and that after the examination of Reid was completed, it was read over to him, corrected at his request, and then signed by him. The attorney then offered in evidence the answer of Reid, given to the said question upon his examination before the inquest and committed to writing as before stated, for the purpose of showing that he had given a different account then from that given by him on the trial. But the prisoner moved the court to exclude the evidence; which motion the court overruled. And the prisoner again excepted.

The case was argued here by M. Johnson, Day and Robert G. Scott, for the prisoner, and by the Attorney General, for the commonwealth.

666 *DANIEL, J., delivered the opinion of the court.

The first question to be considered is that which the prisoner sought to present by his demurrer to the commonwealth's replication to his plea in abatement, to wit, Whether he had been regularly and legally examined by a competent court of justices for the murder with which he stood indicted? In his petition the prisoner says that his examination was irregular in this, that he was illegally and irregularly committed to jail for examination; because he was remanded under a certificate of Samuel H. Royall, a justice of the peace, acting as coroner in the absence of the coroner, who had no legal authority for such action, in as much as neither a coroner nor a justice of the peace, acting as coroner, is empowered by law so to commit; and that said Royall should have sent him before a justice of the peace, who properly and regularly might and should have committed him for examination of the offence with which he stood charged. And in the argument here the prisoner's counsel have endeavored to maintain that the certificate was a necessary and essential part of the record of the examining court. That the justices could not legally proceed in the examination without a proper certificate of the nature of the offence; and that as it appeared from the certificate itself, that it was made without legal authority, the proceedings of the examining court were altogether null and void.

In considering the question it becomes necessary to refer particularly to those provisions of the Code which regulate the arrest, commitment and examination of persons charged with felonious offences; and also those which prescribe the duties of coroners before whom inquisitions of deaths supposed to be caused by violence, are taken; and to advert to some changes made, by these provisions, in the former laws relating to the same subject.

667 *The previous sections of ch. 202, in relation to coroners' inquests, having pointed out the manner in which the inquest is to be conducted and taken, the 7th section of the chapter requires that the coroner shall return to his county or corporation court the inquisition, written testimony and recognizances by him taken; and if the jury find that murder, manslaughter or assault has been committed on the deceased, the coroner is to require such witnesses as he thinks proper, to give a recognizance to appear and testify at such court when it sets for the trial or examination of the accused. And by the 8th section, if a person charged with the offence by the inquest, be not in custody, the coroner may for his apprehension issue process in the same manner as a justice. The process is to be returnable before a justice and proceeded on as directed by chapter 204. And by the 11th section, in case of the failure of the coroner to act, or if there be no coroner authorized to act, or none in the neighborhood in which the dead body may be found, a justice may act as coroner, and be entitled to the same fees, and be subject to the same penalties.

By the 11th section of chapter 204, it is provided that a justice before whom any person is brought for an offence, shall, as soon as may be, in the presence of such person, examine on oath the witnesses for and against him, and he may be assisted by counsel. And the 15th section of the same chapter declares that when the justice considers that there is sufficient cause for charging the accused with the offence, if the accused be entitled to an examining court, the commitment shall be for examination, and the recognizances be for appearance before such examining court as is provided by chapter 205; and if he be not so entitled, unless it be a case wherein it is otherwise specially provided, the commitment shall be for trial and the recognizances be for appearance in the county

668 *or corporation court, at such time as the case can be proceeded in before such court. And the justice shall return to the clerk of such court, as soon as may be, a certificate of the nature of the offence, showing whether the accused was committed or bailed therefor; and the clerk, as soon as may be, shall inform the attorney for the commonwealth in said court of such certificate.

The first section of chapter 205 declares that before a white person charged with a felony is tried before the Circuit court, he shall be examined as in subsequent sections is provided, unless by his assent, entered of record in such court, the examination is dispensed with. The second, third and fourth sections declare that such examination shall be had before the court of the county or corporation in which the offence was committed or may be prosecuted; and may be before the said court at a regular term or special session thereof, as the justice who considers that there may be sufficient cause for charging with the offence the person accused thereof, may in his discretion determine. If the justice determine on a special session of the court for such examination, he is to issue his warrant to the officer of such court, requiring him to summon at least eight of the justices, (if so many there may be,) to meet for the ex-

amination of the fact, at their court-house on such day as said justice shall appoint, not being less than five nor more than ten days after the date of the warrant. And it is further required that such court, whether held at a regular term or a special session, shall consist of at least five justices; and that the justice who committed the accused for examination, shall not, without the consent of the accused, constitute one of the court.

By comparing these several laws with the acts of 1847-8, relating to the same 669 subjects, it will be seen *that the most material changes made by the Code are in reference to the examining courts. By the act of 1847-8 the called or special sessions of the examining courts were entirely abolished, the 19th section of chap. 15, p. 132, directing that when the accused was entitled to the benefit of an examining court before trial, the magistrate before whom he was brought, should bail or commit him for examination before the next succeeding court of his county or corporation. And by the 18th chapter, p. 138, provision was made for the examination at the next session of said court by five justices. When these provisions were about to be incorporated into the Code, it was deemed advisable by the legislature to restore to a certain extent, the special sessions of the examining courts; and the committing justice was, as we have seen, vested with the power of calling such court by his warrant, if he should in his discretion, think proper to do so. No change, however, was made in the duties of the coroner, in reference to a person who by the inquest taken before him, should be charged with the murder of the deceased; the 10th section of the 16th chapter of the act of 1847-8 before referred to, requiring that if the person so charged should not be in custody, he should be arrested by process issued by the coroner, and carried before a justice, who was to proceed with the case in the same manner that was required of justices of the peace in like cases; whilst the 9th section of said act which corresponds with the 7th section of chapter 202 of the Code, before cited, directs the coroner to recognize the witnesses to appear at the next county or corporation court for the examination or trial of the accused, and also to return to said court the inquisition, written evidence and all examinations and recognizances by him taken.

It will be seen that neither by the Code nor the act of 1847-8, is any power, in 670 terms, given to the coroner to *commit in any case; and that the discretion of calling intermediate sessions for the examination of those entitled to the benefit of examining courts, is vested in the justices alone. It is argued that though the provisions of the Code re-establishing the called courts, do not give the coroner power and authority to summon a court for the examination of a person charged with murder by the inquest, as formerly under the act of 1819, he still retains his common law power to commit a person so charged by the inquest, "if he be present." It is not improbable that the prisoner was present at the inquest, and that Royall, in committing him as coroner, acted on this view of the law. Whether this view was correct or not, we do not deem it necessary to enquire. For it is well settled by decisions of the General court, made under the former laws, that the warrant of commitment formed no part of the record; and that when it appeared that the prisoner had been regularly examined for the same offence with which he was indicted, the court could not be called upon to investigate the legality of the commitment. McCaul's Case, 1 Va. Cas. 271; Murray's Case, 2 Va. Cas. 504. And in Clore's Case, 8 Gratt. 606, it was decided by the same court, that the principle of the decisions just above mentioned is not at all varied because of the subsequent amendments of the law in the Code, relating to arrest and commitment; that after the finding of the grand jury upon the examinations and proofs before them, charging the accused with the murder, it was no defence in reason or in law to the prisoner, that there had been irregularities in his commitment.

Nor can we see on what ground an effort can be made to maintain that the certificate was without competent authority. For even if Royall acted under a mistaken view of his duties in committing the prisoner by virtue of his supposed power as cor- 671 oner to *do so, such error does not extend to the certificate. The fact that he had undertaken to act on this occasion as coroner in the absence of the regular coroner, did not divest him of his office of justice of the peace. Though for the occasion discharging as coroner the duties peculiar to that office, no power or right of justice compatible with those duties was thereby taken away. And having just discharged the judicial duty of taking the inquest, and having by his warrant as coroner committed the prisoner, he had the same means before him of certifying as a justice of the peace, the nature of the offence, as could be possessed by any justice in any case of commitment. And when we look at the certificate, we find that his course was in exact conformity with this view of his duties. For whilst it appears by the certificate that he made the commitment as a coroner, the certificate itself is made by him as a justice of the peace. "I, Samuel H. Royall, a justice of the peace, do hereby certify that acting as a coroner, I committed," &c. And the certificate is signed by him with the addition, J. P. The certificate being thus in all respects legal and proper, it is not necessary to express any opinion as to what might have been the legal effect on the rights of the prisoner had it been shown to have been otherwise.

The second assignment of errors is based on an exception to an opinion of the court overruling a motion of the prisoner made at its November term 1851, for a change of the venue. After he had been arraigned and had pleaded not guilty, he made a motion

for a change of venue, and in support of it filed his own affidavit and introduced a number of witnesses to prove its statements. In his affidavit he expresses the belief of the existence of such a general prejudice against him and his cause that he could not obtain a fair and impartial trial
672 in the county; and that even if *a jury should be brought from another county, they would be so influenced by the popular feeling as to preclude the possibility of his having a fair trial. That threats had been made by some of the people that even an acquittal would not protect him, and that he would be murdered by a mob. That many and influential citizens had raised a subscription and had employed counsel to aid in the prosecution. And that he verily believes that at the period of his examination and commitment, the state of feeling against him and his cause was such, that if one or two leading men present had made the suggestion, he would have been put to death by the violence of the people then assembled.

No decision has been made by our appellate courts in criminal cases, prescribing the rules and principles by which the judges of the circuits are to be governed in disposing of motions for a change of venue. In order, however, to prevent the hindrance and embarrassment to the course of justice, that would be likely to arise from too readily granting such motions, it may be safely affirmed, that the mere affidavit of the prisoner of his fears or belief that he cannot obtain a fair trial in the county is not sufficient to sustain the motion; but that he should be required to show by independent and disinterested testimony, such facts as make it appear probable at least that his fears and belief are well founded. On the other hand, when such facts are stated and shown by the prisoner, and not successfully opposed or explained on the part of the commonwealth, no arguments of inconvenience or delay should be permitted to stand in the way of the great end to be attained, a fair and impartial trial.

It is obvious also that a state of facts, which, under the former laws regulating the sources from which the jury were to be drawn, might have been conclusive in favor of a motion for a change of
673 venue, might, under *the existing statutes, wholly fail to show any difficulty in the way of obtaining a fair trial in the county. For whilst by the law as it formerly stood, the court had no power to send beyond the limits of the county for a jury, no matter what might be the difficulty of obtaining therein a jury free from exception; it is now provided by the 10th section of chapter 208 of the Code, that if qualified jurors not exempt from serving cannot be conveniently found in the county in which the trial is to be, the court may cause so many as may be necessary, of such jurors, to be summoned from any other county or corporation by the sheriff or sergeant or by its own officer. In this state of the law it is difficult to suppose a case in which this court could safely undertake to pronounce erroneous a judgment of a Circuit court refusing an application for change of venue based simply on the ground of difficulty in obtaining jurors for the trial in the county. Cases, however, may be supposed of such strong and extensive and influential prejudice and excitement against the accused, as to endanger the fairness and impartiality of a trial conducted in the county, even though the court should encounter no serious difficulty or inconvenience in obtaining a jury. In such cases, in order to obtain a full, free, dispassionate, just and impartial hearing of the cause, it might be just as important to change the theatre of the trial, as to have a jury filling all the requirements of the law as to qualification and freedom from exception. In view of such a possible state of things, and of the possible existence of other causes not necessarily connected with the jury, and in order to preclude the inference, that, by enlarging the power of the court as to the sources from which the jury might be taken, it intended to curtail the court of any power or discretion which it previously had of changing the venue for causes other than the difficulty of obtaining a jury in the county, the
674 legislature have, in *the 22d section of the chapter cited above, declared that the Circuit courts may, on the motion either of the accused or of the attorney for the commonwealth, or without such motion, for good cause, order the venue for the trial of a criminal case in such court to be changed to some other Circuit court.

With these views of the law we cannot undertake to say, after an examination of the testimony on both sides, that the Circuit court improperly exercised its discretion in refusing to grant the prisoner's motion. It is true it is shown that subscription papers were circulated to raise a fee for the employment of counsel to aid in the prosecution, and that they had been signed by some twenty or thirty persons. Such a fact, of itself, is no ground for a change of venue. It is a circumstance tending to show the extent to which an opinion of the prisoner's guilt prevailed; but it is not difficult to conceive how men, just and upright, and free from any ill will or feeling of vindictiveness towards the accused, in view of the fact that much of the ability, learning and eloquence of the bar was enlisted in his cause, might be willing to contribute for the procuring of additional counsel on the side of the prosecution, in order to bring about, as far as might be, an equal litigation and its probable result, justice, as well to the commonwealth as the accused. It is true also it is shown that there had been shortly after the homicide was committed, considerable excitement against the accused in the immediate neighborhood, and that on several occasions persons had been heard to express the belief that the people would not bear with an acquittal: that some who were present at the inquest, and others who were present at the examining court, had expressed the

belief that the people would have proceeded to put the accused to death if the suggestion had been made by leading men present; and one of the witnesses
675 *examined on behalf of the application, states that he had heard a person say that if the prisoner was acquitted by a jury he would not be surprised if he was hung before he got far from the courthouse; that some six or eight other persons were present on the occasion, who seemed to nod assent: But on the other hand, there is the total absence of proof of any threats against the prisoner; and it was shown that the excitement which at first prevailed had greatly abated, and had at first been confined mainly if not entirely to the neighborhood of the residence of the deceased, and of the place where the homicide was committed; and that the expressions above mentioned had been uttered mainly by persons coming from the same neighborhood. And the opinion is expressed by some of the witnesses, in a manner and under circumstances entitling it to the fullest confidence, that if any effort had been made on the public occasions above mentioned, to do violence to the prisoner or in any manner to impede the course of the law, such effort would have been successfully met and opposed by the people there assembled. And as to the jury, the testimony was clear to show that the court would probably meet with no serious difficulty in obtaining one, from the remote parts of the county, free from all exception. In this state of things, we do not think the court erred in refusing to change the venue.

At the November term of the Circuit court 1852, after the venire had been exhausted and one juror alone found qualified, and the attorney for the commonwealth had moved the court to award the venire facias to bring other qualified jurors from another county or corporation, the prisoner renewed his motion for a change of the venue; the refusal of the court to grant which, is the fourth ground of error taken by the prisoner in his petition.

676 *The prisoner, in his affidavit, relies on his former affidavit and on the proofs offered in support of it. He repeats the expression of his belief of a great and violent prejudice against him and his cause. He states that on a former trial between three and four hundred persons had been summoned for the trial of himself and Reid, who stood jointly indicted with him, and only one panel from all these could be procured for his trial in the county; that at the then present term twenty-four persons had been summoned as veniremen, twenty of whom had attended and out of these but one could be found who had not expressed such opinions as to disqualify them from serving on the jury. He relies on the fact that the court had found it necessary to order the summoning of jurors from other counties, but expresses the belief that even this precaution will not afford him protection and give him a fair and prompt trial.

The testimony offered, as well on the part of the prisoner as of the commonwealth, is conclusive to show that it would have been very difficult if not impossible to obtain a jury in the county free from exception. Of the seven witnesses examined on this motion, (four on the part of the prisoner and three on the part of the commonwealth,) there are only two, who express their belief of the possibility of obtaining a jury in the county. W. W. T. Cogbill, a witness examined in behalf of the motion, "thought the prospect of getting a jury free from exception in the county a very doubtful one, though he thought it possible that one might be obtained;" and Alexander Jones, a witness for the commonwealth, expressed the belief that such a jury "could be obtained, but not without considerable inconvenience and consumption of time;" whilst all the others are decided in the opinion that a jury could not be obtained in the county. They all concur in expressing the belief
677 that *the great difficulty in procuring a jury in the county arose from the fact that the cause had been so long pending, and that the people had generally heard the testimony and the rumors about the case, and had made up their minds; that there was a general belief of the prisoner's guilt, but no prejudice against the prisoner or his cause independent of this belief; and one of the witnesses of the prisoner, to show that he was correct in supposing that there was no personal ill will against the prisoner, stated that he did not believe that there was one man in twenty or even in one hundred that knew the prisoner personally. And one of the witnesses on behalf of the commonwealth, Hobbs, stated that whilst there had been, and still continued to be, a general conviction of the prisoner's guilt, there was then no excitement against the prisoner and no prejudice against him personally; but that on the contrary, there seemed to be, with some, a feeling of sympathy for him, owing, as he believed, to the development of the fact, during the trial in November, by the testimony of Reid and Lipscomb, of the marriage of Reid and Mrs. Robiou, which some believed was without the knowledge or consent of Wormeley. And another witness on the part of the commonwealth stated that he had seen lately no evidence of excitement against the prisoner, nor of any prejudice against him personally; and that there were very few who knew anything about him. That the case had been long pending, and that the people generally had made up their minds; but that he had seen no evidence of any feeling that could possibly affect the minds of jurors coming from another county. That he had been the clerk of the county for several years, and at one time sheriff, and was extensively acquainted with the people: And in confirmation of his belief that there was no excitement against the prisoner, and indeed no great interest felt about his
678 case, he stated the *fact that during the then present term, he had seen

scarcely anybody attending court but those who had been summoned.

It is clear that under the former laws such a motion, accompanied by such proofs, ought to have prevailed, in as much as the great improbability if not impossibility of obtaining a jury in the county is plainly shown. But can we say in the present state of the law that good cause was shown by the prisoner for a change of the venue? Can we say that the court left the prisoner exposed to any improper hazard by refusing to send the case to another county, and instead thereof, ordering a jury to be summoned from another county? We think not. We cannot believe that there was danger of any manifestation of popular feeling or opinion likely to prejudice the prisoner's cause in the minds of his triers; or of there being at the trial anything in the surrounding circumstances, which would not have left the witnesses entirely free to render their testimony, the prisoner's counsel free to uphold and maintain his defence, and the jury equally free calmly and conscientiously to render their verdict in the cause.

The third and twelfth causes of error are based on decisions of the court refusing to grant two several motions of the prisoner for a continuance of his case; the first of which motions was made at the November term 1852, and the second at the special session of the court in January 1853. The first motion was founded on the absence of three witnesses, Junius L. Archer, Abner W. Trabue and Emily W. Robiou. On being required by the court to do so, the prisoner's counsel stated what they expected to prove by these witnesses, and the prisoner by his affidavit verified the statement. It would seem at first view that, even though the court might have erred in refusing to continue the cause, on the prisoner's motion, the prisoner could have no right 679 *to complain of the judgment, in as much as the cause was postponed to a special term, owing to the inability of the court to finish the trial during the term. The prisoner, however, insists that he has been injured by the refusal of the court to continue on his motion, because if a regular continuance had been granted, his trial, instead of taking place at the special session in January, could not have been had till the following regular term in May; and that he would thus have had an opportunity till that time to procure the attendance of one of the most important witnesses, Emily W. Reid, (formerly Robiou,) and to have enjoyed whatever other advantages might have accrued to him or his cause by lapse of time.

As to the two witnesses, Archer and Trabue, there is nothing in the course of the court with regard to the continuance by which the prisoner could be possibly injured, in as much as we find his affidavit for a continuance in January is based entirely on the absence of Emily W. Robiou and John Dunnaway. The fair inference is either that Archer and Trabue were not in fact deemed material by the prisoner, or that they were present, and that the prisoner enjoyed the benefit of their testimony. As to Emily W. Reid, (Robiou,) waiving the consideration of the question whether the facts which, according to the statement, she was expected to prove, might not have been material to the prisoner's defence, the enquiry arises, Was there due diligence? Was there a prospect that the witness would attend at the time to which it was proposed to continue the cause? Was the motion in fact submitted in good faith? And in pursuing the last enquiry, we have the right to take a connected view of the prisoner's course, as disclosed in the two bills of exceptions.

It appears from the testimony in behalf of his first motion, that Mrs. Reid left 680 the state about a fortnight *before the time appointed for the trial in November, and that she left with the full knowledge that she would be wanted at the trial as a witness; for though it is proved by Lipscomb that he met her coming from the office of one of the prisoner's counsel in the month of September, and that she stated she had consulted her counsel, who had informed her that she would not be wanting, the prisoner's counsel all denied having given her such advice, and the counsel from whose office she was seen coming, stated that on the contrary he had told her expressly that she would be wanting. It is proved by Reid, who had been jointly indicted with the prisoner and acquitted at the July term, and who had since intermarried with her, that he had carried her to North Carolina. He at first stated that he did not know where she was, and that he had seen her last in Richmond; and that though possible her attendance might be procured, he knew nothing particularly respecting it: Yet on further examination, he stated that a little more than two weeks before, he had carried her to Salem in North Carolina; that he left her there; and that he had not seen her or heard from her since, and knew nothing to the contrary of her being there still. It was also proved by Lipscomb, on a re-examination, (who on the first examination had disclosed nothing more than that he had carried her to Richmond in September, and that she said she was going to Lynchburg and would be absent for some time, and the further fact of seeing her coming from the office of her counsel, and holding with her the conversation before mentioned,) that he had, about the 25th of October, furnished Reid the means in part of going away, though he did not then know where they were going.

It appears from the bill of exceptions taken to the opinion of the court overruling the motion for a continuance in January, that Emily W. Reid was still 681 *absent, and it did not appear that she had been in the state since the preceding October. Reid being examined, stated that he supposed she was now unable to attend court in consequence of pregnancy, caused by her marriage to him in July last; and that her health had also been affected

by the persecution and harassment to which she had been subjected before she went to North Carolina. But he also further stated that he had not seen her since October, when he carried her to Salem, North Carolina, where she was still boarding, and where she had sisters at school. He also stated that he had written to her and had received two letters from her, the 2d on the 26th of December last; that about a month before the date of the statement he was then making, he had been informed by one of the prisoner's counsel that she would be wanting as a witness at the then present term of the court, and that he had written to her to that effect; and on being asked what was her answer, he said, she stated in her answer that she had been advised by counsel it was unnecessary for her to attend. It is also certified by the court that the counsel for the prisoner declared in open court that they had given her no such advice.

Can any one read this history of the conduct of his witness, furnished by the prisoner, and doubt that it was influenced by motives, and looked to objects, growing out of and connected with the prisoner's trial? And can any one believe that it was designed to be prejudicial to the prisoner's interest? We think not. We cannot believe that a daughter so situated, with her father in the custody of the law, charged with a capital offence, of which he had been once convicted by a jury of the country; an offence growing, (according to the statement of his counsel,) out of a quarrel, occasioned and provoked by unceasing injuries and wrongs inflicted upon her and her mother, by the man with whose murder 682 he was charged, and she, the *witness by whom, according to the same statement, these facts and others deemed material to the defence, were to be proved; we cannot believe that she would, within a few days of the period when he was again about to be exposed to the hazards of a trial, with a full knowledge that she would be wanting as a witness, thus leave the state on the eve of his trial, if she did not believe that such a course on her part would probably be productive of greater benefit to his cause than would be her then appearing and testifying in his behalf. Looking at the conduct of herself and husband in this particular, it is hard to conceive any other motive for it than the hope that it might procure a further delay of the prisoner's cause, or otherwise lay the ground on which to raise some of the very questions in the consideration of which we are now engaged. To suppose that she was really in possession of testimony of probable materiality to the prisoner, and that she designed to withhold it from him at his ultimate trial, would be to impute to her a monstrous degree of filial impiety and ingratitude, a wanton disregard of the life of her father and protector, little short, if any, in moral turpitude and guilt, of the crime for the alleged commission of which he was about to be placed in jeopardy.

There is no positive testimony to connect the prisoner with this scheme. But what has been his course? Has it been that of a man who, about to enter upon a trial involving his character and life, was, in good faith, getting ready for it; who having a material witness, was really desirous that the witness should attend at the time appointed for the trial? It does not appear that the marriage of his daughter with Reid was with his consent or knowledge, but it does appear from the testimony of Winfree the guard of the jail, that he had a conversation with him about the middle of October, in which he informed the prisoner of the report of the marriage, and that 683 he appeared *much displeased, and indulged in some harsh expressions about Reid. But he expressed no feeling of resentment towards his daughter; and there is nothing to show why he might not have desired to see her; why he should not have still felt a parent's interest in her plans of life; and most particularly, why he should not have desired to be informed whether her marriage would lead to any immediate change of residence or to any journey by herself and husband, likely to interfere with her attendance at the approaching trial. Yet in this conversation he makes no enquiry about her, and there is no proof that on any other occasion he had made such inquiry; or sent any letter or message to her. And in his affidavit on the first motion for a continuance, he is wholly silent as to when he was informed of her having left the state; abstains from any statement that her absence was without his knowledge; and does not state that he expected to procure her attendance at the next term of the court; nor indeed state any other fact from which it was to be inferred that he did so expect. And when his case again came on for trial in January, he still made no affidavit with respect to the movements of his daughter; no affidavit of a belief that he could procure her attendance at another term, if a continuance should be granted; and there is still the absence of any proof of any enquiry on his part about her, or of his having requested any friend to go after her, or of his having himself written or requested any friend to write to her and urge her attendance. The prisoner cannot complain of the application of the strictest rules of the law to motions made under such suspicious circumstances; and taking the omissions in the affidavits just mentioned in connection with these circumstances, and seeing that the court had no proof of any prospect of her attending at a subsequent term, we see no error in the judgment of the court in refusing 684 *the motion on either occasion, so far as it was based on the absence of Mrs. Reid. It is true that if the statement of Reid on the second application were alone to be looked to, the inference might be drawn that her continued absence was due to her inability to attend on account of her condition. But his conduct and statements in the case have been such as to entitle them

to little weight; and in her own letter, in reply to his, informing her of the statement of counsel that she would be wanting as a witness, so far as he has disclosed its contents, we find that she places her absence on no such ground, but falsely says that she had been advised by the counsel that she would not be wanting. So far as the motion at January court depended on the absence of Dunnaway, we see no difficulty. Waiving any question of diligence as to him, it is plain that what he was expected to prove was not competent evidence. We perceive therefore no error of the court in respect to either of these motions.

We see nothing to impeach the propriety of the order made by the court at the termination of the November term, directing the sheriff of the county to summon from the city of Richmond thirty jurors and from the city of Petersburg the like number, to attend court at the first day of the special term in January. The order is stated to be based on the opinion of the court that qualified jurors not exempt from serving could not be conveniently found in the county, of whom to form a jury for the trial of the prisoner; and seems to be in exact conformity with the 10th section of ch. 208 of the Code. Had the venire been exhausted at an earlier day of the November term, and the order had been made for the attendance of the jurors at a subsequent day of the same term, there could have been no question to the right of the judge to make it; and there is nothing in the words
685 of the *statute to restrict the right to make the order to such a case. The order does not conflict at all with the provisions of the 5th section of chapter 208, requiring the judge, when he appoints a special term, to prescribe in the order whether a grand jury or venire is to be summoned to attend the said term. The court, after appointing the term, does in effect prescribe at the foot of the order, that no venire is to be summoned to attend from the county; but that instead thereof, the sheriff is to summon jurors from Richmond and Petersburg. And we cannot conceive how the prisoner could be possibly injured by the court's directing the sheriff to summon the jurors from two corporations at once, instead of one of them.

Nor can we see any force in the objection that is set forth, in the 8th cause of error, to the course of the court in permitting the jurors, who had been summoned and did not at first appear, but who subsequently appeared under a rule to show cause why they should not be fined, to be examined as to their qualifications. The jury was not yet complete, and the failure of these jurors to obey the summons of the court at first was a matter with which the prisoner had nothing to do. The causes of their default were matters into which the court would look in considering whether he should fine them; but it is not perceived how their attending on one day instead of another, having not been discharged from the summons, could affect the legality of their being placed on the jury, if in other respects found qualified.

Any decision sustaining an objection to the return on an original venire on the ground that fewer than the number of jurors required by the precept have been summoned, will be found to have no application to orders such as those referred to in the 9th assignment of errors. The law fixes the number of jurors who are to be summoned under such a venire; but in the
686 *orders which the court issues to its officers to summon jurors from other counties, in the case contemplated by the Code, it is restricted to no specified number. The court may order any number it may think necessary in order to form an unexceptionable jury; and if the sheriff from want of time or other cause, fails to summon the whole, no good reason is seen why the return should not stand good for as many as are summoned.

Without deciding whether Richard Coleman was a good juror or otherwise, we are of the opinion that there was nothing in the action of the court in respect to him of which the prisoner can complain here. Notwithstanding the court had overruled the prisoner's objection, and he had excepted to the opinion, it was not too late for the court to reconsider; and it matters not whether the course of the court was changed by the motion of the prisoner or at the suggestion of the attorney for the commonwealth. The legal effect was the same as if the court had in the first instance sustained the prisoner's objection to the juror.

The exceptions of the prisoner to two several decisions of the court overruling his challenges to the two jurors Davis and Brown, present questions which are of a much more serious character, and which have given rise to as frequent discussion, both at the bar and on the bench, as any that have occurred in the administration of criminal law. We do not deem it necessary to make an effort to reconcile the seeming conflicts of opinion that are to be found in the decisions of our courts; nor do we think that the occasion calls for any very extended examination of the rules which are to govern, generally, the questions touching the nature of the opinion that will render a juror incompetent; the more especially as the whole subject has been recently
687 very thoroughly considered in *the General court by one of the most learned and able jurists of the country;* and as the application of a few well settled principles will be found all sufficient for the decision of the precise questions before us.

It is well settled that the question as to the competency of the juror is to be tested by the character and force of the opinion which he has formed, and not by the occasion on which the opinion was formed, or the source from whence the information of the juror may have been derived. Still as

*LOMAX, Judge, in Clore's Case, 8 Gratt. 606.

it is natural to expect that the impression or opinion of the juror would be stronger or weaker, as the information or evidence on which it is formed is more or less full and authentic, it often becomes necessary, where doubt is left from his statements as to the real force of his opinion, to look to his source of information, as a very important circumstance in explanation of this doubt. If upon the whole examination it appears that the opinion is decided or substantial, the juror is incompetent; and on the other hand, if the opinion appears to be merely hypothetical or so slight as that it would in all probability readily yield to the evidence, his competency is established. And if the opinion is founded upon mere rumor, the presumption in favor of the indifference and fairness of the juror, especially if supported by the expression of a belief on his part that he could give the accused a fair and impartial trial, has in most cases led to decisions in favor of the competency of the juror, notwithstanding in some of those cases statements were made by the jurors which, if they had stood alone, would have indicated that the opinions formed were substantial and decided. The application of these principles to the case of the juror Davis result in showing that he was clearly competent. He had had no conversation with any of the witnesses, or any of the jurymen who sat on the 688 former *trial; nor had he read or heard any statement of the facts of the case; but what he had heard had been the opinions or conclusions of those with whom he had talked, without any statement of the facts on which their opinions were founded; but they gave some of the history of the parties. It will be seen that the impression or opinion which he had formed was founded upon the mere opinions of his acquaintances. Though these were acquaintances in whom he had confidence, and though he said that he had rather formed some opinion which it would require evidence to remove; yet the statement taken as a whole negatives the idea that the juror had made up his mind and prejudged the prisoner's case.

As to the juror Brown, though in the latter part of his examination he does state in answer to an enquiry whether his opinion "was not a decided and pretty substantial one," that it was; yet when we look to the source of his opinion, the statements of a lady from the county, "who did not profess to have any personal knowledge of the facts, but who, he believed stated truly as far as she heard," and allow due weight to his declaration of a belief that he could try the cause uninfluenced by those statements, we experience no difficulty in drawing from his whole examination the conclusion that his case belongs to the same class with that of the juror Davis, and think that he was properly accepted by the court as a fair and impartial juror.

On the trial the commonwealth endeavored to contradict James Reid, a witness for the prisoner, by showing that he had testified differently at the coroner's inquest; and in order to lay the foundation for the introduction of the impeaching testimony, the witness was asked if he had not been examined as a witness at the inquest, and if he had not then made a certain statement as to the position of Robiou's wagon at the time he was shot. To which he re- 689 plied *that he had been so examined as a witness; but that he had not made the statement in question. The foundation being thus laid for the introduction of the testimony offered to contradict, it is not perceived on what ground it could be objected to. It is conceded by the prisoner's counsel that if Royall could have stated what Reid had sworn in reference to the matter, from memory alone, or from memory aided by a reference to the written deposition of Reid which he had taken, it would have been competent for him to have made the statement. A deposition officially taken in a judicial proceeding, especially a deposition taken with such exceeding care and accuracy as the one offered; which after being written was read over to the witness, corrected at his request and then signed by him, would seem to furnish a much more authentic history of what had been stated by the witness, than any that could be derived from the memory of witnesses, however veracious and retentive. It could not be read nor was it, as proof of the existence of any fact deposed to by the witness, but as proof of what the witness stated to be the fact in reference to a certain particular, for which purpose it was the best and safest testimony that could have been resorted to.

There are other particulars in which the action of the court was excepted to by the prisoner, but no reference is made to them in his petition, nor in the extended and able argument of his counsel here. We deem it unnecessary to say anything in reference to them, farther, than that after a very careful examination of the whole record, we can discover nothing in the proceedings of which the prisoner can justly and legally complain; and are of opinion to affirm the judgment.

Judgment affirmed.

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690 *Jaques v. The Commonwealth.

April Term, 1858, Richmond.

1. **Criminal Law—Jurors*—Competency.**—On a trial for arson, the nephew of the deceased wife of the person whose house was burned, if she left children, is an incompetent juror.

2. **Same—Same—Same—Relationship to Party—Principal Challenge.**—Such relationship to a party on the record would be a cause of principal challenge. If it be not a cause of principal challenge because the person whose house was burned is not a party on the record, it is a case in which the favor being apparent, he should be set aside.

*See monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

3. **Same—Same—Same—Case at Bar.**—In such case if the deceased wife left no issue, it is for the prosecution to show the fact; and that fact not being shown, the objection is valid.

There were several questions raised in this case, but there was but one point decided. The facts in relation to it are stated in the opinion of Judge Allen. The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at three years; and the court sentenced him accordingly. Whereupon he applied to this court for a writ of error, which was awarded.

There was no counsel for the prisoner.

The Attorney General, for the commonwealth.

ALLEN, J. David Jaques was indicted in the Circuit court of Harrison county for burning a store-house of Charles Lewis, together with various articles of merchandise, the property of said Lewis. A bill of exceptions taken by the prisoner to a decision of the court, sets forth that during the progress of empaneling the jury for the trial of the cause, and before the completion of the panel, or the venire had
691 been exhausted, *one Hiram J. Lynch, a venireman, was called, and being sworn upon his voir dire, stated, that he was the nephew of the said Charles Lewis, whose store-house is in the indictment alleged to have been burned. That his the said Lynch's father was the brother of the deceased wife of the said Charles Lewis. Thereupon the prisoner objected to the said H. J. Lynch as a juryman; but the court overruled the objection and admitted him as such; to which opinion of the court the prisoner excepted.

The common law was watchful over the purity of the jury trial, and to secure the fair administration of justice, guarded against the influence of those passions most likely to pervert the judgments of men in deciding upon the conduct and controversies of their fellow-men.

If a juror have any direct interest in the matter to be tried, the law considers him under an influence which may warp his opinions, and will not confide in him. And upon the same principle, though he might not have any direct interest in the controversy, yet if he were related to either of the parties to the suit in the ninth degree, such relationship constituted a principal cause of challenge, which left no discretion to the court. A principal cause of challenge being grounded on such a manifest presumption of partiality, that if it be found true, the law sets aside the juror; whereas a challenge to the favor leaves it to the discretion of the triers.

In Coke Lit. 157 a, it is said, that if the juror be of blood or kindred of either party, it is a principal challenge; for the law presumeth that one kinsman doth favor another more than a stranger. And the same author says that affinity or alliance by marriage, is a principal challenge, and equivalent to consanguinity where it is between either of the parties, and the same continues or issue be had: And so it was decided in the case of Marshall v.
692 Eure, 1 Dyer 37 b, which was *a challenge to the array. The challenge was that the sheriff was cousin to the defendant: In fact he was cousin to the defendant's wife. The court held that the variance was immaterial; that it was a cause of principal challenge as well as cousinage to the defendant himself. In 1 Chit. Cri. Law 541, it is said that if the juror is related to either party, within the ninth degree, though it is only by marriage, a principal challenge will be admitted. It is further declared by Coke 157 a, that the marriage must continue or issue be had to continue the affinity, so as to constitute it a principal challenge; for which Mounson & West's Case, 1 Leon. R. 88, is cited. That was a challenge to the array because the wife of the sheriff was cousin of the plaintiff, she being dead, leaving issue. Anderson, Ch. J., at first thought it a challenge to the favor being for affinity; but said that "affinity was presumed in law not indifferent as to jurors, but not as to sheriffs." Afterwards Anderson concurred with two of the other judges in holding it to be a principal challenge, in accordance with the decision in Dyer before referred to. Nothing is said in the report of the case as to the necessity of the marriage continuing or that issue be had, although in the statement of the case it is set forth, that she was dead leaving issue. The case shows, however, that in the opinion of Anderson there was a difference between a juror and the sheriff, for though he at first doubted whether affinity in the sheriff was a cause of principal challenge to the array, yet he conceded that affinity was presumed in law not indifferent as to jurors.

But supposing the inference from the case of Mounson & West was correct, it does not decide that the party challenging is bound to show more than the marriage before the array was made out; doing this he shows a prima facie cause of principal challenge; and the burden devolves on the other side to show it has terminated by the death of the wife without issue.
693 *The case from Dyer had previously decided that the party must show that the marriage was before the time of arraying the panel, otherwise it might be intended that the defendant had married his wife after the panel was made out. If therefore in the present case Lewis had been a party on the record, the prisoner, according to the bill of exceptions, would in the absence of all other evidence, have made out a cause of principal challenge, it not appearing that the deceased wife of Lewis had not left issue.

In this case, however, it is contended by the Attorney General, that as Lewis was no party to the prosecution, and had no interest in the result, his relationship to the juror can constitute no cause of principal

challenge or to the favor. As a general rule it may be true that to make out a cause of principal challenge the consanguinity or affinity must be between the juror and one of the parties to the record. Yet when we look to the principle upon which the doctrine rests, which is the legal presumption that one standing in a near relation to one of the parties to the controversy is not indifferent, it is very evident that the reason of the rule would apply to cases although the party to whom the juror was related was not strictly a party to the record. Although the person injured be not, technically speaking, a party to the record, and is not prosecutor, and has no pecuniary interest in the result, yet if he were called as a juror, the fact that he was the injured person would, I conceive, be sufficient of itself, and constitute a cause of principal challenge. There would be nothing in such case to leave to the discretion or conscience of the triers. Professor Davis, in his Treatise on Criminal Law 451, treats relationship to the accused or the party injured as cause of principal challenge; and for the plain reason, that it carries with it prima facie evidence of malice or favor. He cites no authority, and perhaps the literal rule as laid down by Coke, (who 694 *seems to have been followed by all subsequent writers when discussing this subject,) confines the principal challenge to relationship to one of the parties to the record. But his observations were made with reference to controversies between individuals: And in applying the principle to criminal prosecutions, regard should be had rather to the reason than the letter of the rule.

But treating it for the purposes of the present case, as a challenge concluding to the favor, because the party injured is not a party to the record; the objection falls under another class, where according to Coke, although the challenge concludes to the favor, the cause of favor is apparent; and would be a principal challenge if he were a party to the record. If the juror be of kindred or under distress of him in reversion or remainder, &c. these are not, he says, principal challenges, because he in reversion or remainder is not party to the record; but yet they come nearer to the principal challenge than to the other.

In England, such a challenge would have been referred to the conscience and discretion of the triers; but the favor being apparent, they would have been instructed that the juror did not stand indifferent. With us, where the question is determined by the court without the intervention of triers, the distinction between a principal challenge and a challenge to the favor ceases to be of much practical importance. On the case as made out by the bill of exceptions, it would have been a cause of principal challenge if Lewis had been a party to the record; and if to be treated as a challenge to the favor because the party injured is not a party to the record, the favor upon the proof was apparent, and no circumstance was adduced to impair the force of the objection.

It is unnecessary to enquire what circumstances, if any, could obviate such an objection to the juror, treating it as a challenge to the favor merely. The 695 *distinction between the two kinds of challenge as applicable to such a cause is merely technical, as appears from Coke's remarks. The challenge would be principal if the relationship were to a party to the record. It becomes a challenge to the favor because the party injured is not such party to the record. But the object in each case is to secure an impartial jury; and it must be obvious to all conversant with criminal prosecutions, that the feelings of the party injured and of his relations, are generally more excited by a personal wrong or an injury to property resulting in a prosecution for felony, than in ordinary controversies involving mere questions of property. If the purpose of allowing the challenge be to guard against an influence of the passions most likely to pervert the judgment when deciding questions involving the character, liberty or life of the citizen, a person standing in the relation of a nephew by marriage to the party whose property is charged to have been destroyed by the incendiary, could not be considered as standing indifferent between the commonwealth and the accused. I think upon the facts as detailed in the bill of exceptions, the court erred in receiving Hiram J. Lynch as one of the panel, and that for this error the judgment should be reversed, the verdict set aside and a new trial awarded.

Several other questions were presented by the record, but as the judgment must be reversed and a new trial be had, upon which the facts may not be the same, it is unnecessary to express any opinion thereon.

The other judges concurred in the opinion of Allen, J.

Judgment reversed.

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696 *Anglea, &c. v. The Commonwealth.

April Term, 1853, Richmond.

1. **Conviction of Felony—Pardon and Release from Pains and Penalties—Effect upon Costs of Prosecution.**—A person convicted and sentenced for a felony, is afterwards pardoned by the executive, releasing him from all pains, penalties and forfeitures incurred by the conviction and sentence. Previous to the pardon an execution had been issued for the costs incurred in his prosecution by the commonwealth. HELD: That the pardon did not release him from these costs.
2. **Criminal Trials—Costs*—Statute—To What Applies.**—The statute only subjects the prisoner for such costs as the commonwealth is bound to pay; and therefore does not embrace the fees of the clerks, sheriffs or attorneys for the commonwealth.

*The principal case is cited and followed in Finch v. Com., 14 Gratt. 646. See also, monographic *note* on "Fines and Costs in Criminal Cases" appended to Piper v. Com., 14 Gratt. 710.

The case is fully stated in the opinion of Judge Lee.

Robinson, for the appellants.

The Attorney General, for the commonwealth.

LEE, J. On the 26th of June 1851 the plaintiff in error Anglea was convicted in the Circuit court of Lynchburg of murder in the second degree, and the term of his imprisonment in the penitentiary was ascertained by the jury to be five years; and on the 28th of June 1851 sentence was passed upon him by the court accordingly. On the 31st of December 1851 a pardon was granted him by the then executive of the commonwealth, in which it was declared that the governor had thought proper "to pardon the said Joseph Anglea for the crime and conviction aforesaid, hereby releasing him from all pains, penalties or forfeitures that might or would have been inflicted on him had these letters of pardon not been made." Previously to the emanation of this pardon, however, the clerk had taxed the expenses of prosecution, and had issued an execution for the same as 697 the law *directed. This execution was dated on the 21st of July 1851, and was returned by the sergeant of Lynchburg, "No effects." On the 11th of February 1852, after the pardon had been granted, another execution issued and was placed in the hands of the sergeant for collection. In his taxation of the expenses recoverable by the commonwealth, the clerk had included certain fees which he supposed were due to himself, to the clerk of the Hustings court, to the sergeant and to the attorney for the commonwealth in both the Hustings court and the Circuit court, amounting in the whole to the sum of thirty dollars and forty-five cents; and he made an endorsement to that effect upon the execution, specifying the amount due to each. The sheriff to whom this last execution was directed, levied the same upon property of the said Anglea; and he thereupon gave a delivery bond with the other plaintiff in error, William Ferguson, as his security. In computing the amount for which this bond should be taken it appears that the sheriff by mistake added the sum endorsed on the execution as payable to the different officers, to the amount of the execution, and took the bond for the whole, including also a commission on the said sum of thirty dollars and forty-five cents. The bond having been forfeited, a motion was made in the Circuit court of Lynchburg for award of execution thereon. The defendant appeared to contest said motion, and moved the court to quash the execution and bond upon the ground that the former had been illegally and irregularly issued, and the latter improperly exacted. The court, however, overruled the motion to quash, and awarded execution for the sum of four hundred and fifty-three dollars and thirty-seven cents, (the whole amount named in the bond,) with interest thereon from the 24th of February 1852 till paid and 698 costs. The defendants *thereupon excepted to the opinion of the court, setting forth the facts before stated by way of an agreed case: And it also appeared from the exception, that the attorney for the commonwealth in the Circuit court had released so much of the delivery bond as embraced the said sum of thirty dollars and forty-five cents, and the commission charged thereon. To this judgment a supersedeas has been awarded from this court.

It is laid down in 7 Bac. Ab. (Phila. ed. of 1846), p. 416, title "Pardon," letter H, that a pardon whether by the king or act of parliament removes not only the punishment but all the legal disabilities consequent on the crime. And in 2 Russ. on Crimes 975, the doctrine is stated in nearly the same terms. But it is manifest that it could not be intended to convey the idea that a pardon was equivalent in effect to a reversal of the judgment of conviction, and removed all the consequences of the crime and the conviction; because we know that in a variety of instances the effects of the conviction remain notwithstanding the pardon. Thus a pardon will not cure the corruption of blood under the English law caused by an attainder of treason or felony; nor will it relieve a forfeiture either of lands or goods arising upon such attainder. 2 Hawk. P. C. 549, sect. 54, 57; 7 Bac. Ab. 418. So if a man have been attainted of felony and afterwards pardoned, yet he shall not be sworn of an inquest, for that he is not probus et legalis homo. Brown v. Crashaw, Bulst. part 2, p. 154. Lord Hale says a pardon does not always make the man honest, and therefore he shall not be a juryman. 2 Hale's P. C. 278. So in New York, where persons adjudged to imprisonment for life in the state prison are declared "to be civilly dead to all intents and purposes in law," a pardon to a man so sentenced will not annul or affect a subsequent marriage of his wife, nor the 699 sale of his property by *persons appointed to administer on his estate, nor divest his heirs of the interest acquired in his estate in consequence of such his civil death. In the matter of Deming and his children, 10 John. R. 232. So it does not restore the competency of the offender convicted of perjury; and although in case of a conviction for felony, the competency is restored, yet it is said the crime still goes to the credibility of the witness. 1 Phil. Ev. 35; 2 Stark. Ev. 721. And a pardon will never release an interest that may be acquired by a private individual in a share of the penalty incurred. United States v. Lancaster, 4 Wash. C. C. R. 64; Rowe v. The State, 2 Bay's R. 565. Nor will it remit costs to which parties may be entitled. Ex parte McDonald, 2 Whart. R. 440. So in Massachusetts, a discharge from a former sentence in consequence of a pardon, will not protect the party against the additional punishment for a subsequent offence under the statute imposing additional punishment on convicts who had been discharged from former sentences in due

course of law. Evans v. The Commonwealth, 3 Metc. R. 453. And in Virginia it has been decided that a justice of the peace who is convicted of felony, forfeits his office, and is incapacitated from acting under his commission; and a pardon will neither avoid the forfeiture nor restore his capacity. Commonwealth v. Fugate, 2 Leigh 724. Other instances might be cited showing that a pardon of the offence is by no means equivalent in its effects to the reversal of the judgment.

In 1 Chit. C. L. 775 (New York ed. 1847) it is said that the effect of a pardon is to prevent the infliction of the punishment denounced, and also to give to the defendant a new capacity, credit and character. And Judge Blackstone says its effect is to make the offender a new man, to acquit him of all corporal penalties and forfeitures, and not so much to restore his former as to give him a new credit and capacity.
700 4 Bl. Com. *402. This I think gives a more correct idea of the operation and effect of a pardon than the language used in Bacon and Russell. For in fact though it relieves the party of all penalties directly annexed to the offence, yet it does very little towards removing the other consequences of the crime.

In regard to the construction of the terms of a pardon, we find it laid down as a settled rule, that no pardon of felony shall be carried beyond its express purport. 7 Bac. Ab. 411; 2 Hawk. P. C. 535, § 12. And that a pardon at the suit of the party is to be taken more strongly against him, but where granted mero motu, more strongly against the grantor. 17 Vin. Ab. title Prerogative, p. 19, 20, 27, 31, 36.

If the pardon in this case be tried by these rules, it cannot be made to extend to the remission of the costs of the prosecution. It was not the unsolicited act of the governor done of his own mere motion, because it was in answer to a petition that had been presented to him praying that it might be granted. It is not stated from whom the petition came, whether from the party himself or others, or from both; but in the absence of proof to the contrary, it may be assumed that he was a party petitioning. The language of the pardon is that "the governor has thought proper to pardon the said Anglea for the crime and conviction aforesaid, hereby releasing him from all pains, penalties and forfeitures that might or would have been inflicted on him but for the said pardon. Now, payment of the costs of the prosecution cannot be regarded as a pain, penalty or forfeiture, within the meaning of the pardon. The term "pain" imports some bodily suffering or corporal infliction; while the terms "penalty" and "forfeiture" are used to signify an involuntary transfer or surrender of a sum of money or of property, imposed by way of punishment for the commission of an offence against the law. Tom-
701 lin's Law Dict. titles *"Penalty and Forfeiture." But the payment of the costs of the prosecution is no part of the punishment prescribed by law for the commission of felony. It stands on a different footing from a pecuniary fine that may be imposed. The latter, when exacted, is not by way of compensation to the commonwealth for a loss or injury done by the perpetration of a criminal act. Money will not remunerate the commonwealth for the loss of the life of a citizen, or for an injury to his person or property; but the fine is imposed for the purpose of punishment, and thereby to deter the same party and others from committing similar violations. But with regard to costs it is different. They are exacted simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the state and its violated laws. It is money paid, laid out and expended for the purpose of repairing the consequences of the defendant's wrong. It is demanded of him for a good and sufficient consideration, and constitutes an item of debt from him to the commonwealth. Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offence. Indeed our statute expressly declares that the laws of costs shall not be interpreted as penal laws: they are to be construed as remedial statutes and liberally and beneficially expounded for the sake of the remedy which they administer. The right to enforce payment of them is a mere incident to the conviction, and thereby vested in the commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it. And it can make no substantial difference whether the money is going directly to the witnesses and others who are entitled to be paid for their services
702 in the *prosecution, or the commonwealth having paid them, stands by substitution in their place. Indeed where a party having a claim that may be included in the execution, fails to present it for the purpose in due time, it shall be disallowed. Code, ch. 210, § 12. And we have seen that a right either in the king or a subject shall not be divested by a pardon unless there be express words of restitution. 2 Hawk. 549, § 54. In the same book, at p. 546, the author, speaking of the effect of a pardon to discharge a suit in the spiritual court, says that if the time to which such pardon hath relation be prior to the award of costs to the party, it shall discharge them; and that though it be subsequent to the award of costs, yet if it be prior to the taxation of them, it shall discharge them, because nothing appears in certain to be due for costs before they are taxed. The converse of this proposition may be inferred to be also true, that if they have been taxed, the costs shall not be discharged. And if this doctrine is applicable to costs due the commonwealth here on a conviction of felony, then the costs in this case were not affected by the pardon, as they had been taxed and an ex-

ecution had issued for them before the pardon was granted.

In the case of a fine or amercement, our statute has sufficiently prevented the executive pardon from affecting the pecuniary interest of the commonwealth, by providing expressly that it shall not remit, either in whole or in part, any fine or amercement imposed by competent authority, excepting for certain contempts of court. Code of 1849, p. 106, § 20, 21. Now it can scarcely be supposed that while the legislature was thus carefully guarding against the governor's remitting a fine of even inconsiderable amount or any portion of a fine, that it would have made no provision against his remitting the costs of prosecution which might be hundreds or thousands of
703 dollars, if they had *for a moment supposed that his act of grace or exempting the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed, (as expressed by Ch. Justice Marshall in United States v. Wilson, 7 Peters' R. 150,) would also have the effect of releasing him from the obligation to reimburse the amount which had been actually paid out of the common treasury in consequence of his delinquency. This incident of a conviction for felony, we cannot but presume, was as familiar to the legislative mind as the payment of the pecuniary fine that might be assessed upon the offender; and it is not unreasonable to infer that after protecting the treasury against executive remission of pecuniary fines, great and small, it was contemplated that the whole function of a pardon would be exhausted in relieving the party from the corporal punishment and personal disabilities involved in his conviction. To extend its effect and make it operate as an acquittance for moneys due the commonwealth for expenses actually incurred and paid out of the treasury in vindication of the violated majesty of her laws, rendered necessary by the criminal act of the party himself, would be, I think, in contravention of the spirit of the act and of the intention of the legislature.

Since the introduction of this provision into the Code, the effect of a pardon in this state seems more nearly to approach that of satisfying the exigency of the sentence in respect of the corporal punishment imposed, than that of its reversal. This last places the party in statu quo ante, (if the corporal punishment has not been undergone,) as if such a judgment had never been rendered. But neither undergoing the corporal punishment nor a pardon of the crime operates to such an extent. By both, the party is restored to his personal liberty, and his competency as a witness is re-established; but neither takes away the guilt or
704 *washes out the moral stain; for as we have seen, the crime still goes to his credibility, of which the jury must judge; and in cases of conviction for perjury, neither restores even the competency as a witness. Neither now releases from the payment of any pecuniary fine that may have been assessed, still less, as I think, from the costs and expenses actually incurred and paid out of the treasury in bringing the offender to justice. If a case should occur in which justice requires that these should be remitted, the appeal should be made to the legislative authority to which the pecuniary interests of the commonwealth are properly confided. I think therefore the Circuit court did not err in holding the pardon shown in evidence in this case, to be no sufficient answer to the demand of the commonwealth.

But I am of opinion that the Circuit court did err in the amount for which judgment was given. It clearly appeared that the sheriff who levied the execution and took the forthcoming bond, by mistake included in the amount for which it was taken, the fees which were endorsed upon the execution by the clerk, and included in the amount for which it issued; and indeed the attorney for the commonwealth in the Circuit court, convinced of the error, released the amount of those fees and the commission which the sheriff had charged thereon. But I am further of opinion that the clerk of the Circuit court erred in including those fees in the execution. The act provides (Code of 1849, p. 783, § 11), that in every criminal case, the clerk of the court in which the accused is convicted, shall make up a statement of all the expenses incident to the prosecution, including those which are incident to any proceeding preliminary to conviction in another court, which are payable out of the treasury. This provision was adopted from that of the act of 1819, (1 Rev. Code 1819, p. 608, § 31,) amended
705 by *the act of March 11, 1832, (Sess. Acts, p. 49, § 2,) and re-enacted at the revisal of the criminal code in 1848, chap. 23, § 12. (Sess. Acts 1847-8, p. 157.) The costs and expenses for which the convict's estate was thus made liable, were those with which the commonwealth was chargeable, such as jail fees, charges for dieting, guards and transportation accruing before conviction, compensation to witnesses and jurors, fees to constables for arresting accused and summoning witnesses; but not fees to the officer of either court, the attorney for the commonwealth, the clerk and the sheriff. The act of 1848, before cited, § 18, expressly provided that the commonwealth should not be liable to any attorney, clerk or sheriff for his fees in any criminal prosecution, but that the same should be deemed to be included in the allowance made to such attorney, clerk or sheriff for public services, unless where otherwise provided by law. By the Code of 1849, p. 783, § 12, and p. 699, § 16, it is expressly provided that no fee to any attorney for the commonwealth, clerk, sheriff or sergeant shall be payable out of the treasury, except where expressly provided. At p. 702, § 29, it is provided that for services rendered the commonwealth in a civil case, the clerk shall be entitled to the same fees as would be charged for like services rendered to an individual, and for other public service he is to receive a stated sum to be al-

lowed by the court. By § 30, on same page, compensation to the sheriff is provided for arresting a party charged with felony and conveying him to jail, also for the support of the prisoner and for guards. But no provision is made for the ordinary fees of the clerk or a sheriff in a case of felony, whether the prisoner be convicted or otherwise: For the § 16, at p. 707, providing for taxing fees of attorney, clerk and other officers of the court, only applies to prosecutions for misdemeanors, as expressly
706 declared in the corresponding *provision in the act of 1848, (Sess. Acts, p. 158, § 18,) or cases in which there is a judgment or decree on behalf of the commonwealth for costs; terms inappropriate to a case of felony in which no judgment for costs is pronounced, and shown by all the antecedents of the existing provisions of the law on the subject, to be intended to apply to civil cases and misdemeanors only. I think therefore that in this case the attorney from the commonwealth, clerk and sergeant were not entitled to claim payment of fees out of the treasury, (such as were chargeable in civil cases, or in misdemeanors where the defendant was convicted, as distinguished from special allowances made by the court;) and that the commonwealth not being chargeable with the same, they should not have been included by the clerk in his taxation of the costs for which execution was to issue.

A doubt has been suggested as to the jurisdiction of this court in this case, the subject matter of controversy being less than five hundred dollars in amount; and at first I thought it might be a matter of serious question. Further reflection has, however, satisfied me that the doubt is without any real foundation. I regard the collection of the costs as an incident to the sentence of the court in the exercise of its criminal jurisdiction. Had its jurisdiction been of that character alone, the execution must have issued from it and been returnable to it, and if a forthcoming bond be given by it, award of execution must be granted. Every appeal from its judgment must be from what is done in the exercise of criminal jurisdiction, and of course comes to this court, (since the transfer to it of the appellate jurisdiction of the former General court,) without regard to the amount in controversy. The authority of the court to enforce the collection of costs in such a case derives some support from the practice of the former District courts of chancery,
707 the *correctness of which has never been questioned, to award execution of forthcoming bonds taken under process emanating from that court, though the proceeding might seem to partake more of an action at law than a suit in equity.

For the reasons which I have endeavored to assign, I am of opinion to reverse the judgment of the Circuit court, and to proceed now to render judgment for the amount named in the forthcoming bond, after making the deductions herein before specified.

The other judges concurred in the opinion of Lee, J.

Judgment corrected.

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708 *Lazier v. The Commonwealth.

July Term, 1858, Lewisburg.

1. **Criminal Proceedings—Felony—Writ of Error—When Returnable.**—A writ of error awarded during term to a judgment in a case of felony, may be made returnable to any day of the term.
2. **Same—Defects in Form—How Taken Advantage of.**—In criminal causes the same defects or imperfections of form may be taken advantage of on a general as upon a special demurrer.
3. **Same—Indictments—Murder—Counts.***—In an indictment for murder there are two counts, in the second of which the offence is not set out as another offence. This is not error. See Code, p. 770, § 11.†
4. **Same—Same—Two Distinct Felonies Charged—Election.**—If two distinct felonies are charged in one indictment, it may be quashed, or the prosecutor will be compelled to elect for which offence he will proceed.
5. **Same—Same—Dates in Figures—Effect.**‡—It is not error that dates in an indictment are set out in figures instead of words. See Code, p. 770, § 11.†
6. **Same—Same—Murder—Surplusage—Case at Bar.**—An indictment for murder charges the wound to have been inflicted on the 9th of December, of which wound she on the said 14th of December died. The word "said" is surplusage, and its insertion is not a fatal defect.
7. **Same—Same—Same—Description of Wound.**§—In an indictment for murder it is not necessary to set out the length, breadth or depth of the wound. See Code, p. 770, § 10.†
8. **Same—Joint Indictment—Separate Trial—Witnesses—Competency.**—Two persons being jointly indicted for the same offence, and being tried separately, one is not an incompetent witness for the other by reason of the joint indictment. See Code, p. 752, § 21.

At the May term 1853 of the Circuit court for the county of Wood, Benoni Lazier and Hyatt Lazier were jointly indicted for the murder of Clemansa Devon. The indict-

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***Criminal Proceedings—Indictments—Counts.**—In an indictment for murder there are two counts, in the second of which the offence is not set out as another offence; this is not error. This proposition laid down in the third headnote of the principal case is quoted with approval in Hausenfluck v. Com., 85 Va. 711, 8 S. E. Rep. 663. See *foot-note* to Dowdy v. Com., 9 Gratt. 727. See monographic *note* on "Indictments" appended to Boyle v. Com., 14 Gratt. 674.

†See the opinion of JUDGE MONCURE for the provisions of the statute.

‡**Same—Same—Dates in Figures—Effect.**—For the proposition that it is not error to set out in the indictment the dates of the crime in figures instead of words, the principal case is cited and followed in Cady v. Com., 10 Gratt. 779. See monographic *note* on "Indictments" appended to Boyle v. Com., 14 Gratt. 674.

§**Same—Same—Proof—Variance.**—Upon the author-

ment contained two counts, in both of which the offence was described in nearly the same terms; and the second count did not set it out as another offence. In both counts, too, the dates were set out in figures; and in neither was the depth or length or width of the wound described. It was charged to have been made by a shot from a rifle
709 gun *on the knee of the right leg, on the right side thereof. In the first count, after setting out the infliction of the wound, it is said, "Of which mortal wound she, the said Clemansa Devon, from the said 9th day of December in the year aforesaid did languish, and languishing did live; on which said 14th day of December in the year 1852 the said Clemansa Devon, in the county aforesaid, of the said mortal wound died."

When the prisoners were brought into court, they demurred generally to the indictment and each count thereof; and the attorney for the commonwealth having joined in the demurrer, it was overruled by the court. They then pleaded "Not guilty," and elected to be tried separately. Benoni Lazier was thereupon put upon his trial; and the jury found him guilty of murder in the second degree, and fixed the term of his imprisonment in the penitentiary at fifteen years. Whereupon the court, overruling his motion for a new trial, sentenced him in accordance with the verdict.

In the progress of the trial the prisoner made several questions to the court which were overruled; and he excepted. The first was, that whilst the court was selecting twenty-four men for the panel, the attorney for the commonwealth insisted to have the question put to each juror, as he was sworn, whether his opinion was such as to prevent his convicting any one of an offence punishable with death. To this the prisoner objected, but the court overruled the objection.

Another question was, that a juror having in answer to a question by the court, stated that he had made up a decided opinion from rumor; the prisoner asked him whether the opinion was favorable or unfavorable to him; when the court interposed and told the prisoner that he could not be allowed to ask that question: And the juror was set aside.

Another question was as to the com-
710 petency of Hyatt *Lazier as a witness for the prisoner. He was jointly indicted with the prisoner; and had not been tried. The attorney for the commonwealth rested his objection solely on that ground; and the court sustained it, and excluded the witness.

And last the prisoner moved the court to instruct the jury to disregard the first count; which motion the court overruled.

The prisoner applied to this court for a writ of error at its present term, and the writ was granted, and made returnable to the same term.

Fisher, for the prisoner.

The Attorney General, for the commonwealth.

MONCURE, J. The indictment in this case is against Benoni Lazier and Hyatt Lazier, for the murder of Clemansa Devon, and contains two counts. The accused demurred generally to the indictment and each of the counts; and the attorney for the commonwealth joined in demurrer. The demurrers were overruled. The accused being then arraigned, severally pleaded not guilty, and elected to be tried separately. Benoni Lazier was tried first; and was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for fifteen years, the period by the jurors in their verdict ascertained: And this is a writ of error to the judgment against him.

The writ was awarded and made returnable during the present session of this court, but after the first day thereof; and a preliminary question was raised by the counsel for the plaintiff in error, whether it should not have been made returnable to the court on the first day of a term, or in the clerk's office to the first Monday in a month,
711 or to some rule day. This *question is answered by the Code, p. 642, § 2, which declares that "process awarded in court may be returnable as the court shall direct."

The first error assigned in the judgment is, that the court erred in overruling the demurrers: And this assignment of error I will now proceed to consider.

It was decided by the General court in the case of the Commonwealth v. Jackson, 2 Va. Cas. 501, that the act in 1 Rev. Code 1819, p. 511, § 101, taken from the English statute of 27 Eliz. ch. 5, declaring that the court shall not regard any other defect or imperfection in the pleadings than what shall be specially alleged in the demurrer as causes thereof, does not extend to criminal causes; and therefore, in such cases, defects or imperfections of form may be taken advantage of on general demurrer. The same construction should be put on the corresponding provision in our present Code, p. 650, § 31; and the same objection may still be made on a general, as on a special demurrer in a criminal case. There are provisions in the Code, however, dispensing with the necessity of formal allegations in an indictment; and declaring that "no indictment or other accusation shall be quashed, or deemed invalid," for any of certain enumerated causes. So far as these provisions extend, they cure the indictment against objection, however raised; and they seem to extend to most if not all defects of form.

One of the objections taken to the indictment is, that the two counts appear to be for the same murder; whereas the joinder of several counts in one indictment is al-

ity of the principal case that it is not necessary to set out the length, breadth and depth of the wound, it was held in Curtis v. Com., 87 Va. 598, 13 S. E. Rep. 78, that it was not necessary to prove that the wound was in the same part of the body in which it was alleged to have been. See Code 1887, sec. 3245.

lowed on the theory, that two or more offences of the same nature, on which the same or a similar judgment may be given, may be contained in different counts of the same indictment; and it should therefore appear in the form of stating the offence in the different counts, that they are for different offences; otherwise the indictment is demurrable for duplicity.

712 *It is usual to obviate this technical objection of duplicity, by inserting the word "other" before the subject of the offence in a second count. But it is not inserted in all cases, and its insertion in no case is indispensably necessary. It is not usual to insert it in indictments for murder; but the party murdered is described in all the counts as the same person, and the instrument of death is not always stated in the different counts to be a different instrument; nor can it be necessary that it should be so stated; for certainly different offences may be committed with the same instrument. The indictment in this case, so far as relates to this objection, conforms to precedents furnished by approved writers on criminal law. The objection, therefore, does not apply to the case. But if so technical an objection would ever have been sustained in any case in this state, it would not now; the Code, p. 770, § 11, having dispensed with the necessity of inserting in an indictment any allegation which is unnecessary to be proved. So far from its being necessary to prove that offences stated in different counts of an indictment are different offences, if they are in fact different, and are felonies, the indictment may be quashed, or the prosecutor compelled to elect for which offence he will proceed; though the indictment will not on that ground be demurrable.

Another objection taken to the indictment is that the dates are set out in figures instead of words.

It is certainly safer and more certain to set out dates in an indictment in words instead of figures. Figures are more easily altered than words, and are more apt to be illegible, either from obliteration, or not being plainly made. In practice, they are not often used in indictments, except in describing written instruments, though they sometimes are: And I do not think that at this day the use of them would be a fatal defect in an indictment, even at common law. In England it would be under the

713 statutes 4 Geo. 2, ch. 26, and 6 *Geo. 2, ch. 14, requiring all indictments to be in words, at length.

Wharton, in his American Criminal Law, p. 146, says that dates are more properly inserted in words written at length, than in Arabic characters; but a contrary practice will not vitiate an indictment. The cases which he cites, so far as I have had access to them, seem fully to sustain what he says. There are, no doubt, some American cases the other way, and 6 Blackf. R. 533, is cited as being so, by the counsel for the plaintiff in error. The preponderance of American cases, however, is decidedly in favor of the position of Wharton. But even if the use of figures, instead of words, in setting out the dates in this indictment would be a fatal defect at common law, it would not under our statute, Code, p. 770, § 11, which declares that no indictment or other accusation shall be quashed or deemed invalid for omitting to state, or stating imperfectly, the time at which the offence was committed, when time is not the essence of the offence.

An objection taken to the first count is, that it is insensible, or contradictory and repugnant, in speaking of the "aforesaid 14th day of December," when no other day than the 9th of December is before mentioned.

It is sufficient in regard to this objection to say, that even if it would have been valid at common law, it is not under our statute, Code, p. 770, § 11, which declares that no indictment or other accusation shall be quashed or deemed invalid for omitting to state or stating imperfectly the time, &c., or for the omission or insertion of words of mere form or surplusage. The word "aforesaid," before the "14th day of December," is mere surplusage, and its insertion therefore is not a fatal defect.

Another objection taken to the first

714 count is, that *the length, breadth and depth of the wound is not set out therein.

The common law requires that the manner in which, or the means by which, the death of the deceased was caused, at least if known to the grand jurors, should be set forth in an indictment for murder. This requisition often renders several counts and long and particular statements in an indictment for murder necessary; and, after all, sometimes leads to an acquittal, by means of a fatal variance. In England this needless and mischievous requisition has been wisely dispensed with by st. 14 & 15 Vict. ch. 100, § 4; and the length of an indictment for murder in that country is now but four lines. For this statute, and a statement of its advantages, see 2d Arch. Crim. Practice and Pleadings, p. 200-1, 2, and note (1), Waterman's American edition 1853. Our Code has, to some extent, modified this common law requisition.

Where the death of the deceased was caused by a wound inflicted by the accused, it was formerly held in England that the length and depth of the wound should generally, but need not always, be stated. But this doctrine has been recently overruled. In Rex v. Mosley, 1 Moody's R. 98, 2 British Crown Cases, the judges held that although they might have felt great difficulty had the precedents been uniform, yet as there were precedents against the objection, they might consider, whether common sense required a statement of these particulars; and as the statement, if introduced, need not be proved, they thought it unnecessary. Upon the authority of this case, where an indictment stated the length and breadth of a wound, but not the depth, and it was objected that as there was only one wound,

the depth ought to be stated, it was held that it was not necessary; for if common sense did not require it where there were several wounds, (as in Mosley's Case,) common sense did not require it where
715 there *was only one. Rex v. Tomlinson, 6 Car. & Payne 370. So where an indictment merely alleged the giving of "one mortal bruise," and it was urged that the dimensions of the bruise ought to have been described, Parke said, "I am disposed to go further than the judges in Mosley's Case, and to say that it is not necessary to describe the bruises at all; such rule being in my judgment most consistent with common sense." Turner's Case, 1 Lewin 177. See note to Archbold's Crim. Pr. before cited. I would say, therefore, that even at common law, the omission to set forth the length and depth of the wound would in no case be fatal. But if it would at common law, I am of opinion that it would not under the Code, p. 770, § 10, which declares, that "all allegations unnecessary to be proved, may be omitted in any indictment or other accusation." It is not only unnecessary to prove the length and depth of the wound, as alleged in the indictment, but even that it was in the same part of the body in which it is alleged to have been.

These are all the objections which were taken to the indictment or either of the counts; and being all unsustainable, and the indictment being in my opinion free from just ground of exception in all respects, I think the demurrers were rightly overruled.

A bill of exceptions was taken by the prisoner to several opinions given by the court in the course of the proceedings and trial, one of which was the opinion of the court overruling the motion of the prisoner to instruct the jury to disregard the first count, which he alleged to be faulty. This is not assigned as error in the petition, but was relied on as such in the argument of the counsel of the plaintiff in error. Being of opinion, as before stated, that the demurrer to the first count was properly overruled, I am of course of opinion that the count
716 is not faulty, *and the court was therefore right in refusing to instruct the jury to disregard it.

Another of the opinions given on the trial and set out in the bill of exceptions, was the opinion of the court refusing to permit Hyatt Lazier, who was jointly indicted with the prisoner and not then tried, to be examined as a witness; he being objected to by the attorney for the commonwealth only on the ground that he was jointly indicted with the prisoner. This is assigned in the petition as one of the errors in the judgment; and I will now proceed to consider it.

It was a well settled though technical rule of evidence at common law, that a party in the same indictment could not be a witness for his codefendant until he had been first acquitted, or, in some cases, convicted, whether the defendants were jointly or severally tried. This rule was recognized as the law of this state in Campbell's Case, 2 Va. Cas. 314; and has been recognized by the courts of some of our sister states. The People v. Bill, 10 John. R. 95; State v. Smith, 2 Ired. R. 402; Commonwealth v. Marsh, 10 Pick. R. 57. This was an unreasonable rule so far as it rendered the party incompetent as a witness for his codefendant when tried severally, merely on the ground of his being joined in the same indictment. If severally indicted, he was competent; and yet he had the same interest in the subject matter and event of the prosecution in that case as in the case of a joint indictment; for in neither case was the judgment against his codefendant evidence against him. There was no reason, therefore, for a different rule in the two cases; and it seemed to be proper to make the rule uniform in both. Accordingly, the legislature declared in the Code, p. 752, § 21, that "No person who is not jointly tried
717 with the defendant *shall be incompetent to testify in any prosecution, by reason of interest in the subject matter thereof." I think one of the objects of the legislature in this section was, and its fair and reasonable construction is, to remove the objection of incompetency arising from the fact that the defendants are jointly indicted, in all cases in which they are severally tried; and to place them on the same footing in regard to competency as if they had been severally indicted. There could be no doubt of this but for the words, "by reason of interest in the subject matter thereof," at the conclusion of the section. It seems to be supposed that these words were used to limit the removal of the restriction to those cases in which the party has an interest in the "subject matter," as contradistinguished from the event of the prosecution. But it would be strange if the legislature intended to remove the restriction where the party has an interest in the subject matter of the prosecution, and let it remain where he has no such interest. The words were used in no such restrictive sense; and are susceptible of an explanation which is consistent with the construction I have placed on the section. The legislature did not intend to make the party competent as a witness, notwithstanding any objection that might otherwise be made against him. If it had so intended, the words in question would have been omitted. It intended merely to remove one ground of incompetency, and let any other which might exist remain unaffected. The party might be incompetent from infamy or other legal cause. It was therefore necessary to use the words in question, or other similar words which might have the effect of limiting the restoration of competency according to the legislative intention. Other and perhaps more appropriate words would have been used if the legislature had merely intended to apply the section to the case of a person jointly indicted, but not jointly
718 tried, *with the defendant. In that case the words of the section probably would have been, "No person jointly indicted, but not jointly tried, with the de-

fendant, shall be incompetent to testify in any prosecution by reason of his being so jointly indicted." But the object of the section was much larger than this. It was intended to be applied to any person interested in the subject matter of the prosecution and not jointly tried with the defendant, whether jointly indicted or not, or whether concerned as an accomplice or otherwise, in the offence or not; and therefore words were used which were applicable to all the cases in the legislative mind. An accomplice is certainly interested in some sense in the subject matter of the prosecution; and his incompetency as a witness rested on that ground.

A brief history of this section may serve to account for its phraseology. It was formerly held that the party whose signature was forged was not a competent witness for the prosecution on an indictment for the forgery. Though interested in the subject matter, he was not directly interested in the event of the prosecution; as the judgment therein could not be evidence for or against him in any suit on the instrument charged to be forged: And on principle, therefore, there was no good ground for his incompetency. But the rule of evidence was considered to be too firmly fixed to be altered, except by legislation; and a statute was therefore made for that purpose in England. In this state a similar statute was made at the revisal of 1819; the act "for punishing persons guilty of certain thefts and forgeries and the destruction or concealment of wills" providing, that "in any prosecution under this act, or for any forging or counterfeiting whatsoever, the testimony of no person shall be rejected on account of his interest in the subject, unless he be a party defendant to the prosecution. In the act of 1847-8, sometimes called the Criminal Code, this provision of the 719 *act of 1819, with some modifications, was adopted as a general provision, and was not confined to offences of forgery and the like. Sess. Acts, p. 124, § 33. The words of that act are, "No person, unless he be a party defendant therein, and jointly indicted, shall be incompetent to testify in support of any prosecution whatever, by reason of any interest which he may have in the subject matter thereof." The words "interest in the subject matter," contained in the act of 1819, and peculiarly appropriate thereto, were thus substantially retained in the act of 1847-8, to which, in its extended application, they were still appropriate. The act of 1847-8 was limited to witnesses "in support of any prosecution. It left the defect of the common law rule of evidence recognized in Campbell's Case, entirely uncured. The provision in the Code, p. 752, § 21, so modifies the act of 1847-8 as to cure that defect; but substantially retains so much of the phraseology of that act as was not inconsistent with the object in view: And hence the words, "by reason of interest in the subject matter thereof," are found in the provision contained in the Code; but are as appropriate to all the objects of the law as any other words that could have been used.

But it is argued by the Attorney General, that codefendants in a joint indictment are jointly liable, in case of conviction, whether it be joint or several, for all the expenses incident to the prosecution; Code, p. 783, § 11; and that this liability creates an interest in the event, as contradistinguished from "the subject matter" of the prosecution, which renders such codefendants, though severally tried, incompetent witnesses for each other, notwithstanding the provision in the Code, p. 752, § 21. It seems to me that, in contemplation of law at least, the witness would be testifying against his interest; which would be, to convict his codefendant, who would 720 then be bound with him for *the costs in case of his own conviction. A judgment of acquittal of his codefendant could not be used as evidence in his favor on his own trial, and therefore he would not be benefited by his acquittal. But even if this liability for costs created such an interest in the event of the prosecution as would render a person incompetent as a witness, according to the general rule of evidence on that subject, it would not have that effect in this case. For, to give it such effect would, to a great extent, avoid the operation of the provision in the Code, before referred to. If I am right in saying that one of the objects of that provision was to render codefendants in an indictment who are severally tried, competent witnesses for each other, if subject to no other objection than that of their being jointly indicted, that object would be entirely thwarted, if the liability for costs would render them incompetent. And thus one provision of the Code would have the effect of defeating another. The legislature intended to render them competent, notwithstanding their liability for costs; which, if not a part of the subject matter of the prosecution, are at least an incident thereto.

There are many cases in which a party, having an interest in the event of a prosecution, is still a competent witness. Wherever it appears, expressly or by implication, to be the intention of the legislature that he should be a competent witness, he will accordingly be so. Prosecutors, though liable for costs, are competent witnesses. Where prosecutors are entitled to rewards in case of conviction, they are still competent: The objection goes only to their credibility. "It was upon the principle that the exclusion of persons entitled to reward would be inconsistent with the spirit of the acts giving the rewards, and against the grounds of public policy, that their competence was virtually continued. Per Cur. in King v. Williams, 9 Barn. & 721 *Cress. 556, 17 Eng. C. L. R. 440; Roscoe's Crim. Ev. 139. I am therefore of opinion that the court erred in refusing to permit Hyatt Lazier to be sworn or to testify in the cause.

Errors are assigned in various other opin-

ions given by the court in the course of the trial; but I deem it unnecessary to consider them, as the questions on which these opinions were given may not arise in a future trial.

I think the judgment should be reversed, the verdict set aside, and the cause remanded for a new trial; on which Hyatt Lazier is to be admitted as a witness, if again offered by the prisoner, and there be no other objection to his competency than that of his being jointly indicted with the prisoner.

The other judges concurred in the opinion of Moncure, J.

Judgment reversed.

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722 *Brogy v. The Commonwealth.

July Term, 1853, Lewisburg.

1. **Criminal Law—Rape—Identity of Prisoner—Case at Bar.**—On a trial for rape the main question is as to the identity of the prisoner. The female is examined, and although she swears positively that the prisoner is the person who committed the outrage upon her, she declines to give a description of him as at the time of the outrage. The commonwealth then introduces a witness to prove the particulars of the description of the person who committed the outrage, given by the female to the witness on the morning after the rape was committed, and before she had seen the prisoner, in corroboration of proof of the *causa scientiæ* of the female witness.

HELD:

1. **Same—Same—Evidence—Recent Complaint of Victim—Particulars of.**—Though it is competent to prove the fact of a recent complaint by the female for the purpose of sustaining her credit, it is not competent to prove the particulars of her complaint: And so it is not competent to prove the particulars of the description given by her.

2. **Same—Same—Refusal to Give Description of Person upon Oath—Effect.**—The female having declined to give a description of the person who committed the outrage when upon oath, it is not competent to prove the description given by her when not upon oath.

2. **Same—Evidence—Absence of Witness—Testimony at Former Trial—Admissibility.***—A witness for the prisoner who had given evidence at a former trial, is absent from the commonwealth at the second trial. It is not competent for the prisoner to prove what the witness swore to on the former trial.

The case is stated in the opinion of Judge Allen.

Baldwin and Michie, for the prisoner.

The Attorney General, for the commonwealth.

ALLEN, J. At the November term of the Circuit court of Augusta county in the year 1852, Matthew Brogy was indicted for a rape. Being arraigned, he pleaded not guilty; and a jury was impaneled to try him; but not being able to agree, the jury was discharged. At the June term 723 1853 he was again *put upon his trial, found guilty and sentenced to the penitentiary for the period of ten years. In the progress of the trial the counsel of the prisoner tendered two bills of exceptions to rulings of the court; and after the verdict he moved the court to set it aside and grant

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*Criminal Law—Evidence—Witness Absent from State—Evidence on Former Trial—Admissibility.—The principal case holds that it is not competent for the prisoner to prove what a witness swore to at a former trial, when at a second trial such witness is absent from the commonwealth. See, in accord with the principal case, Finn v. Com., 5 Rand. 701, as to criminal cases when the witness is out of the state. The decision of the principal case is based upon this case.

In Crite v. Com., 1 Va. Dec. 423, citing the principal case, it is held, on a trial for murder, the evidence of a witness taken down at the coroner's *inquest*, but who was not recognized and who has since removed beyond the jurisdiction of the court cannot be read, but it is left a quære as to whether it could be read if the witness was dead. See also, Whitehurst v. Com., 79 Va. 556.

In United States v. Angell, 11 Fed. Rep. 34, the principal case is followed, and at page 42, the court says: "In Finn v. Com., 5 Rand. 701, it is said that proof of what a witness said upon a former trial is inadmissible in a criminal prosecution, especially where he has only removed out of the state. The same was held in New York, in the case of People v. Newman, 5 Hill 295. So also, in *Brogy v. Com., 10 Gratt.* (*Va.*) 722; in Bergin v. People, 17 Ill. 426; in State v. Houser, 28 Mo. 233; and these are all the American criminal cases I have been able to find on this point. I have found no case where the testimony of a witness, absent but living, given at a former trial, has been allowed to be proved at a subsequent trial."

Civil Cases—Evidence—Witness Dead—Testimony at Former Trial—Admissibility.—The evidence of a witness given on a former trial of a civil case, who has since died, may be proven on a subsequent trial of the case. Carrico v. W. Va. R. R. Co., 39 W. Va. 86, 19 S. E. Rep. 571, citing Finn's Case, 5 Rand. 701, and *Brogy's Case, 10 Gratt.* 722, and following the dicta there laid down as to civil cases. In Mattox v. U. S., 15 Sup. Ct. Rep. 337, the same rule was laid down in regard to civil cases as in Carrico v. W. Va. R. R. Co., and in commenting on the principal case, at page 339, it is said: "As to the practice in this country, we know of none of the states in which such testimony is now held to be inadmissible. In the cases of Finn v. Com., 5 Rand. (Va.) 701; Mendum v. Com., 6 Rand. (Va.) 704, and *Brogy v. Com., 10 Gratt.* 722, the witnesses who had testified on the former trial were not dead, but were out of the state, and the testimony was held by the court of appeals of Virginia to be inadmissible, though the argument of the court indicated that the result would have been the same if they had been dead."

See also, Lee v. Hill, 87 Va. 497, 12 S. E. Rep. 1052; Caton v. Lenox, 5 Rand. 31, where it is said in the first headnote: "Where a witness has given evidence in a suit, in which a new trial is granted, and the witness dies before the second trial, the substance of his testimony may be proved on the second trial, and it is not necessary to repeat his *very words*."

See discussion of this subject in 2 Va. Law Reg. 807; 6 Va. Law Reg. 802. See monographic *note* on "Constitutional Law."

a new trial of the cause upon the ground that the verdict was contrary to evidence; which motion the court overruled. To this decision the prisoner tendered his bill of exceptions, setting out all the evidence introduced at the trial, which was signed by the judge. To this judgment the prisoner has obtained a writ of error from this court.

The first error assigned is to the decision of the court admitting the evidence of the witness Jas. J. A. Trotter, as complained of in the first bill of exceptions. That bill of exceptions sets out at length the testimony given at the trial by the female upon whom the outrage was committed tending to prove that the offence had been committed, by the prisoner and two others, who have been convicted, near the line of the railroad. And it would seem that the principal question before the jury, after the proof of the commission of the offence, was the identity of the perpetrators. The transaction occurred in the vicinity of the Irish shanties on the line of the railroad. The witness deposed that she had never seen any of the men before. That she took very particular notice of the faces of the men. That she recollected no particular marks about any of them, except Halon (a fourth person who had been tried and acquitted of this offence). That Halon had a blot or blemish in his eye: That she could not say what the color of their clothing was, whether they had hats or caps on, or were bare headed, nor whether they had coats on. That she heard no conversation among the men, and did not hear the prisoner say anything.

The witness further stated, that 724 she was certain *that the prisoner at the bar was the second man who violated her, and that she was equally certain as to the other man. That she felt sure, before she heard of any arrest, that she could identify them. That she did not recollect of having given any description of the men to any one. That on the next day, when she came to Staunton, she recognized Halon by the spot in his eye, and the other three by their features, and pointed them out to the magistrate in the order in which they violated her.

After sundry other witnesses had been examined, the commonwealth introduced the witness Trotter, and proposed proving by him that on the next morning after the perpetration of the outrage, he received from the female witness, before she had seen the men who were arrested, and while on the way to Staunton to attend the examination before a justice, a description of the persons who committed the outrage upon her; and proposed proving further the particulars of that description. To the introduction of which evidence the prisoner by his counsel objected, upon the ground:

First. That it was no part of the res gestæ.

Second. That the particular description said to have been given by the female witness was inadmissible, even in confirmation of her testimony.

Third. Because she had given such description when not on oath, and now in her testimony upon oath declining to give any description of any of the persons engaged, except the man Halon.

But the court overruled the objections of the prisoner, and admitted the evidence to go before the jury in corroboration or proof of the causa scientiæ of the witness.

It does not appear from the bill of exceptions in what manner the statements of the witness above referred to were given, 725 whether upon her examination *in chief or on her cross examination. She swears positively that she was certain the prisoner at the bar was the second man who violated her; and that she was equally certain as to the other men; but she recollected no particular marks about any of them except Halon, who had a spot or blemish in his eye. And in the third objection taken by the counsel of the prisoner, it is set forth that the witness now in her testimony on oath declined to give any description of the persons engaged except Halon. The evidence, therefore, of the witness Trotter tended to prove the only doubtful fact in issue, the identity of the prisoner; and this by furnishing a particular of description given by the principal witness the day after the transaction; but which that witness could not or would not swear to on the trial.

But although she declined swearing to the particulars of description, yet it is maintained that being sworn to by independent witnesses, it is proper to go before the jury.

The bill of exceptions does not disclose what were the particulars of description which the testimony of the witness tended to prove. But being offered in corroboration or proof of the truth of her knowledge of the identity of the prisoner; and as he was standing at the bar in the presence of the jury, the particulars probably conformed to his appearance.

As a general and almost invariable rule, the previous declarations of a witness not under oath cannot be given in evidence either as proof of substantive independent facts, or as confirmatory testimony, except in special cases. In prosecutions for rape the fact that the person injured made complaint recently after the commission of the offence, is admissible, and the absence of such complaint would be suspicious. The proof of such offences depends in a great measure upon the testimony of a sin- 726 gle witness, and therefore *every test should be applied to her integrity for the safety of the accused. Proof therefore of a recent complaint is original evidence, if the party injured has been examined. So is also the state and appearance of the female, any marks of violence, and the condition of her dress shortly after the occurrence. But the fact of complaint is admissible for the purpose only of repelling the suspicion which grows out of the position of the witness; and this purpose is fully attained by the proof of the complaint

as a substantive fact. If it is carried beyond that point, then the rule which excludes hearsay and statements not under oath is violated without any sufficient reason.

In the case of The King v. Clarke, 3 Eng. C. L. R. 333, Holroyd, justice, decided that the fact of the complaint, as also a description of the state and appearance of the party injured, may be given in evidence; but that the particulars of complaint were not evidence as to the truth of her statements. Thus putting the mere fact of the complaint upon the same footing with the state and condition of the party injured, as original substantive facts to be weighed by the jury. But if the declarations of the injured party when not under oath, are also to be received as evidence of the facts which they purport to establish, the accused may be put in jeopardy by statements of facts not established by the sanction of an oath, or made in his presence. In the case of the Queen v. Megson, 38 Eng. C. L. R. 173, where the party injured died before trial, the court held that it was not competent to prove the particulars of the complaint made by her soon after the offence was committed, with a view of showing who the parties were who committed it. This in principle was similar to the case under consideration. There the evidence was lost by the death of the witness; here by the inability or refusal to give such particulars under oath. There it was
727 offered as *independent testimony with a view of showing who were the parties who committed the offence. And here it is offered as tending to prove the identity of the prisoner by giving evidence of particulars of description corresponding with his appearance, or with other evidence showing that the description as given corresponded with the appearance of the prisoner at that time. And where the injured party was absent it was held that it was not competent to prove she made complaint soon after the occurrence, because evidence of recent complaint is to confirm her testimony; but as she was absent her evidence was not before the jury to be confirmed. Queen v. Gutteridge, 38 Eng. C. L. R. 18; Queen v. Osborne, 41 Eng. C. L. R. 338.

I am not prepared to say that evidence of such complaint being made would not be proper as original testimony, although the party injured should not be examined as a witness. All testimony which proves a fact tending to establish a certain conclusion is confirmatory of other facts tending to prove the same fact. The judge, in the case of The King v. Clarke, ubi supra, seems to class the proof of fresh complaint and the appearance of the parties together, and treat all as independent testimony of original facts. But whether viewed as original or confirmatory evidence merely, does not affect the question here; and therefore I deem it unnecessary to express any opinion on the point. All the authorities referred to except the cases in Tennessee and Ohio, concur in holding that the particulars of the complaint are not admissible.

The foregoing cases decided, at nisi prius by a succession of able jurists, have given the rule in the English courts, and are referred to by all the elementary writers, English and American, as having placed it upon proper grounds. 1 Greenl. Evi.
728 § 102; 1 Russ. *on Crimes 688; 1 Phil. on Evi. 193; Roscoe's Crim. Evi. 23; Wharton's Amer. Crim. Law 245.

The Attorney General has referred us to a case decided in Tennessee and two cases in Ohio, in which it is supposed a different rule has been established. The first is the case of Phillips v. State, 9 Humph. R. 246. In that case the party injured was examined as a witness for the prosecution. After her examination, her husband was also examined as a witness for the prosecution, and was permitted to relate to the jury the statement of the circumstances and particulars of the alleged offence made to him by his wife recently after the perpetration thereof. From the statement of the case it seems the wife in her examination had stated the particulars, and the evidence of the husband proving similar statements to him shortly after the transaction, were admitted in confirmation of her testimony. The judge remarked that proof of the particulars of the complaint cannot be admitted as original evidence to prove the truth of the statements, or to establish the charge made against the prisoner; but that it was admissible for the purpose of testing the accuracy, as well as the veracity of the witness: And for this position a remark of the judge in the case of The Queen v. Megson is relied on. In that case the party injured having died, the court decided it was not competent to prove the particulars of the complaint with a view of showing who the parties were who committed the offence. And the judge in his opinion observed, that where the witness describes the outrage in the witness box, evidence of her complaint soon after the outrage, is admissible to show her credit and the accuracy of her recollection. The case did not call for any opinion upon the question, how far the particulars of description could be given in evidence for such a purpose; and the expression itself is somewhat equivocal; whether he is to be understood
729 *as meaning anything more than that the complaint itself was admissible for the purpose stated.

The case of Johnson v. The State, 17 Ohio R. 593, decides that the declarations in such case made immediately after the offence was committed, may be given in evidence to sustain her evidence given in court; but not as substantive testimony to prove the commission of the offence.

These decisions, it seems to me, carry the doctrine farther than is warranted by the true principle upon which such testimony is excepted from the general rule excluding all evidence of statements not under oath, and made in the absence of the party to be affected by them. That a female so injured should complain immediately is in consonance with all experience. The fail-

ure to complain whilst the injury was fresh would naturally excite suspicion that the charge was an afterthought. Evidence of the fact of complaint repels that suspicion affecting the credit of the witness; and the proof should not be permitted to go beyond the reason which permits its introduction.

Proof of declarations made by a witness out of court in corroboration of testimony given by him on the trial of a cause is as a general, almost universal rule, inadmissible. A different opinion at one time prevailed, and Hawkins states the rule to be, that what the witness has been heard to say at another time may be given in evidence in order to confirm or invalidate the testimony given in court. Hawk. P. C. book, 2, ch. 46, § 48. But in Parker's Case, 26 Eng. C. L. R. 95, the court decided that what a witness said when not on oath could not be admitted to confirm what he said upon oath; and that the passage in Hawkins was not law. Subsequent decisions have conformed to Parker's Case. In conformity with these latter decisions the rule is laid down in 2 Philips' Evi. 445, with one exception, which has no application to this case. "It *may be observed (he says) on this evidence in general, that a representation without oath can scarcely be considered as any confirmation of a statement on oath. It is the oath that confirms; and the bare assertion that requires confirmation." See also Robb v. Hackley, 23 Wend. R. 50. The principle of this rule would exclude all such particulars of description at the time of the complaint. And there can be no reason, as it seems to me, to distinguish the case of rape from any other case where the credit of the witness is assailed. Identity becomes a question in most cases of felony, and if besides evidence of the complaint as an independent fact, evidence of the particulars may be given to test the accuracy of the witness, the same reason would hold in every other case.

Even, however, if the case of rape did admit of the exception suggested in the cases referred to from Ohio and Tennessee, this case would not fall within the principle of those cases. They merely decide that where the witness is examined particulars of description contained in her complaint may be given in evidence to confirm her testimony. The proposition rests on the ground that in her examination on the trial, she has given such particulars; otherwise proof of them at a former time could not tend to corroborate the accuracy of her testimony. But in the present case, instead of making any such statement when on oath, she declined to do so; and the witness was introduced to prove particulars of description alleged to have been given by her when not on oath, and not in the presence of the prisoner: I do not perceive how this could be treated as confirmatory evidence merely. It was evidence of an independent fact proved by a different witness; and only tended to corroborate her testimony so far as the jury might believe the truth of such statement made to the witness on another occasion, as a fact proved in the cause. *In this case the evidence was objectionable on still another ground. I have heretofore considered it as though the substance of the statements made to the witness Trotter, constituted a part of the complaint of the injured party made immediately after the commission of the offence. The bill of exceptions shows that immediately after her escape from her ravishers, she fled to the house of Michael Yessler, which she reached about early candle light. That Yessler took her the same evening to Mrs. Kellar's. Whether she made complaint to Yessler, or to any one on arriving at Mrs. Kellar's, does not appear from this bill of exceptions, or that if testimony was offered of such complaint it was objected to. She further stated that she did not recollect of having given any description of the men to any one. She therefore gave no evidence of any complaint to the witness Trotter. Such complaint would naturally have been made to Yessler or to some one at Mrs. Kellar's. The proposition was to prove by the witness Trotter, not that she made complaint to him recently after the offence, or the particulars thereof, but the statements made to him the next morning, before she had seen the man arrested, and while on the way to Staunton to attend the examination before the justice, giving a description of the persons who committed the outrage upon her. Such statements could not be treated as part of the complaint which the law contemplates; and if they could be received as evidence, then any statements made by the party injured at any time before the trial would be admissible evidence upon a prosecution for rape. If so any declaration, no matter how exaggerated or corrupt, would be proper evidence for the consideration of the jury; whilst the party who made them, would escape all the responsibility resulting from the sanction of an oath. I think the evidence tendered was under the circumstances disclosed *in this bill of exceptions, inadmissible, and should not have been received.

The second bill of exceptions presents the question, Whether it was competent for the prisoner to prove what two persons had sworn to on a former trial of the cause; The witnesses having left the commonwealth before the second trial, and being beyond the jurisdiction of the court? This question was presented and directly decided by the General court as far back as 1827, in Finn's Case, 5 Rand. 701. The evidence there was offered to prove what Candler had sworn to at the called court; the attorney for the commonwealth having proved that the witness, though living, was beyond the jurisdiction of the court; having left the commonwealth soon after he was summoned to attend as a witness. It was offered in connection with an alleged admission of the prisoner that what the witness had sworn at the called court was true as far as he went, but that he had not told all, or

enough, when the prisoner was interrupted while speaking of the testimony. The court decided first that this interrupted conversation of the prisoner did not amount to a confession that the evidence was true; so that the admission of the prisoner laid no foundation for the introduction of the evidence. Having disposed of that proposition, the judge remarks, "A question, however, arises on this bill of exceptions of a graver and more important character. It is whether the evidence which Candler gave on the previous examination, can be admitted per se, and independently of the prisoner's confession; Candler having removed from the commonwealth." After stating that in civil cases where the witness is since dead, what he swore on a former trial may be given in evidence, the judge proceeds, "But we cannot find that the rule has ever been allowed in a criminal case; indeed it is said to be expressly 733 *decided otherwise:" And all the judges concurred in the opinion that the evidence was inadmissible.

This decision has never been controverted in Virginia since. The whole criminal code has since undergone a revision, but the rule, as laid down in Finn's Case, has been acquiesced in both by the courts and the legislature. I do not think it necessary therefore to go into the enquiry whether the rule was originally founded on proper principles or not. The rule has been established and recognized, and, I think, should be adhered to; and whether a foundation had been laid for its introduction or not, the evidence was properly excluded.

But for the error complained of in the first bill of exceptions, the judgment should be reversed, and a new trial awarded.

DANIEL and LEE, Js., concurred in the opinion of Allen, J.

MONCURE and SAMUELS, Js., dissented on the first point. They were for affirming the judgment.

Judgment reversed.

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734 *Smith v. The Commonwealth.

July Term, 1853, Lewisburg.

1. **Criminal Law—Evidence—Confessions—When Admissible—Case at Bar.**—On a trial for felony, a confession of the prisoner may be given in evidence, unless it appears that the confession was obtained from the party by some inducement of a worldly or temporal character in the nature of a threat, or promise of benefit, held out to him in respect of his escape from the consequences of the offence or the mitigation of the punishment, by a person in authority or with the apparent sanction of such person.
2. **Same—Same—Same—Persons in Authority.***—A person to whom a free negro is bound as apprentice, though a justice of the peace, if not acting as such, and no way affected by the offence, is not a person in authority in the sense of the rule which excludes confessions made to a person in authority.

This was an indictment in the Circuit court of Washington county against Benjamin Smith, a free negro, for a rape upon Margaret Trent, a white girl. Upon the first trial the jury was hung. On the second trial the prisoner was convicted and sentenced to be hung. On both trials the prisoner excepted to an opinion of the court admitting evidence of his confessions. It appears that the prisoner was raised by Andrew Edmonson, a magistrate of the county of Washington, and at the time of the confession he was an indented apprentice to Edmonson, and living with him. That when the constable came to the house of Edmonson to arrest the prisoner for the offence, the officer went to bed; and early the next morning before the prisoner had got up, the witness Edmonson went to the kitchen where the prisoner was asleep and called him up. When the prisoner got up, the witness sat down beside him and said to him solemnly, "The die is cast. The dog is dead. She (meaning the prosecutrix) has sworn it, and you must suffer. Now will you suffer and let Campbell es- 735 cape. Now I *want you to tell me the truth, the whole truth, and nothing but the truth; and I will save your neck if I can." And thereupon the prisoner made a full confession to the witness of his guilt. On the first trial, as the bill of exceptions set out, the witness stated, that at the time the prisoner seemed convulsed with fear.

The Campbell spoken of by the witness was a negro man who before this trial, had been tried, convicted and executed for a similar offence committed upon the same prosecutrix, and at the same time.

Upon the application of the prisoner, this court allowed a writ of error to the judgment.

J. W. Sheffey, for the prisoner.

The Attorney General, for the commonwealth.

LEE, J. There is confessedly some obscurity and confusion in the law upon the subject of confessions in criminal cases. The dicta of the English judges in many cases will be found wholly irreconcilable, and some of their reported decisions at nisi prius directly conflicting. Another difficulty in arriving at correct results arises from the fact that those judges, in delivering their opinions, have sometimes used language broad enough to cover other cases marked by very different circumstances, although no doubt intended by them to be

*Criminal Law—Evidence—Confessions—When Admissible—Persons in Authority.—On this question, see the principal case cited in Shiffiet v. Com., 14 Gratt. 658, and *note*; Thompson v. Com., 20 Gratt. 730, and *note*; Mitchell v. Com., 33 Gratt. 860, and *note*; Vaughan v. Com., 17 Gratt. 581. See also, *fool-note* to same case; Venable v. Com., 24 Gratt. 643; Page v. Com., 27 Gratt. 980; Wolf v. Com., 30 Gratt. 833, 840; Early v. Com., 86 Va. 928, 11 S. E. Rep. 795; United States v. Stone, 8 Fed. Rep. 259, 260; State v. Morgan, 35 W. Va. 267, 271, 13 S. E. Rep. 387, 389.

construed and understood with reference to the subject matter—the case in hand—of which they were treating. And the elementary writers, in giving the rules which they supposed to be fairly deducible from those opinions, have sometimes laid them down much too broadly by failing to advert to the restrictions imposed by the circumstances of the particular case. The dicta of judges at nisi prius are also frequently cited as authorities without reference to their agreement or disagreement with adjudicated cases, and the decisions are
736 given in a form so concise *and with a statement of the facts upon which they were pronounced so meagre and imperfect, that they can be entitled to little weight as authority. The rules too which are given by those writers, being deduced from dicta and decisions which cannot be reconciled among themselves, will be found to be in some instances directly conflicting.

Of this conflict of opinion among the English judges, repeated instances are to be met with in the reported cases, and some of them will be hereafter more particularly adverted to. Even with regard to the weight and degree of credit which a jury should attach to a confession of a party accused of crime, much difference of opinion has existed. In Warickshall's Case, 1 Leach 298, it is declared that a free and voluntary confession is deserving of the highest degree of credit, as flowing from the highest sense of guilt. So in Lambe's Case, 2 Leach 625, it is stated as the opinion of the judges, that it constitutes the highest and most satisfactory evidence of guilt. Chief Baron Gilbert says, that a voluntary confession is reckoned the best evidence; Gilb. Ev. 123; and such is the opinion of Erle, justice, expressed in Baldry's Case, 2 Denison's C. C. 430. On the other hand, Justice Foster regards hasty confessions as the weakest and most suspicious of all kinds of evidence. Foster's Crown Law 243. And of this opinion is Sir William Blackstone. 4 Bl. Com. 357. In Simon's Case, 6 Carr. & Payne 541, Alderson, baron, speaking of the admission of the party, says that it showed how little reliance was to be placed on evidence of that character. And in a note to the case of Earle et ux. v. Picken, 5 Carr. & Payne 542, Parke, justice, is reported to have remarked upon several different occasions upon his circuit, that too much weight ought not to be attached to evidence of this kind. A similar diversity of opinion will be found to have existed among
737 the judges in this country. *Perhaps no general proposition can be predicated concerning the weight and degree of credit to be given to a confession; because this must depend in every case upon the age, character and mental capacity of the party, and the share of education which he has enjoyed, and all the surrounding circumstances which attended it. And this seems to be the opinion of a learned writer on the law of evidence. 1 Greenl. Ev. § 215.

Whatever may be the degree of credit due to it, the confession of a party charged with a criminal offence is admissible testimony against him, being received upon the presumption that no one will make a statement contrary to his own interest if it be untrue. 1 Phil. Ev. 110. Hence when the circumstances are such as to overthrow that presumption and to leave it uncertain whether the statement be true or false, the law deems it better that it should be withdrawn from the jury, and the confession will accordingly be rejected. Per Campbell, C. J., and Pollock, C. B. Baldry's Case, 2 Denison's C. C. 430. It is therefore declared as the condition of the admissibility of a confession, that it be free and voluntary, and not made under the influence of such a bias upon the mind of the party as will in the judgment of the law, disturb the free exercise of volition, and destroy the presumption that the confession so made is true: And this, the judge and not the jury, is to determine.

What shall be said to constitute such an influence or bias on the mind as will serve to repel the presumption that the confession is true, and thus exclude it from the jury, has given occasion to much discussion and various opinions on the numerous cases reported in the books. And it must be confessed that in settling the doctrine upon this subject, rules of a highly artificial and somewhat arbitrary character have been applied by the courts. It may well
738 be questioned *whether, if the matter were res integra, it would not be better (as is the practice in Scotland, see Alison's Crim. Law of Scot. 581, 582), to suffer the whole to go to the jury to be weighed by them, and such degree of credit to be given to it as they shall deem it entitled to when considered in connection with the surrounding circumstances. My own experience, I confess, has not inculcated that distrust of the competency of juries to make proper discriminations which would seem to be implied in some of the rules which have prevailed upon this subject. Or, if it be determined that it is the province of the judge to say whether the confession is of such character as to be admissible as evidence, it may be doubted if it would not be better to permit him to decide the question upon his own view of all the circumstances, comprehending the nature of the confession itself, the character and condition of the party making it, and of him to whom it is made, and the time, place and manner in which it was so made, untrammeled by the artificial rules which have been established for his government. It has, however, been so long and firmly settled that the judge is to pass on the admissibility of the confession, and to be governed by certain prescribed principles in forming his judgment, that it is a matter now no longer to be drawn in question or disturbed; and we must abide by the doctrine as it is settled.

It has, however, been justly remarked that the decisions excluding confessions have gone to a length neither required by

justice nor warranted in reason or by sound policy. And this has been alluded to by learned judges in terms of regret and complaint. Parke, justice, has said "that the doctrine of inducements (under the supposed influence of which the confessions were regarded as having been made) has been carried to the verge of common 739 sense." See citation *1 Phil. Ev. 424, 8th ed. in note. In Baldry's Case, 2 Denison's C. C. 430, Erle, justice, says, "according to my judgment, in many cases where confessions have been excluded, justice and common sense have been sacrificed not at the shrine of mercy, but at the shrine of guilt." And in the same case, at p. 445, Parke, baron, in speaking of the inducements that had been held sufficient to vitiate confession, says, "The decisions to that effect have gone a long way."—"I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation of Mr. Pitt Taylor, that the rule has been extended quite too far, and that justice and common sense have too frequently been sacrificed at the shrine of mercy." See also 1 Greenl. Ev. § 219. And in the more recent cases the judges have plainly manifested a disposition not only not to carry the doctrine any further, but also to some extent to retrace their steps, and to adhere more closely to the proper discrimination to be made between the different kinds of inducements that may be supposed to have led to a confession, and the characters of the parties by whom the same may appear to have been held out.

The rule that may be fairly deduced from authoritative decisions upon the subject is, that a confession may be given in evidence unless it appear that it was obtained from the party by some inducement of a worldly or temporal character in the nature of a threat, or promise of benefit, held out to him in respect of his escape from the consequences of the offence or the mitigation of the punishment, by a person in authority, or with the apparent sanction of such a person.

The inducement must relate to 740 temporal or worldly *advantage as contradistinguished from exhortation or persuasion to confess with a view to spiritual benefit Gilham's Case, 1 Mood. C. C. 186; Sarah Nute's Case, 1 Burn's Justice 688, and cited 2 Russ. 832; Gibney's Case, cited Joy on Confessions, 57. And it must have been held out by or with the apparent sanction of some person holding such a relation to the party accused, or the offence, or the prosecution, as shall cast upon him the character of a person "in authority" in the matter.

It is true authority is to be found both in elementary treatises and in the reported dicta of judges, for the proposition that a confession can never be received in evidence where the party has been influenced by any threat or promise, without regard to the person by whom the threat or promise was made. The law is so stated broadly in 2 Stark. Ev. 48, (third Am. ed. 1830;) and for authorities, he refers to Warickshall's Case, 1 Leach's C. C. 298; Rudd's Case, 1 Cowper's R. 331, S. C. 1 Leach 115; and 2 Hawk. ch. 46, § 34, p. 595. But in Warickshall's Case, the promises which were supposed to have induced the confession, were made by the prosecutor who, it is agreed on all hands, is a person in authority within the meaning of the rule; and what is said by the court must be understood with reference to the actual case. In Rudd's Case a motion was made to admit the defendant to bail upon the ground of her having been received and examined as king's evidence by three magistrates who were acting as such in the matter, and were therefore persons in authority, and to whom she had, as alleged, made a disclosure of everything she knew under the faith and confidence reposed in them, and taking it for granted they were fully acquainted with the duty of their office: And the remarks of Lord Mansfield are to be understood with reference to the case then before him. The passage cited from Hawkins is shown 741 not *to have been any part of the text of Hawkins, but to have been introduced into the margin of some of the later editions. In Gilbert's Evidence, at p. 137, the same passage is to be found. But in Gilham's Case, 1 Moody C. C. 186, Parke, justice, remarked, that the passage does not appear to be by C. B. Gilbert; and that it was probably inserted by the editor Lofft. And in a note it is stated that in the early editions of Gilbert the passage certainly does not appear, and that the editor probably took it from the margin of the eighth edition of Hawkins. It is added that the Old Bailey Papers 1786, are referred to, but upon examination of them the passage in terms is not to be found. See Joy on Confessions, p. 31.

So in the case of The King v. Spencer and another, 7 Car. & Payne 776, Parke, baron, said there was a difference of opinion among the judges whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable, though he said he would receive it in that case and reserve the point. In Dunn's Case, 4 Car. & Payne 543, and in Slaughter's Case, reported in a note to the former, it was held by Bosanquet, justice, that any person telling a prisoner that it will be better for him to confess will always exclude any confession made to that person. In Kingston's Case, 4 Car. & Payne 387, a confession made to a surgeon who had told the prisoner she had better tell all she knew, was excluded. And this doctrine would seem to be supported by Walkley's Case, 6 Car. & Payne 175; Clewes' Case, 4 Car. & Payne 221; Thomas' Case, 6 Ibid. 353; Knapp's Case, 9 Pick. R. 496; and Guild's Case, 5 Halst. 163.

But in Row's Case, Russ. & Ry. C. C.

153, where the confession was induced by the advice of some of the prisoner's neighbors given in presence of the constable who had the prisoner in custody, but who at the time made no remark thereon, 742 it was held by the, nine *judges who were present, that the evidence was admissible and the conviction right, because the advice to confess was not given or sanctioned by any person who had any concern in the business; the persons who had given it having nothing to do with the apprehension, prosecution or examination of the prisoner. In Taylor's Case, 8 Car. & Payne 733, Patteson, J., said it was the opinion of the judges that a confession was admissible, unless there had been some inducement held out by some person in authority. The cases of Rex v. Gibbons, 1 Car. & Payne 97; Same v. Tyler & Finch, Ibid. 129; Same v. Hardwick, cited in a note to Gibbon's Case, and in 6 Peters Abr. 84, and Same v. Lingate, Ibid. are to the same effect. And in the recent case of Regina v. Moore, 2 Denison's C. C. 527, it is declared in the judgment of the court, (eight judges being present,) that a confession is clearly admissible, though obtained by threats or inducements, if such threats or inducements were held out by a person not in authority.

This, I take it, is now the well settled rule in England. I think it wise and salutary, and that it should be adhered to here. A different rule would cut off a most important, and in many instances, the only source of evidence by which the conviction and punishment of guilt can be secured. Nor do I apprehend that a party accused will be subjected to undue peril by its observance. The cases must be extremely rare in which parties under any influence whatever, will confess themselves guilty of crimes of which they are in fact innocent; although certainly there are a few such cases reported as having heretofore occurred in the annals of criminal jurisprudence. And it is for the jury to weigh the confession as well as all the other evidence in the cause, and to give to it exactly that degree of credit to which it is entitled, and no more: and that juries can perform 743 this duty, impartially and *discreetly, my experience and observation have not led me to entertain any serious doubts.

In the case before us, inducements were certainly held out to the prisoner to make confession; and those inducements were of the character contemplated by the rule. And he was a free negro and the apprentice by indenture of the witness to whom the confession was made, and it happened also that the master was a magistrate of the county in which he and the prisoner resided. And it is urged that by reason of his character of master, or of magistrate, or both, the witness was a person in authority within the meaning of the rule upon that subject.

In some of the elementary treatises on this subject it would seem to be stated broadly that the master or mistress of a prisoner is a person in authority within the meaning of the rule, in virtue of that character. Joy on Confessions, p. 5; 1 Pitt Taylor's Ev. 587. In Roscoe's Ev. p. 43, it is not stated so broadly. The author, in illustrating who are meant by persons in authority, mentions the prosecutor, constable, &c. In 1 Greenleaf's Ev. § 222, the author illustrates by the prosecutor or his wife, the prisoner being his servant, thus referring to the cases in which the confessions were excluded not simply because the inducements were held out by the prisoner's master or mistress, but because the master was also prosecutor. In 2 Russ. on Crimes, the author, describing those whose inducements would exclude a confession, says, "It would seem that all who are engaged in the apprehension, prosecution or examination of a prisoner," are considered persons in authority within the meaning of the rule. He then proceeds to give numerous illustrations, and among the rest enumerates "the master or mistress to a servant." Whether he means that being such master or mistress sufficed of itself to constitute the party such person in 744 authority, or that he *or she should be in some way engaged in the apprehension, prosecution or examination of the prisoner, is left somewhat uncertain. But upon examining the various cases in which the master or mistress has been held to be a person in authority, it will be found that in them all the offence in some way concerned the master or mistress, and that they were connected with the matter itself. Thus in Upchurch's Case, 1 Moody's C. C. 465, the prisoner was a domestic servant to the prosecutor who kept a beer-house. The prosecutor's wife lived with him and took her share in the management of the house, and it was by her the inducements to confess were held out. In Sarah Taylor's Case, 8 Car. and Payne 733, the offence was setting fire to the prosecutor's house, the prisoner being his servant; and the inducements to confess were held out in the presence of the wife of the prosecutor and owner of the house, who expressing no dissent, was therefore regarded as sanctioning the inducement. Simpson's Case, 1 Moody's C. C. 410, is to the same effect. In Warringham's Case, the offence was stealing from a shop; and the confession was induced by what was said by the mistress of the prisoner, who, it appeared, was in the habit of managing the shop. 2 Denison's C. C. 447, in note. In Parratt's Case, 4 Carr. and Payne, 570, the prisoner was a mariner, and was charged with having stolen a watch from a shipmate while on board their vessel, the watch having been found concealed in the cable. The captain of the ship threatened to commit him to jail immediately upon their arrival at New Castle, unless he would confess who his partner was, and the prisoner accordingly did make a confession. Here the felony was committed on board the vessel of which the party holding out the inducements was the master, and he had the right to arrest the prisoner and commit him to jail on

reasonable suspicion that he was the guilty party. In Carrington's Case, 745 *and Howell's Case, cited by Parke, baron, in delivering the opinion of the judges in Moore's Case, 2 Denison's C. C. 522, the same or a similar distinctive feature, we are told, will be found to exist. And in none of the cases which I have been able to find upon the subject, has the simple relation of master or mistress to a party making a confession under inducements, per se and unconnected with any other circumstance creating an interest or concern in the matter, been held sufficient to exclude the confession as made to a person in authority, within the meaning of the rule.

In the recent case of The Queen v. Moore, 2 Denison's C. C. 522, decided in 1852, the precise question arose as to the admissibility of a confession made to the prisoner's mistress, under inducements held out by her, the offence being unconnected with the person or property or dwelling-house of the master or mistress. The charge was infanticide, and the prisoner, under inducements held out by her mistress, had made a confession which was offered in evidence against her. Objection was made, but it was received by the court: and the prisoner (though acquitted of the murder) having been found guilty of the misdemeanor of concealing the birth of her child, the case was reserved for the consideration of the judges. The case was elaborately argued for the prisoner, and seems to have been very deliberately considered by the court. It was admitted by the counsel in argument, that in none of the cases where the inducement had been held to exclude the confession, was the offence unconnected with the person or property or dwelling-house of the master and mistress, as in the case before the court; but it was urged that for an offence of that character, committed in their house, no one would be more likely to interfere and become prosecutor than the master and mistress; for that if it were hushed up and they had been parties to the concealment of the offence, 746 *they would have subjected themselves to the charge of misprison of felony. It was also insisted that it was in the proper department of the wife to look after the morals of her female servants: that no one has so much authority over the mind of a maid servant as her mistress, and that the mistress, qua mistress should be said to be a person in authority. The argument, however, did not prevail; the court (eight judges present), held that it was only where the offence concerned the master or mistress that their holding out the threat or promise renders the confession inadmissible: and it was accordingly held that the evidence was properly received and the conviction right.

This case I regard as settling the rule in England, and I see no good reason for departing from it here.

I do not think the circumstance that the master happened to be a justice of the peace or magistrate of the county, should make any difference under the circumstances of this case. It cannot be doubted that the cases in which confessions have been excluded because of inducements held out by magistrates, were where such magistrates were in some way concerned in the arrest or examination of the party or otherwise connected with the prosecution, and where their official character was recognized and appreciated by him in connection with the matter. Such is the plain sense and reason of the rule, and none of the cases which I have found favors a different idea excepting possibly Clewe's Case, 4 Car. & Payne 221. And in that case, the interview had by the witness with the prisoner took place in his character of magistrate and clergyman, and his magisterial character was made known to the prisoner and recognized by him. But no question was made on this point, the counsel for the prosecution being content to rely upon a subsequent warning given to the prisoner that no mercy could be shown him, as sufficient to put an end 747 to any *hopes which he might have conceived founded upon what had previously passed between him and the witness: And the evidence was accordingly admitted. Here the witness Edmonson was taking no part in the arrest or examination of the prisoner, nor was he in any way concerned in the prosecution. The offence was not committed upon his premises, nor did it affect him or his rights of property in any way. He was not at all likely to become prosecutor, but to retain the services of his apprentice, might more probably be disposed to aid in his defence. It was in his character of master and a friend that he was recognized by the prisoner, and no allusion whatever was made to his magisterial character, nor was it so far as appears, at all present to the mind of the prisoner at the time. In fact it is not stated that the prisoner knew he was a magistrate.

I am by no means insensible to the force of the argument which has been so strenuously urged by the counsel for the plaintiff in error, founded upon the status of the prisoner, the extreme ignorance and dependence of that class upon those by whom they are held in service, and the actual state of terror and alarm into which the prisoner was thrown by the intelligence that his guilt had been discovered. With regard to this last mentioned matter, it might be enough to say that the bill of exceptions taken on the second trial, which is the subject of consideration here, does not state the appearance and condition of the prisoner at the time the confession was made, and that we are not at liberty to supply any facts by reference to the bill of exceptions taken on the first trial. But without placing too much stress on this, I think it is a sufficient answer to say that the evidence goes to the jury subject to observation by the prisoner's counsel upon any and every circumstance which may serve to impair its weight or the de- 748 gree of credit to which it is *entitled, and that the jury may disregard it

altogether if they shall think the circumstances are such as to deprive it of all weight; but no different rule as to its admissibility can be applied having reference to this particular class of persons without departure on the part of the court from its legitimate province, and an assumption of the power of making law as well as of expounding it.

I think that the Circuit court did not err in admitting the confession made to the witness Edmonson to go in evidence to the jury, and that the sentence of death passed on the prisoner should be affirmed.

ALLEN and SAMUELS, Js., concurred in the opinion of Lee, J.

DANIEL and MONCURE, Js., dissented.

Judgment affirmed.

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749 *Commonwealth v. Scott.

October Term, 1853, Richmond.

1. **Statute—Directing When Circuit Court Shall Be Held—Constitutionality of—Case at Bar.**—The act Sess. Acts of 1852, ch. 66, § 23, p. 58, which directs that the Circuit court of Henrico shall be held at the state court-house in the city of Richmond, is not in violation of the 7th section of the 6th article of the constitution of Virginia.*

2. **Intoxicating Liquors—Illegal Sale—Writ of Error—Right of Commonwealth to.**†—In a prosecution for selling ardent spirits by retail to be drunk at the place where sold, without having first obtained a license to keep an ordinary, a writ of error lies for the commonwealth from the judgment of an inferior court.*

3. **Same—Same—Presentment—Immaterial Plea—Case at Bar.**—The presentment in such a case describes the defendant as a free negro; as for this offence, white persons, Indians and free negroes are to be prosecuted and punished in the same manner, a plea that the defendant is an Indian and not a free negro, is an immaterial plea, and was properly excluded.

4. **Same—Same—Same—Changing Plea.**‡—The presentment was made at the March term 1851 of the County court, and at the May term the defendant appeared and demurred to the presentment, and the demurrer was overruled; and he then pleaded not guilty. At the August term 1852 when the cause was called for trial, he moved for leave to withdraw his plea of not guilty, and plead that he was not a free negro, but an Indian. HELD: The plea was tendered too late even if it was a good plea.

5. **Same—Same—Same.**—It was not necessary for the commonwealth to prove that the defendant was a free negro.

This case comes up on a writ of error awarded at the instance of the commonwealth, to a judgment of the Circuit court of Henrico, whereby a judgment of the County court of Henrico in favor of the commonwealth against said Scott was reversed.

On the 8th March 1851, William Scott sen'r was presented in said County court for retailing ardent spirits to be drunk at the place where sold without
750 *having first obtained a license to keep an ordinary at the place of sale. By the presentment, the grand jury present "William Scott sen'r, a free negro, for, &c." A summons being issued and executed, the defendant appeared on the 8th day of May 1851, and demurred generally to the presentment; and his demurrer being overruled, he on the same day pleaded "Not guilty;" and the cause was continued for the defendant. At August term 1852 of said court, on the cause being called for trial, the defendant moved the court to permit him to withdraw his plea of "Not guilty," and to plead that he was not a free negro, as stated in the presentment, but an Indian; which motion was overruled; and he excepted. A jury was impaneled, and on the trial, after the commonwealth had introduced evidence tending to prove the offence charged in the presentment, the defendant produced and offered to give in evidence a certificate of said County court that the store of William C. Scott in said county was a fit and convenient place for the retail of ardent spirits, and that said William C. Scott was of good character; which paper the court, on motion of the attorney for the commonwealth, excluded from the jury; and the defendant excepted.

The jury found a verdict of guilty; and thereupon the defendant moved the court to set aside the verdict and grant him a new trial, on the ground that the verdict was contrary to law and the evidence; which motion was overruled, and judgment rendered against the defendant for thirty dollars, the fine imposed by law, and the costs. To the decision overruling the motion for a new trial the defendant tendered a bill of exceptions, which was signed, and made part of the record. In this bill of excep-

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*See JUDGE ALLEN'S opinion for the provisions of the constitution and the statutes.

†**Intoxicating Liquors—Illegal Sale—Writ of Error—Right of Commonwealth to.**—In State v. Church, 4 W. Va. 746, it is said: "The third section of chapter 110 of the Code, page 722, provides that a writ of error shall lie in any case for the accused, and if the case be for the violation of the law relating to the revenue, it shall lie also for the state. If this was an indictment for selling, or exposing for sale, spirituous liquors without a license, a writ of error would lie for the state. *Commonwealth v. Scott, 10 Gratt 249;* Coe's Case, 9 Leigh 620; Hampton's Case, 3 Grattan 590; Hill's Case, 5 Gratt. 682; and Hatcher's Case, 6 Gratt. 667."

See, in accord, citing the principal case, State v. Allen, 8 W. Va. 681; State v. Kyle, 8 W. Va. 713; discussion of subject in 6 Va. Law Reg. 243. See sec. 4053, Code of 1887.

‡**Intoxicating Liquors—Illegal Sales—Changing Plea.**—In a criminal case the court may permit the plea of guilty to be withdrawn, and another plea to be entered in its place, in the exercise of a sound discretion, if justice and a fair trial on the merits require it; but it must be in time, and the reason for it must be made to appear clearly and distinctly. State v. Shanley, 38 W. Va. 531, 18 S. E. Rep. 738, citing the principal case.

tions it is set forth, that the defendant moved the court to set aside the verdict because there was no proof offered that he was a free negro; but the court overruled 751 said motion; and the *court further certified that the facts proved were, that ardent spirits were sold by retail by the defendant in the county of Henrico, to be drunk at the place where sold, and that the same were drunk at said place within one year next before the making the presentment in manner and form as charged in said presentment. To this judgment a writ of error was awarded by the Circuit court of Henrico; which being of opinion that the County court erred in rejecting the plea mentioned in the defendant's first bill of exceptions, reversed the judgment, set aside the verdict and remanded the cause for a new trial, with leave to the defendant to plead that he is not a free negro, as alleged in the presentment. And to this judgment the commonwealth has obtained a writ of error from this court.

The Attorney General, for the commonwealth.

Crump, for the appellee.

ALLEN, J. A preliminary objection not made in the court below or appearing on the face of the record, has been raised in argument here. It is contended that the Circuit court of Henrico held in the city of Richmond, was held at a place where the constitution did not authorize it to be held; and therefore the judgment was a nullity. The objection rests upon the provisions contained in the 7th article of the constitution, and the act concerning the terms of the Circuit courts, passed March 22d, 1852. Sess. Acts, ch. 66, p. 58. The 23d section of this act directs that the Circuit court of the city of Richmond and the Circuit court for the county of Henrico shall each sit in the city of Richmond at the state court-house.

The 1st section of article 6th of the constitution directs that there shall be a Supreme court of appeals, District courts and Circuit courts; and that the jurisdic- 752 tion *of these tribunals and of the judges thereof, except so far as the same is conferred by the constitution, shall be regulated by law.

By the 2d section the state is divided into twenty-one judicial circuits; and the county of Henrico constitutes a part of the sixth circuit; and the city of Richmond forms the seventh circuit. The 6th section directs that for each circuit a judge shall be elected by the voters thereof, who, during his continuance in office, shall reside in the circuit of which he is judge; and the 7th section provides that a Circuit court shall be held at least twice a year by the judge of each circuit, in every county and corporation thereof, wherein a Circuit court is now, or may hereafter be established. The constitution being silent as to the times and places of holding the courts thereby established, legislation was necessary to carry its provisions on this subject into effect. The general law, Code, ch. 162, § 7, p. 625, directs that the Circuit court for any county or corporation shall be held at the court-house of such county or corporation, except where some other place is prescribed by law or lawfully appointed. This court is bound to take notice of the law fixing the time and place of holding the Circuit courts. The act of May 22d, 1852, is the only law prescribing the place where the Circuit court of Henrico shall sit. This court, therefore, judicially knows that the judgment in this case was pronounced by that court sitting in the place prescribed by law, because the court could not legally sit in any other place. If the law directing the court to be held in that place is in violation of the constitution and therefore void, the court sitting at that place had no jurisdiction to pronounce judgment; and the question having been raised must be decided.

The city of Richmond is within the territorial limits of the county of Henrico. 753 It is not necessary by the *common law that a city be a county of itself. Not being counties necessarily of themselves, they are part of the counties where they be. Coke Lit. 109 b.

In England there are certain cities and towns to which, out of special grace and favor, the kings have granted the privilege to be counties of themselves, and not to be comprised in any other county. These are called counties corporate. Ibid. note H. It is not pretended that any such grant has ever been made to the city of Richmond, constituting it a county of itself, so as no longer to be comprised within the county of Henrico. It therefore continues to be geographically a part of the county, and judicially and politically a part of the county, except so far as it has been withdrawn by the provisions of the constitution or by law from the jurisdiction of the county. The constitution constitutes the city a distinct circuit, for which a judge is to be elected by the voters thereof, who is to reside in it during his continuance in office; and a Circuit court is to be held at least twice a year by the judge of the circuit in the city. To this extent the city is withdrawn from the jurisdiction of the county in reference to judicial matters. But the constitution, in providing for a Circuit court for the city, is silent as to the jurisdiction: That is to be regulated by law. Constituting the city into a separate circuit, with a court to exercise such jurisdiction as the law might confer on it, does not erect the city into a separate county. If these provisions stood alone, the city might, for all other purposes political and judicial, remain a part of the county. We are therefore of opinion that the city still remains within the territorial limits of the county, is comprised in it; and the law prescribing the state court-house in the city of Richmond as the place where the Circuit court for the county of Henrico should sit, is not in violation of the 7th section of the 6th article of the constitution, 754 directing *that a Circuit court shall be held at least twice a year by the

judge of each circuit, in every county or corporation thereof wherein a Circuit court is now or may hereafter be established.

It is objected that this is not a case in which a writ of error lies from the judgment of an inferior court for the commonwealth. The Code, ch. 209, § 3, p. 779, provides that if the case be for a violation of a law relating to the revenue, a writ of error shall lie for the commonwealth. The offence charged is the selling ardent spirits by retail to be drunk at the place where sold, without having first obtained a license to keep an ordinary. The act of selling by retail, &c., of itself constitutes no offence, for that is made lawful under certain circumstances. The offence consists in the act of selling, &c., without having obtained the license, which is granted upon paying the tax imposed by law. The provision in the Code is taken from the act of February 29th, 1828, Sup. Rev. Code 332, entitled "An act to amend the several acts and parts of acts concerning the taxes on licenses to merchants and others." This act applies to ordinary keepers, &c.; and the provision giving the right of appeal to the commonwealth, (and by the act of the next session entitled "An act to amend the revenue laws," Sup. Rev. Code, p. 333, the right to obtain a writ of error,) has ever since been held to apply to prosecutions for the offence charged in this presentment. Jurisdiction was exercised in such a case in Teft's Case, 8 Leigh 721: And though the question does not from the report seem to have been raised in the argument or alluded to in the decision, yet as it was the exercise of jurisdiction not before conferred, it could not have passed without consideration. Accordingly, in Coe's Case, 9 Leigh 620, a prosecution for a similar offence, it is said by the same court, that according to Teft's Case, a writ of error may be awarded
755 to the commonwealth *in such a case. And these cases have been followed in Hampton's Case, 3 Gratt. 590; Hill's Case, 5 Gratt. 682; and Hatcher's Case, 6 Gratt. 667.

The provision, after having received such judicial construction, was incorporated into the act of March 3d, 1840, Sess. Acts, p. 5, reducing into one the several acts concerning taxes on licenses to keepers of ordinaries, &c.; the 17th section of which imposes a penalty for this offence: And subsequently, the provision has been incorporated into the Code. After such a series of decisions and legislation, the question of jurisdiction should be considered as at rest. As to the 29th section of the act in the Code, p. 752, subjecting a party convicted of a second violation of the law to six months' imprisonment in jail at the discretion of the court, it cannot change the character of the offence; though the punishment is increased, it is still punishment for a violation of the revenue laws: And besides it introduces no new law. By the Code of 1819, 2 Rev. Code, ch. 240, § 10, upon a second conviction for such an offence the party was to be imprisoned six months; so that a similar law was in force when the decisions referred to were made and the subsequent legislation took place.

I think there was no error in the judgment of the County court as disclosed by the first bill of exceptions.

The plea which the party asked leave to file came too late: and if for no other reason, might have been rejected for that cause. But the matter itself which he asked leave to plead would not have abated the presentment. The Code, p. 784, § 1, provides that in a criminal case against an Indian or person of Indian descent, (other than a negro,) the proceedings shall be as against a white person. In a prosecution for the offence charged in this presentment a white
756 person, *Indian or free negro, is tried and punished in the same manner as in this proceeding: And therefore, if the defendant had been an Indian, it could not have produced any change in the manner of proceeding or mode of punishment, or given the commonwealth a better writ in another proceeding. As to any testimony which might have been offered, its competency would have to be decided upon when it was offered, having regard to the relative conditions of the accused and the witness at the time. The description of the defendant as a free negro does not enter into the nature of the offence or vary the mode of punishment. It was, therefore, wholly immaterial, and no proof was necessary to sustain it. Being such an immaterial averment, requiring no proof, it would be no evidence of the fact in any other proceeding; and the defendant could sustain no prejudice from it. The description being immaterial and mere surplusage, requiring no proof, the County court properly overruled the motion to set aside the verdict, because there was no proof offered that the defendant was a free negro. Nor was there any error in refusing to set aside the verdict because it was contrary to evidence. The facts certified proved the commission of the offence by the defendant as charged in the presentment.

The correctness of the decision of the court, as set forth in the second bill of exceptions, has not been controverted. The defendant was prosecuted under the second clause of the 18th section of the Code, p. 209, for selling ardent spirits by retail to be drunk at the place of sale, without a license to keep an ordinary at such place. The certificate which he offered to give in evidence was not a license to keep such an ordinary, and furnished no defence against the charge alleged in the presentment, and was properly excluded from the jury.
757 *It seems to me there was no error in the judgment of the County court; and the Circuit court, instead of reversing, should have affirmed the same.

The other judges concurred in the opinion of Allen, J.

Judgment of the Circuit court reversed with costs, and judgment of the County court affirmed.

758 *Vaughn v. The Commonwealth.

October Term, 1858, Richmond.

1. **Bonds—Obligor—Larceny.***—The obligor in a bond may commit larceny in taking it.

2. **Same—Same—Same—Case at Bar.**—K holding a bond executed by V to J, and supposing from what had passed between them before, that V then intended to pay it off, took it out of his pocket book and held it in his left hand whilst with his right hand he was searching in his pocket for a pencil to calculate the interest. Whilst K was thus occupied V took the bond out of his hand without violence, K supposing that V wished to look at it, and not objecting to his taking it. Upon getting possession of the bond V immediately rolled it up, put it into his mouth and chewed it, and then threw it to one side, K supposing he had swallowed it. V supposed at the time that the bond was still the property of J who he believed had treated him badly and against whom he was much incensed. HELD: That under the circumstances this taking of the bond was larceny.

This was an indictment for the larceny of a bond in the Circuit court of Page county againt Thompson Vaughn. The jury found the prisoner guilty, and ascertained the term of his imprisonment in the penitentiary at one year; and the judgment was according to the verdict.

After the verdict was rendered the prisoner moved for a new trial on the grounds that the verdict was against the law and contrary to the evidence: But the court overruled the motion, and he excepted; and spread the facts upon the record: and obtained a writ of error from this court.

It appears that the prisoner executed to Isaac S. Jones a bond bearing date the 1st of March 1852 for twenty-five dollars; and that there was a credit upon this bond of five dollars as of the date of the 22d of March 1852. That this bond was given for the purchase money of land, and that 759 the prisoner complained *of Jones as to some matter growing out of that purchase; though he admitted the existence of the debt due by the bond. About the 1st of September 1852 Reuben B. Bell, as the agent of Jones, sold the bond to Henry A. Keyser, an acting constable in the county of Page, and on the 14th of September Keyser informed the prisoner that he held the bond, but did not apprise him that it was Keyser's property. The prisoner said it was hard for him to pay his brother's debt, and asked Keyser if he was coming to the Big Spring meeting, which was to be held on the fourth Sunday of that month; if he was, he should bring the bond there, and the prisoner would take it up. Keyser supposed prisoner meant thereby that he would pay the money there.

Keyser and the prisoner met at the appointed time and place; and about the time the congregation were leaving the church, the prisoner beckoned to Keyser to come to him: They went to a school-house about one hundred yards distant from the church, and there the prisoner asked Keyser if he had the bond with him: He replied affirmatively; and they then slipped behind the school-house, and Keyser took the bond out of his pocket book, and whilst holding it in his left hand, and feeling for a pencil with his right hand with a view to calculate the interest on the bond, the prisoner asked him twice whether he was certain that was the bond; and he replying yes, the prisoner taking hold of the bond as Keyser supposed, for the purpose of examining it and paying the money, and using as much force as was necessary, instantly rolled it up and put it in his mouth and chewed it, and as Keyser supposed swallowed it: This however was not the fact; but after chewing it he threw it away; and upon his stating this fact after his arrest, the bond was found a few days after the occurence at or under the school-house before mentioned.

760 *After the prisoner had taken the bond and put it in his mouth, he said to Keyser, Now tell Mr. Jones I owe him nothing, and he has nothing to show that I do owe him anything. No violence was used by the prisoner in getting possession of the bond, nor did Keyser resist the prisoner's taking it. Prisoner spoke of having a resurvey of the land he bought of Jones, and would do nothing until Mr. Jones had done him justice. The prisoner and Keyser then parted; and Keyser meeting with Bell, at the church, it was agreed they would send after the prisoner and request him to come back and settle the matter. This was accordingly done, and the messenger, who was a relation of the prisoner, urged him to return and settle with Keyser; but the prisoner was highly excited and refused to return; and in reply to a suggestion of the messenger that he had done the act without thinking, the prisoner said, No, he had been

*Burglary—What Constitutes—Construction.—In State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 418, upon a trial for burglary it appeared that three persons, much intoxicated went into a store and called for cider which they drank and paid for, they went out and came in again and called for more, which was poured out to them and delivered to them in glasses on the counter and a pistol was discharged in the house, and they all went out leaving the cider in the glasses on the counter; when they returned the store was lighted, and they pushed against the door which was locked and it broke open, they went in, followed by other persons against whom there was no charge or suspicion, and there in the light and in the presence of other persons drank the cider; the refusal of an instruction that tells the jury under these circumstances that if they in good faith believed they had a right to drink the cider, that it was theirs, that they did not have the intent to steal the same, is error. The court basing its ruling on the dissenting opinion of MONCURE, J., in *Vaughn v. Com., 10 Gratt. 764*, where he said: "That property which is taken openly, in the presence of the owner, affords a strong presumption that it is not taken feloniously. This presumption may be repelled by evidence; but strong evidence should be required for that purpose, when the property taken is the party's own bond."

See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

thinking of it for some time; that he had been badly treated by Isaac S. Jones and Madison Vaughn, and he did not intend to pay them any more. This conversation occupied some ten or fifteen minutes.

Alex. Anderson, for the prisoner.

The Attorney General, for the commonwealth.

SAMUELS, J. The statute, Code of 1849, p. 729, § 15, 16, places larceny of papers of value on the same footing as larceny of any other subject. The rules of law and evidence applicable to the offence of larceny generally, must also apply in a case of such larceny under the statute.

Several questions were discussed by the plaintiff's counsel, in his printed argument, growing out of various errors alleged to have been committed in the mode of procuring the evidence, previous to the finding of the indictment on which the convic-
761 tion was *had. I perceive no error in the action of the court, in these respects; the questions, however, do not properly present themselves in the record, and should, therefore, be no further considered.

The only question before the court is that presented by the motion for a new trial; that is, Whether the jury were justified by the evidence, in finding the plaintiff guilty of feloniously stealing, taking and carrying away the bond, as in the indictment alleged? These ingredients are of the essence of larceny charged. If they, or anyone of them, do not exist, the offence is incomplete.

No question is or could be made in regard to the identity of the bond, or Keyser's title thereto.

As to the felonious intent, that is the purpose of converting to the use of the party taking, lucri causa. If it be conceded, as it must be, that a man may commit larceny of a bond by which he stands bound for the payment of money to another, the only advantage or profit which can accrue to the party so committing larceny, is in withholding, concealing or destroying the evidence of his debt. If he steal a bond executed by another, he may possibly receive the money due thereon; of the bond binding himself, he can make no such use. The only advantage which Vaughn could promise to himself, was in the concealment or destruction of the bond. The evidence shows clearly, that he intended to secure this advantage to himself. The jury were therefore justified in finding the felonious intent, the animus furandi. It has been said that the offence is incomplete, because the money was still due, notwithstanding the concealment of the bond, and that it was subsequently produced; that the conversion to Vaughn's use was therefore incomplete. This argument would apply in every case in which stolen property is reclaimed by the owner, before it is consumed by
762 use; *the title of the owner of goods and chattels continues notwithstanding a larceny thereof; yet it has never been held that the offence is less complete after they are reclaimed than if they had been used and consumed by the thief.

The "taking," another essential part of the offence, is said not to have occurred in this case. It is said that every larceny must contain within itself a trespass in the act of taking; that there can be no trespass against property not in the owner's possession; that in this case the possession of the bond was not in Keyser the owner, but was in Vaughn, who had acquired it without force or violence, and with Keyser's assent. If all this be conceded, the question recurs. What is possession by the owner within the meaning of the law against larceny? It has been held that goods and money in a store under the control of a salesman who has no authority or interest about them but as salesman, are still in possession of the owner; and if such salesman animo furandi convert them to his own use, he is guilty of such "taking," of such trespass, as is of the essence of larceny. So if a shopkeeper exhibit his wares to one who takes them into his hands under pretext of inspecting or buying them, but who forthwith converts them to his own use animo furandi, the "taking" or trespass against the property is such as enters into the offence. If by fraud or device the owner (not intending to part with his right), be induced to place his property in the hands of another, who acquires possession with a felonious intent to convert it to his own use, the "taking" and trespass are such as are required to complete the offence of larceny. See Starkie v. The Commonwealth, 7 Leigh 752.

In this case the bond was permitted by Keyser to pass into Vaughn's hands under the belief that it was to be immediately paid; to let him see that it was the bond he proposed to pay: Keyser had no
763 *intention of delivering the bond and waiting to a future time for payment; and the device or trick by which Vaughn got the bond into his own hands, is equivalent to, if not identical with, a trespass against the possession. See the case above cited.

The "carrying away" necessary to complete the offence of larceny, may consist in a very slight removal of the stolen property; the removal to a much shorter distance than is shown in this case would have completed the offence.

The evidence tended strongly to prove every material allegation in the indictment. The plaintiff failed to prove that the bond was not justly due, or any other fact which would give him any pretext of right to act as he did. If under a mistaken opinion of right the plaintiff had acted in the manner disclosed by the evidence, he might have been held guilty of trespass merely. In the absence of all proof in extenuation of his offence, the jury were justified in rendering the verdict complained of.

I am of opinion to affirm the judgment.

MONCURE, J. My first impression of this case was strongly against the common-

wealth. It has been weakened by the argument of the Attorney General, and the views of my brethren embodied in the opinion of Judge Samuels. But it has not been removed. The case is an extraordinary one. A man has been convicted of stealing his own bond; the act being done openly, in the presence, and with the knowledge of the assignee of the bond.

When a man is charged with stealing the bond of another, we can at once understand the object he probably had in view; that is, to collect the bond and appropriate the proceeds to his own use. But when he is charged with stealing his own bond, he cannot have had this object in view, 764 and we must find another in *the circumstances of the case before we can admit that he may be guilty of the offence.

I do not doubt but that a man may be guilty of stealing his own bond; as a man may be guilty of stealing his own goods, for the purpose of charging a bailee for their value. A man would be guilty of stealing his own bond, if he were to take it from the desk of his deceased creditor for the fraudulent purpose of preventing the discovery of the existence of the debt by the executor, and of avoiding its payment. Other circumstances might be sufficient to show a felonious intention in such a case.

But it is difficult to conceive how such an intention can exist when the bond is openly taken from the possession of the holder. It is true that secrecy, though a usual, is not a necessary, attendant of larceny; which may be, and sometimes is, committed openly. That property is taken openly, in the presence of the owner, affords a strong presumption that it is nôt taken feloniously. This presumption may be repelled by evidence; but strong evidence should be required for that purpose, when the property taken is the party's own bond.

What benefit can be derived from the act, is a question which at once presents itself; and cannot easily be answered. The existence of the debt, and the fact that the bond was taken by the obligor, are known and can be proved; and the payment of the money can as well be enforced without the bond as with it.

It may be said that the obligor may not know that by law a debt can be recovered even though the bond given for its payment be destroyed. But we cannot fairly attribute such ignorance to him, and it would be contrary to legal principles to do so. A man is presumed to know the law, even in a case in which the presumption would be a legal element of his guilt: Surely he ought to be presumed to know it, 765 *in a case in which the presumption would make him innocent.

It is not sufficient if the party in taking the bond merely intend to provoke the owner; or to throw difficulty and delay in the way of its collection; or to obtain what he considers justice of the obligee. No benefit of that kind is such gain as the law contemplates in the definition of larceny. The party must intend to convert the subject itself to his own use, and not to use it temporarily for an ulterior object. If a man take a horse from another's stable for the purpose of riding it, but not of converting it to his absolute use, he will not be guilty of larceny, though he leave the horse where the owner may never get it again. The mode of converting a bond to the obligor's own use is to prevent its enforcement against him; and if he do not take it fraudulently for that purpose, he is not guilty of larceny.

The circumstances of this case support the presumption, arising from the nature of the subject and the open manner in which it was taken, that the act was not done feloniously. The bond had been given for part of the purchase money of a tract of land. There had been two controversies between the parties; one about the boundaries of the land, and the other about some wheat left growing on the land at the time of the sale, which the vendor had depastured contrary, as the vendee supposed, to his rights. It was proved that the former had been settled, though the vendee was evidently not satisfied with the settlement: The latter was subsisting at the time of the alleged larceny. When the vendee took the bond, he told the assignee he would have a resurvey of the land, and would do nothing until the vendor had done him justice. This, with the other circumstances, strongly tends to show that the act was done under a sense of supposed injustice, and the influence of feelings of irritation and resentment, rather than with a felonious 766 *intention. The observation made at the time of taking the bond, "Tell Mr. Jones I owe him nothing, and he has nothing to show that I do owe him anything," may tend to show a felonious intention, but is not sufficient to counteract the other circumstances. It may be accounted for consistently with them as the hasty speech of an excited man.

That the prisoner had no idea he was committing larceny in taking the bond, is manifest from the whole record. The Attorney General expressed such a belief in the opening of his argument. The jury who tried the case, no doubt entertaining the same belief, recommended the prisoner to the clemency of the executive. And the judge who presided at the trial, doubtless with the same view, heartily joined the jury in their recommendation.

Intention is an important element in the constitution of crime, especially the crime of larceny. And though a man who knowingly commits a wrongful act may be guilty of larceny, even though he may not believe that the act amounts in law to larceny; yet his ignorance is an important circumstance to be weighed with others in determining whether the act was done with a felonious intention.

In addition to the other circumstances tending to the exculpation of the prisoner, is the important fact that on his trial the commonwealth conceded his good character

for honesty, sobriety and industry, and dispensed with any proof on these points.

Upon the whole, I am of opinion that the prisoner is guilty of trespass, and not of felony; and that the judgment against him should be reversed, and a new trial awarded.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

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767 *Montague v. Commonwealth.

October Term, 1853, Richmond.

1. **Criminal Law—Jurors—Voir Dire—Statutory Disability—Power of Court to Set Aside.**—On a trial for a felonious offence, the court, of its own motion, without the suggestion of either party, may examine upon oath all who have been summoned to serve upon the jury, touching any disability created by statute, such as infancy, want of freehold or property qualifications, or in a capital case, conscientious scruples on the subject of capital punishment; and upon any such disability being thus made to appear, or if it be shown that any one summoned has been convicted of perjury, the court may and should set aside any such juror of its own action, without objection made by either party.

2. **Same—Same—Natural Disability—Power of Court to Set Aside—Effect of Erroneous Exercise.**—On a trial for felony the court, of its own motion, without the suggestion or consent of either party, may excuse or set aside a juror who, though in all other respects competent, is disabled physically or mentally, by disease, domestic affliction, ignorance of the vernacular tongue, loss of hearing or other like cause, from properly performing the duties of a juror. But the erroneous exercise of this power is a matter of exception by the prisoner, for which the judgment of the court may be reversed.

3. **Same—Same—Challenge for Cause—Necessity of Showing—When Overruled.**—As no challenge to a juror is allowed to the commonwealth except for cause, when such challenge is made, the cause should be shown, and should be a good and legal cause for the exclusion of the juror; otherwise it should be overruled.

4. **Same—Challenge—Right of Accused to Except to Allowance or Disallowance of—Review on Appeal.***—The decision of a court allowing a challenge on the part of the commonwealth, or disallowing a challenge on the part of the accused, whether such challenge be a principal challenge or a challenge to the favor, is matter of exception on the part of the accused; which it is right to have reviewed in the appellate court.

5. **Same—Jurors—Power of Court to Set Aside in Absence of Challenge.**—The court cannot of its own motion, where no challenge is made, without good cause, set aside a juror, except where he is disabled physically or mentally from properly performing the duties of a juror, or is disqualified by statute.

6. **Appellate Practice—Jurors—Examination—Exceptions.**†—Though in all cases great weight is justly due to the opinion of a court before whom the jurors are questioned and examined, yet upon exception taken the appellate court must judge from the facts therein stated, whether the reason for setting aside a juror is good and sufficient or the contrary.

768 *7. **Criminal Law—Jurors—Opinion Formed—Competency—Case at Bar.**‡—A talesman when examined on his *voir dire* said that he had heard a great deal said about the case, but that he had not heard or read the evidence given at the examinations before the mayor or Hustings court; and that he had formed no opinion on the subject. He then stated that since the prisoner had been in jail his wife and family had moved to the lot adjoining his residence, and had lived there; that they were often at his house, and that there was great intimacy between the families, and on that account he would rather not sit in the case, that his mind might be influenced: and in answer to a question from the court he said he was unwilling

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***Appellate Practice—Jurors—Challenge—Right of Accused to Except to Disallowance.**—The decision of a court allowing a challenge on the part of the commonwealth or disallowing a challenge on the part of the accused, whether such challenge be a principal challenge or a challenge to the favor, is matter of exception on the part of the accused, which is his right to have reviewed in the appellate court. The appellate court will not enquire whether injury has been done to the prisoner by improperly setting aside a competent juror, but the law will intend prejudice to the prisoner.

In Thompson v. Douglass, 35 W. Va. 337, 13 S. E. Rep. 1015, the principal case on this point is disapproved, the court holding that, the mere exclusion of a juror upon a challenge for cause upon insufficient ground will not be cause for reversal; and in commenting upon the principal case, at page 340, BRANNON, J., says: "I am of opinion that this decision (Montague's Case) is erroneous, and hurtful to the practice of the courts and the administration of justice, and ought not longer to prevail. The doctrine that harmless error shall not reverse and render fair trials abortive has made great progress since the date of the decision cited. JUDGE LEE gave no reasons in the opinion, except that in criminal cases the law would intend harm to an accused where he is deprived of a right. He did not even refer to the *quære* in Clore's Case, 8 Gratt. 606, and the strong argument of JUDGE LOMAX, probably overlooking them."

†**Appellate Practice—Jurors—Examination—Exceptions.**—Though in all cases great weight is justly due to the opinion of a court before whom the jurors are examined and questioned, yet upon exceptions taken the appellate court must judge from the facts therein stated, whether the reason for setting aside a juror is good and sufficient. For this proposition, see the principal case cited and approved in Cluverius v. Com., 81 Va. 793.

‡**Criminal Law—Jurors—Opinion Formed—Competency.**—See, citing the principal case, Vaughan v. Com., 85 Va. 674, 8 S. E. Rep. 584; Muscoe v. Com., 86 Va. 450, 10 S. E. Rep. 534, and applying the doctrine to instructions.

On this question, see the principal case cited in Jackson v. Com., 23 Gratt. 933, and *note*; *foot-note* to Poindexter v. Com., 33 Gratt. 766; *foot-note* to Wormeley v. Com., 10 Gratt. 658; Cluverius v. Com., 81 Va. 885; State v. Baker, 33 W. Va. 324, 329, 10 S. E. Rep. 641, 643.

to trust himself under the circumstances: He thought he could give the prisoner a fair trial on the evidence: That he had no prejudice for or against the prisoner, there was no connection by blood or marriage between them, and that he had never spoke to the prisoner's wife or family on the subject of the trial. He is a competent juror, and it is error to set him aside, for which the prisoner may except and have the judgment reversed.

3. **Appellate Practice—Jurors—Setting Aside—Prejudice.**—The appellate court will not enquire whether injury has been done to the prisoner by improperly setting aside a competent juror, but the law will intend prejudice to the prisoner.

At the November term 1852 of the Circuit court of Petersburg, Lewis Montague was indicted for the murder of Gardener G. Thompson. His trial came on in June 1853, when he was convicted of murder in the first degree, and sentenced to be hung.

Upon the trial several questions were made by the prisoner, but only one of them was considered by this court: That relates to the exclusion of a juror. After the original panel had been exhausted, the court directed thirty-six persons to be summoned to attend as jurors. One of the persons so summoned was John A. Ezell, who being sworn on his voir dire, and being interrogated by the court, whether he had made up and expressed any opinion as to the guilt or innocence of the prisoner, answered that he had heard a great deal said about the case, but that he had not heard any of the evidence given in at the examination before the mayor or before the Hustings court, and had not read any account of either of those examinations; and that he had not formed any opinion on the subject. 769 *He then stated voluntarily and without having been enquired of as to that matter, that since the prisoner had been in jail, the wife and family of the prisoner had moved to the lot adjoining his (Ezell's) residence, and had lived there; that they were often at his house, and that there was great intimacy between the families; that on that account he would rather not sit in the case; that his judgment might be influenced. And being asked by the court, whether his unwillingness to serve arose from its being an unpleasant duty, or because he was unwilling to trust himself under the circumstances, he replied, it was because he was unwilling to trust himself under the circumstances. And being asked whether he could now give the prisoner a fair trial on the evidence which he might hear on the jury, he answered, that he thought he could. He also stated that he had no prejudice for or against the prisoner: That there was no connection by blood or marriage, between himself and the prisoner or their families. He also stated that he had never conversed with the prisoner's wife or any of his family, or spoke to any of them on the subject of this trial. And thereupon the court rejected the said Ezell as a juror; and the prisoner excepted. Upon the application of the prisoner this court granted him a writ of error.

Joynes and Patton, for the prisoner, insisted:

1st. That Ezell was a competent juror, Hailstock's Case, 2 Gratt. 564; Clore's Case, 8 Id. 606; Wormeley's Case, supra 658.

2d. That it was error to reject him from the panel, for which the prisoner was entitled to have the judgment reversed. They insisted that the opinion to the contrary expressed in Clore's Case, was not sustained by the authorities cited to support it, and was condemned by the uniform current of decisions in England, and by our own 770 statute. They cited The King *v. Willis, Barnard, King's Bench R. 108; President, &c. of Brooklyn v. Patchen, 8 Wend. R. 47; Heath's Case, 1 Rob. R. 735; Sperry's Case, 9 Leigh 623; The King v. Inhab. St. Michael, 2 W. Bl. 718; Doebler v. Commonwealth, 3 Serg. & Rawle 237; Eaton v. Commonwealth, 6 Binn. R. 447; Jones v. State, 3 Blackf. R. 37; Commonwealth v. Spring, Amer. Law Reg. 424; Leath's Case, 1 Va. Cas. 151; State v. Shaw, 3 Ired. R. 532, and Gaston, J.'s opinion in this case; Rawls v. The State, 8 Smedes & Marsh. 599; Commonwealth v. Parker, 2 Pick. R. 550; State v. Benton, 2 Dev. & Bat. 196; The King v. Edmonds, 4 Barn. & Ald. 471; State v. Lytte, 5 Ired. R. 58; Hines v. The State, 8 Humph. R. 597; Boles v. The State, 13 Smedes & Marsh. 398; Judge v. The State, Georgia R. 173; Commonwealth v. Lesher, 17 Serg. & Rawle 155; Code, ch. 208, § 9, p. 744.

3d. That it was error in the court to set aside the juror, upon its own motion, without any objection either by the prisoner or the attorney for the commonwealth. The opinion of Gaston, J., in Benton's Case, 2 Dev. & Bat. 196, 218; Spring's Case, Amer. Law Reg. 424; 1 Rev. Code of 1819, 607.

The Attorney General, for the commonwealth, insisted:

1st. That the judge who presided at the trial having held that Ezell was not an impartial juror, he must be so considered in this court. This principle is referred to in Clore's Case, 8 Gratt. 606; People v. Bodine, 1 Denio's R. 281; Honeyman's Case, 3 Id. 121; Freeman's Case, 4 Id. 9, 31-37; Harrisburg Bank v. Foster, 8 Watts R. 304.

2d. That the court had authority to set aside the juror without any objection expressly made by either the prisoner or the attorney for the commonwealth. Cornell's Case, 2 Mason's R. 91, 94, 104; Com- 771 monwealth *v. Stockley, 10 Leigh 678; Damon's Case, 13 Wend. 351; Lewis' Case, 9 Smedes & Marsh. 115; Benton's Case, 2 Dev. & Bat. 196; Hines v. The State, 8 Humph. R. 597. And such is the constant practice in the Circuit courts.

3d. That a challenge to the favor raises a mere question of fact, whether the juror is partial; which question was at common law decided by triers. That the law of Virginia which makes the court the trier, does not change the nature of the question: It remains a question of fact to be decided upon all the evidence furnished, as well

the statement and deportment of the juror, when examined as a witness touching his own indifferency, as those of other witnesses, if others are examined. From the decision of this fact by the triers, whether they be the court or others, there can be properly no appeal, because no other tribunal can weigh the evidence on which it rests. And it might well be contended that there has been no case in Virginia in which judgment has been reversed for a decision of the court on a challenge going only to the favor. But he insisted that at most the courts had never reviewed such decisions further than to see that no partial juror had been put on the prisoner; and that was enough for this case. He insisted that the distinction was between cases where there was ground of principal challenge and where it was a ground of challenge to the favor. He referred to the opinion of Gaston, J., in Benton's Case, 2 Dev. & Bat. 213, 221; Clore's Case, 8 Gratt. 606; Cornell's Case, 2 Mason's R. 91; Tatum v. Young, 1 Port. R. 298, 308; Marshall's Case, 8 Alab. R. 302; Henry's Case, 4 Humph. R. 270.

LEE, J., delivered the opinion of the court.

It seemeth to the court here, that in proceeding to the trial of a party charged 772 with a felonious offence, it *is competent to the court of its own motion without the suggestion of either party, to examine upon oath all who may have been summoned to serve upon the jury touching any disability created by statute, such as infancy, want of freehold or property qualifications, or in a capital case, conscientious scruples on the subject of capital punishment; and that upon any such disability being thus made to appear, or if it be shown that any one so summoned has been convicted of perjury, such court lawfully may, and should, set aside any such juror of its own action, without objection made by either party; and that in such case the disqualification or disability created by statute is to be distinguished from matter of challenge by the parties, which imputes no absolute want of capacity or eligibility to serve on any such case, but a want of fitness to serve on the particular case at bar for the cause assigned.

And it further seemeth to the court that in a case of necessity and to prevent a failure of the ends of justice, it is also competent for the court to excuse or set aside a juror who, although free from any statutory disability, and possessing the legal qualifications of a juror, and standing indifferent between the commonwealth and the accused, is yet disabled, physically or mentally, by disease, domestic affliction, ignorance of the vernacular tongue, loss of hearing or other like cause, from properly performing the duties of a juror; and this of its own motion without the suggestion or consent of either party; but that the power of so doing is to be exerted with due caution and circumspection, and in the exercise of a sound discretion, for the same purposes and upon the same grounds and principles which govern the court in the exercise of its discretion to discharge a jury sworn in a criminal case before they shall have rendered a verdict; the former power being in effect 773 but a corollary from the *latter, which has been confirmed by a statutory provision.

And it further seemeth to this court, that if in any such case, a Circuit court shall have erroneously exercised its discretion by discharging any such juror without such good and sufficient cause as aforesaid, it is matter of exception on the part of the accused, for which the judgment of the said Circuit court may be reviewed and reversed in this court.

And it further seemeth to this court, that as by the law of Virginia, no challenge of a juror is allowed to the commonwealth except for cause, so when any such challenge shall be made on the part of the commonwealth, the cause thereof shall be shown, and the same must constitute a good and legal cause for the exclusion of such juror; and if the same be found vague, uncertain or irrelevant, it should be overruled by the court.

And it further seemeth to this court, that as by law all challenges are to be tried in the court in which they are made; and as the court is required to sign a bill of exceptions in a criminal cause, when tendered by a party for whom a writ of error lies to an appellate court, the decision of a Circuit court allowing a challenge on the part of the commonwealth, or disallowing a challenge on the part of the accused, is matter of exception on the part of the accused, whether such challenge be a principal challenge or a challenge to the favor; and that it is the right of the accused to have such cause of challenge reviewed in this court, and if the same be found insufficient, that the judgment of the court should be for that cause reversed.

And it further seemeth to this court that as a court in a criminal cause where a direct challenge is made on the part of the commonwealth to a juror cannot rightfully allow the same and set aside the juror 774 unless *good and sufficient cause be shown for such challenge, still less can the court of its own motion, where no challenge is made, without cause or without good and sufficient cause, set aside a juror, except as has been hereinbefore declared.

And it further seemeth to this court, that although in all cases great weight is justly due to the opinion of a court before whom the jurors are questioned and examined, yet that upon exception taken, this court must judge from the facts therein stated, whether the reason for setting aside a juror is good and sufficient or the contrary. And that upon the facts set out in the bill of exceptions taken to the exclusion of the juror John A. Ezell, it seemeth to this court that said juror even if he had been directly challenged for cause on the part of the common-

wealth, should have been adjudged to stand impartial and indifferent between the commonwealth and the plaintiff, and that no just cause of exception whatever is made to appear; and that if no other objection were shown to the said Ezell, it was the right of the prisoner that he should be placed upon the panel out of which the jury was to be chosen.

And it further seemeth to this court that it is no answer to this objection that the said juror, John A. Ezell, was not one of the original twenty-four summoned and returned upon the venire facias in the cause, but was one of the thirty-six talesmen summoned by order of the court after the panel of the original twenty-four had been exhausted, because in the opinion of this court, the court possesses no other or greater power to set aside a talesman who has been duly summoned than it does to set aside one returned upon the original panel.

And it further seemeth to this court, that while it may not be impossible nor yet difficult to show how the plaintiff might have been prejudiced by the exclusion
775 *of the juror Ezell, under the facts and circumstances disclosed by the record in this case, yet that it is not necessary that the court should enter upon any such enquiry; because in the opinion of this court where any legal right has been denied to a party on trial for a criminal offence, or any of the safeguards thrown around him by law for his protection, has been disregarded, it is not for this court to say what might or might not have been the effect upon the case of the accused: The law will intend prejudice if it be necessary to enable him to exercise his right to have the judgment of the court reviewed in the appellate tribunal, and will hold it impossible in such a case to say that a fair and impartial trial has been had.

And it seemeth further to this court, that as the questions arising upon the record in this case, other than those upon which the opinion of the court has been hereinbefore expressed, may not again occur upon any future trial of this cause, it is unnecessary for this court at this time to express any opinion upon them.

Wherefore and for the reason hereinbefore expressed, it seemeth to the court here, that the judgment aforesaid is erroneous. Therefore it is considered that the same be reversed and annulled; and it is ordered that the verdict rendered by the jury be set aside, and that the cause be remanded to the said Circuit court with directions to proceed in the manner prescribed by law to cause another jury duly qualified to come and to say whether the said Lewis Montague be guilty of the felony wherewith he stands accused or not guilty, and further to proceed as the law requires.

Which is ordered to be certified to the said Circuit court of Petersburg.

Judgment reversed.

776 *Cady v. The Commonwealth.

January Term, 1854, Richmond.

1 **Criminal Law—Uttering Forged Note—Parol Proof of Existence of Bank—Surplusage.***—On a prosecution for uttering and attempting to employ as true a forged note purporting to be the note of the Bank of Delaware in Pennsylvania, a banking company authorized by the laws of Pennsylvania, the existence of such a bank may be proved by parol evidence. The averment that it was authorized by the laws of Pennsylvania is surplusage, and need not be proved.

2. **Same—Indictment—Date Stated in Figures—Effect.**—The time when the offence is alleged in the indictment to have been committed, being stated in figures, is no error.

Daniel Cady was indicted in the Circuit court of Ohio county, for that he on the 16th day of September 1853, at the county aforesaid, feloniously did utter and attempt to employ as true, to Caroline Seabright, a certain false and forged bank note, purporting to be a true and genuine bank note, for the payment of ten dollars, of the Bank of Delaware county, Chester, Pennsylvania, the same being a banking company authorized by the laws of Pennsylvania, with intent to defraud the said Caroline Seabright; he, the said Daniel Cady, then and there knowing the said false and forged note to be false and forged, against the peace, &c.

On the trial the prisoner filed a bill of exceptions to an opinion of the court, in which it is stated, that the commonwealth offered no evidence to prove that there was such a bank in the state of Pennsylvania as the Bank of Delaware county, except the evidence of witnesses who proved that there was such a bank in Pennsylvania, and they had seen and well knew the genuine notes of it. To the sufficiency of which evidence to prove this fact, and that it was established by the laws of Pennsylvania,
777 the prisoner objected, *and also insisted that it was incumbent on the commonwealth in this case, before he could be convicted of the offence charged in the indictment, to produce the law of the state of Pennsylvania, or a copy thereof, authorizing or creating the Bank of Delaware county. But the court overruled said objections; and also ruled that it was not necessary for the commonwealth, in order to convict the prisoner of the offence wherewith he stands charged by the said indictment, to offer in evidence, or produce on the trial any law of Pennsylvania, or copy thereof, authorizing or creating the Bank of Delaware county.

The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at two years. And thereupon he moved in arrest of judgment: 1st. Because he says that the indictment does not

*See monographic *note on* "Indictments, Informations and Presentments," appended to Boyle v. Com., 14 Gratt. 674; also, *foot-note* to Lazier v. Com., 10 Gratt. 708.

charge him with uttering or attempting to employ as true any false and forged note or bill of a banking company; but with uttering and attempting to employ as true a false and forged bank note on the Bank of Delaware county, not charging it to be a banking company; and because the said indictment does not charge him with uttering or attempting to employ as true a false and forged note of a banking company. 2d. Because the time when the said supposed offence was committed, is laid in the indictment in figures and not in words.

The court overruled the objections, and sentenced the prisoner in accordance with the verdict of the jury. Whereupon he applied to this court for a writ of error, which was awarded.

Jacob, for the prisoner.

The Attorney General, for the commonwealth.

SAMUELS, J. This cause is brought here by writ of error to a judgment of
778 the Circuit court of Ohio *county, whereby the plaintiff was condemned to imprisonment in the penitentiary.

The indictment was for the felonious offence of knowingly uttering and attempting to employ as true a false and forged bank note for the payment of ten dollars, of the Bank of Delaware county at Chester, Pennsylvania, the same being a banking company authorized by the laws of the state of Pennsylvania, with intent to defraud, &c.

The prosecution is under § 3, ch. 193, p. 732, 3 of the Code of 1849. This section so far as it regards bank notes, is enacted against two classes of offences:

1st. The forgery of a note of a banking company, or knowingly uttering and attempting to employ as true, a forged note of a banking company which does exist.

2d. The forgery of a note, or knowingly uttering or attempting to employ as true, a forged note purporting to be the note of a banking company when such company does not exist.

The prosecution in this case was had as against an offence of the first of these classes. A question was made in the Circuit court, and in this court, whether the commonwealth was not required to prove the existence of the banking company by producing the written law of Pennsylvania giving it existence: The Circuit court decided that parol evidence was admissible, and that written evidence was not necessary.

The statute obviously contemplates the notes of any banking company having existence; but it is in nowise of the essence of the offence that the banking company should have been organized in any particular mode: It is immaterial whether it existed by written charter or not. The allegation that the bank was authorized by law in Pennsylvania is therefore mere surplusage, and need not be proven. The Circuit court correctly decided that parol proof was
779 *admissible to prove the existence of the banking company.

The plaintiff further alleges that the Circuit court erred in overruling his motion in arrest of judgment. It is said the motion should have been sustained because the indictment does not follow the language of the statute creating the offence. This is a mistake of fact. The indictment substantially sets forth all the facts constituting the offence, the felonious intent, the forged character of the note, the existence of the company, the knowledge of the plaintiff that it was forged, the uttering and attempting to employ it as true, and the intent to defraud are all alleged; and nothing more is required to complete the offence.

It is further alleged that the judgment should have been arrested because the time when the offence is alleged to have been committed is expressed in figures and not in words. This objection was made before this court at its July term 1853, in the case of Lazier v. The Commonwealth, supra 708, and it was there decided that it was not material that dates should be given in words, but that they might be expressed in figures.

I am of opinion the judgment should be affirmed.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

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ACTIONS.

1. To entitle a party to recover back money which he has paid upon a contract which has been wholly rescinded, or the consideration of which has wholly failed, he must not have been guilty of any fraud or illegal conduct in the transaction.
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2. A remainderman not having the right of possession of a slave at the time it is sold by the tenant for life, cannot maintain trover for its recovery.
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ADVERSARY POSSESSION.

1. A executes a deed of trust to secure a debt; and then sells a part of the land to H, and gives him a title bond; and H takes possession. The land is afterwards sold under the deed of trust, and H continues to hold. The possession by A after the deed was as tenant by sufferance; and the possession by H, after his entry, was of the same character; and therefore the statute of limitations is no bar to an action by the purchaser under the deed for the recovery of the land.
Creigh's heirs *v.* Henson, 231

2. An open, exclusive, notorious and uninterrupted possession of land for more than twenty years, taken, held and claimed under a parol gift from a plaintiff in ejectment, for a life not yet terminated, is no bar to his recovery in the action.
Clarke *v.* McClure, 305

3. As a general rule possession to give title, must be adversary; and where a defendant has entered under the plaintiff, and acknowledged his title as that under which he holds, he cannot controvert it.
Idem, 305

4. To make out a title by adverse possession, as a general rule, the title must be adverse in its inception. Idem, 305

5. An adverse possession depends upon the intention with which the possession was taken and held. Where the act itself imports that there is a superior title in another by whose permission, and in subordination to whose continuing and subsisting title the entry is made, such entry cannot be adverse to the owner of the legal title; and such possession so commencing, cannot be converted into an adverse possession but by disclaimer, the assertion of an adverse title and notice. Idem, 305

6. A vendee who enters under an executory contract which leaves the legal title where it was, and contemplates a future conveyance, enters in subordination to it, holds under, and relies upon it to protect his possession in the mean time: And in such case, as also in the case of lessee, mortgagee, cestui que trust and the like, a privity exists which precludes the idea of a hostile tortious possession which could silently ripen into a title by adverse possession under the statute of limitations.
Idem, 305

7. An entry on land under a parol gift from the owner, and a claim to hold any estate by virtue of the gift, is in its nature, the recognition of the continued existence of a subsisting title in the legal owner: And a claim to hold any estate by gift from the legal owner, is a claim to hold in subordination to his legal title. Idem, 305

8. Bill by H, junior patentee, against R, senior patentee, claiming land covered by both patents; and there is a decree accordingly, and for a conveyance by R to H; but it is never executed. H occupies a part of his land, though not that part in the interlock, and holds for many years. H and those claiming under him have adversary possession of the land to the bounds of his patent.
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9. A purchaser under R cuts the wood upon the interlock, and converts it into coal upon the land, and removes and uses it. This temporary possession did not disseize the heirs of H. Idem, 386

10. After the forfeiture of land to the commonwealth under the delinquent land *laws, no possession thereof adverse to the proprietor in whose name it was forfeited, can run against the commonwealth.
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Staats *v.* Board, 400
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11. Quære: Whether after the lien of the commonwealth for taxes attaches to lands, any possession adverse to the proprietor can impede the right of the commonwealth to subject said lands to sale or forfeiture for such taxes; and as a consequence to transfer to a purchaser or vest in an actual occupant, or subject to re-entry and grant, such forfeited lands.
Staats *v.* Board, 400

12. Though the deed executed by the sheriff for land sold for taxes, be defective, it is competent evidence to show, with other evidence, an actual entry under a claim of title, and a continued holding thereunder, so as to make out a title or right of entry by actual possession. Possession so taken and continued for the time prescribed, might ripen into a right of possession, and so bar the right of entry of the opposing party.
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13. An actual possession of land claiming the same adversely, does not prevent the operation of the deed made by a commissioner of delinquent lands, conveying to a purchaser the commonwealth's right to the land.
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14. K conveys a slave to his step son by deed for value, and retains possession of the slave and her increase for many years. It is not an adversary possession, affording him the protection of the statute of limitations.
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AFFIDAVIT.

1. The affidavit of a witness of his inability to attend the court, not having been objected to in the court below for want of notice, that objection cannot be made in the appellate court.
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2. Such affidavit is sufficient to authorize his deposition which has been taken de bene esse, to be read as evidence.
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APPELLATE COURT.

1. A party complaining of the admission of improper evidence, must state the facts in his bill of exceptions, from which it will appear affirmatively, to the appellate court, that the evidence was improper.
Johnson's ex'x *v.* Jennings' adm'r, 1

2. In assumpsit for money lent and paid, the issues being "non assumpsit," and "the statute of limitations," and the verdict being for the defendant alone on the last plea, the admission of improper evidence having reference to the issue on the first plea only, and which could have no influence on the issue on the last plea, is not ground for reversing the judgment.
Idem, 1

3. A question is propounded to a witness, which is objected to, but the objection is overruled, and an exception is taken. The exception does not state the answer of the witness, or that he answered the question. The appellate court will not reverse the judgment. Idem, 1

4. In an exception to the opinion of the court excluding evidence, the exception must show the relevancy of the evidence, or it is no ground for reversing the judgment. Idem, 1

5. If an exception is taken to an opinion of the court excluding written evidence, and the evidence is made a part of the exception, and is against the party excepting, the exclusion of the evidence is not error of which the exceptant can complain.
Idem, 1

6. Upon an application to establish a public landing, if no motion has been made in the county court to quash the report of the viewers, it is too late to object to it in the appellate court.
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7. In such a case a party opposed to the establishment of the landing, having made himself a party in the cause, and taken an appeal, upon which all the proceedings subsequent to the report of the viewers were quashed; and it being proved that after the cause went back he was served with notice, and he having appeared and opposed the establishment of the landing without objecting to the sufficiency of the notice, he cannot object to it in the appellate court.
Idem, 12

8. If an instruction is given on an abstract question which may mislead the jury, it is an error for which the judgment will be reversed.
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10. The affidavit of a witness that he was unable to attend the court, not having
783 *been objected to for want of notice, that objection cannot be made in the appellate court.
Tayloe *v.* Smith, 557

11. A writ of error may be awarded in a criminal cause during the term of the court, returnable to the same term; and may be then heard.
Lazier's Case, 708

12. Though in all cases great weight is justly due to the opinion of the court before whom jurors are questioned and examined, yet upon exception taken, the appellate court must judge from the facts therein stated, whether the reason for setting aside a juror is good and sufficient or the contrary. Montague's Case, 767

13. The court sets aside a competent juror: This is error for which the prisoner may except, and have the judgment reversed.
Idem, 767

14. The appellate court will not enquire whether injury has been done to the prisoner by improperly setting aside a competent juror; but the law will intend prejudice to the prisoner. Idem, 767

15. A decree states that an order of publication against an absent defendant, had been duly published. It is to be taken in an appellate court, that everything required by the statute was done.
Moore & als. *v.* Holt, 284

16. In a controversy between the commonwealth and a person convicted of a felony, in respect to the costs, the Supreme court of appeals has jurisdiction, without regard to the amount involved.
Anglea *v.* The Commonwealth, 696

ARDENT SPIRITS.

1. A presentment for selling ardent spirits to be drunk at the place where sold, without having obtained a license to keep an ordinary, describes the defendant as a free

negro. This description is immaterial, and need not be proved.
Scott's Case, 749

2. In such a prosecution a writ of error lies for the commonwealth.
Idem, 749

ASSIGNOR AND ASSIGNEE.

1. An assignment of a bond, in the absence of an express agreement to the contrary, imports a guaranty that the assignee shall receive the full amount of the bond from the obligor; and also the right of the assignee to resort to the assignor for any part thereof which he shall fail to collect from the obligor with the exercise of due diligence.
Peay *v.* Morrison's ex'ors, 149

2. What circumstances will not import an agreement that the assignor shall not be personally responsible to the assignee upon the assignment. Idem, 149

3. The bond is secured by a deed of trust upon land, which is not sold for some time after the bond fell due. The delay in the sale of the trust property not having been occasioned by the active agency of the assignee, or that he can be regarded as assenting to it in any other sense than might be equally imputed to the assignor; and it not appearing that the value of the security was diminished by the delay, that delay cannot discharge the assignor from his liability upon his assignment.
Idem, 149

4. The obligor of the bond having become insolvent before the bond fell due, though the deed of trust might have been enforced for the nonpayment of the interest semi-annually, yet as it did not appear affirmatively, that a sale to pay the interest would have been judicious or expedient, the assignor is not released by the failure to sell.
Idem, 149

ASSUMPSIT.

1. To entitle a party to recover back money which he has paid upon a contract which has been wholly rescinded, or the consideration of which has wholly failed, he must not have been guilty of any fraud or illegal conduct in the transaction.
Johnson's ex'x *v.* Jennings' adm'r, 1

2. In such a case the usual and better mode of counting is the common count for money had and received. But if the plaintiff declares specially, it must appear with sufficient certainty from the facts so set out, or from apt averments made in the count, that the consideration has wholly failed, and that such failure did not proceed from any fraud or illegal conduct on the part of the plaintiff. Idem, 1

3. In assumpsit for various sums of money lent to or paid for the defendant's intestate, though payments and setoffs cannot be proved without an account of such payments or setoffs filed, yet defendant may prove that the money sued for, or any part of it, was not lent to or advanced for the intestate, but was paid out of the money of the intestate in the hands of the plaintiff.
Idem, 1

4. Bond given for a loan of money which is to be paid in a few days by a debtor of the obligor. The debtor pays the debt and takes up the bond: It is thereby ex-
784 tinguished; and if, in a future *settlement between the borrower and his debtor, this claim is omitted by mistake, the remedy of the debtor is not on the bond, but for money paid to the use of the borrower.
Young for &c. *v.* Johnston, 269

ATTACHMENTS—Foreign.

1. Process in a foreign attachment is served upon a garnishee having property of the absent debtor in his hands; and afterwards other creditors sue out attachments at law against the same party as an absconding debtor, which are served upon the same garnishee; and before the foreign attachment is ready for a hearing, they obtain judgments and an order for the sale of the property in the hands of the garnishee. The plaintiff in the foreign attachment may amend his bill and enjoin the sale.
Moore & als. *v.* Holt, 284

2. It is not necessary that the plaintiff in a foreign attachment shall file with the clerk an affidavit of the nonresidence of his debtor before the process is issued, in order to constitute the process with the endorsement upon it in the nature of an attachment, a lien when served. Idem, 284

3. The endorsement in the nature of an attachment does not authorize the officer serving the process to take the effects out of the hands of the garnishee, or to require him to give security to have them forthcoming; nor does it operate as an injunction, so as to subject a party to the penalty of a contempt for disobedience. If the plaintiff desires such an order of the court as will effect these purposes, he must file the affidavit according to the statute.
Idem, 284

4. It is not necessary to state in the endorsement on the subpœna the character or amount of the claims for which the attachment is issued. This is to be done in the bill. Idem, 284

5. What circumstances are sufficient to show that the debtor had gone beyond the limits of the state without an intention to return, when the process issued in a foreign attachment was served. Idem, 284

6. The decree states that the order of publication against the absent defendant had been duly published. It is to be taken in an appellate court, that everything required by the statute was done.
Idem, 284

7. A guarantor of a debt may maintain a foreign attachment against the principal before he has paid the debt.
Idem, 284

8. A creditor at large may maintain a suit

in equity in the nature of a foreign attachment, to set aside a fraudulent deed conveying real estate, made by his debtor; both the debtor and his grantee living and being out of the commonwealth.
Peay *v.* Morrison's ex'ors, 149

BAIL.

1. In the case of a scire facias against bail upon a recognizance in a case of felony, a plea which alleges that at the time the recognizance was entered into the principal was by law acquitted and discharged of the said several supposed felonies of which he stood charged, presents no defence for the bail: And this whether the plea is to be considered as averring an acquittal of the principal upon a trial had, or his discharge by operation of law for the failure to try him within three terms of the court.
Archer *v.* The Commonwealth, 627

2. In such a case a plea that at the time of entering into the recognizance the prisoner was unlawfully imprisoned by the commonwealth, and detained in prison until by force and duress of imprisonment he and his surety entered into the recognizance, presents no defence for the bail.
Idem, 627

3. The condition of the recognizance being that the principal shall make his personal appearance on the first day of the next term of the court, and not depart thence without leave of the court, a plea that the principal did appear on the first day of the term of the court to which he was recognized, but that the judge who presided on the said first day of the court, would not sit in his case, or make any order therein, does not present a defence for the bail.
Idem, 627

4. A plea that a previous prosecution against the principal, for the same offences to which by the recognizance he had undertaken to appear, had been terminated by a nolle prosequi, presents no defence to the action against the bail. Idem, 627

5. See Scire Facias, No. 2, and
Idem, 627

6. The act of March 31st, 1851, Sess. Acts 1850-51, p. 36, which authorizes a plaintiff in an action to require security in certain cases from the defendant, constitutes the relation of principal and bail between the defendant and his surety; and it is the right of the surety to surrender his principal.
Levy *v.* Arnsthall, 641

785 *7. By the act of April 16th, 1852, Sess. Acts 1851-52, ch. 92, § 4, p. 77, which authorizes the plaintiff in an action to file interrogatories to a defendant in custody; and authorizes the court, upon notice to the plaintiff or his attorney, to discharge a defendant from custody, applies to a defendant in custody of his bail, as well as a defendant in jail.
Idem, 641

BANKRUPTS.

1. The sureties of a public officer are not excluded from the benefit of the bankrupt act of 1841.
Saunders *v.* The Commonwealth, 494

2. The states are not subjected to the provisions of the bankrupt act of 1841; and the discharge of a bankrupt does not discharge him from his liabilities to the state.
Idem, 494

3. The lien of a judgment is not defeated by the discharge of the debtor as a bankrupt: And it may be enforced in the state courts.
McCance *v.* Taylor, 580

4. In such a case the elegit sued out upon the judgment, may be in the usual form; and in executing it the sheriff must take notice of the bankruptcy of the debtor, and disregarding all property of the debtor not subject to the lien, levy it upon that which is so subject. Idem, 580

BONDS.

1. There are three principal obligors in a bond, and two of them put money in the hands of the third to pay it, and he undertakes to pay it. As between the three the third is the principal obligor, and the other two are his sureties.
Buchanan *v.* Clark & als., 164

2. A paper intended to be a bond, is signed in blank as to the sum, by a person as surety; and the blank is afterwards filled up in his absence, without his knowledge, and without authority from him. It is not his bond.
Rhea *v.* Gibson's ex'or, 215

3. An endorsement on a bond being equivocal in its character, all the circumstances attending the transaction, the contemporaneous conduct and declarations of the parties, evidence of their purposes and motives, may be looked to to ascertain what kind of instrument was within their contemplation and design.
Smith's ex'or *v.* Spiller, 318

4. An endorsement held to be a part of the bond, and irrevocable without destroying the bond. Idem, 318

5. A covenant by the holder of a bond with the principal obligor, to give a specific time for payment, does not release the surety at law: His only remedy is in equity.
Devers *v.* Ross, 252

6. Bond is executed for money lent to be paid in a short time by a debtor of the obligor; and the debtor pays the debt and takes up the bond. It is thereby extinguished; and if, in a future settlement by the borrower and his debtor, this item is omitted by mistake, the remedy of the debtor is not on the bond, but for money paid to the use of the borrower.
Young for &c. *v.* Johnston, 269

7. A bond given to indemnify a surety for costs in another state, recites that the obligee is such surety: The obligors in the bond are estopped from denying that the obligee was such surety.
Cordle *v.* Burch, 480

8. See Sheriffs, No. 1, 2, and
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9. The obligor in a bond may commit larceny in taking it.
Vaughn's Case, 758

CIRCUIT COURT OF HENRICO.

The act, Sess. Acts of 1851-52, ch. 66, § 23, p. 58, which directs that the Circuit court of Henrico county shall be held at the state court-house in the city of Richmond, is not a violation of the 7th section of the 6th article of the constitution of Virginia.
Scott's Case, 749

THE COMMONWEALTH.

In a prosecution for selling ardent spirits by retail, to be drunk at the place where sold without having obtained a license to keep an ordinary, a writ of error lies for the commonwealth from the judgment of an inferior court. Scott's Case, 749

CONFESSIONS.

1. On a trial for felony a confession of the prisoner may be given in evidence, unless it appears that the confession was obtained from the prisoner by some inducement of a worldly or temporal character, in the nature of a threat or promise of benefit held out to him, in respect of his escape from the consequences of the offence, or the mitigation of the punishment, by a person in authority, or with the apparent sanction of such person.
Smith's Case, 734

2. A person to whom a free negro is bound as apprentice, though a justice of
786 *the peace, if not acting as such, and no way affected by the offence, is not a person in authority, in the sense of the rule which excludes confessions made to a person in authority. Idem, 734

CONSIDERATION.

1. A deed from a husband to his wife, conveying to her all his property real and personal, under circumstances showing a strong meritorious consideration, set up in equity against a nephew, the heir at law of the grantor.
Jones & wife *v.* Obenchain & als., 259

2. To entitle a party to recover back money which he has paid upon a contract which has been wholly rescinded, or the consideration of which has wholly failed, he must not have been guilty of any fraud or illegal conduct in the transaction.
Johnson's ex'x *v.* Jennings' adm'r, 1

CONSTITUTION OF VIRGINIA.

1. The constitution of Virginia does not of itself give jurisdiction over any class of cases, to either the Supreme court of appeals or the District courts of appeal. The jurisdiction is to be conferred by statute.
Barnett *v.* Meredith, judge, 650

2. The act, Sess. Acts of 1851-52, ch. 66, § 23, p. 58, which directs that the Circuit court of Henrico shall be held at the state court-house in the city of Richmond, is not a violation of § 7 of article 6 of the constitution of Virginia. Scott's Case, 749

CONTINUANCE.

The court being satisfied from the evidence that a witness is absent with the connivance of the prisoner, her absence is not a ground for a continuance of the trial on his motion. Wormeley's Case, 658

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To entitle a party to recover back money which has been paid upon a contract which has been wholly rescinded, or the consideration of which has wholly failed, he must not have been guilty of any fraud or illegal conduct in the transaction.
Johnson's ex'x *v.* Jennings' adm'r, 1

CONVEYANCES.

1. Owners of a large tract of land convey a part of it. The call of the deed is, Beginning on the line of a survey made for S, six hundred and ninety poles from the northerly corner, running thence with S's line a given course and distance, to two white oaks, &c. Though there is an obvious mistake in some one or other of the calls of the survey, yet the beginning corner must be made at the point on the line of S six hundred and ninety poles from the northerly corner.
Smith & al. *v.* Chapman, 445

2. In such case the action of the court or of the commissioner of delinquent lands, under whom a party claims, in the proceedings for the sale of the lands, cannot alter the beginning corner called for by the deed.
Idem, 445

3. In ascertaining the boundaries of the land claimed by a plaintiff in ejectment, who claimed as a purchaser of a part of a large tract sold by the commissioner of delinquent lands, no regard is to be paid to any private arrangements or divisions of the plaintiff and the other purchasers of parts of the same tract of land at the same sales. Idem, 445

4. An actual possession of land claiming the same adversely, does not prevent the operation of the deed made by the commissioner of delinquent lands, conveying to a purchaser the commonwealth's right to the land. Idem, 445

5. The ex'ors of R execute two deeds at the same time to the same parties, by one of which they convey a tract of land except so much as was covered by a decree made in favor of H; by the other they convey a number of adjoining tracts of land, one of which also includes the land covered by said decree, and in this last deed there is no reservation. The two deeds having been made at the same time and to the same parties, must be considered parts of the same transaction, and as constituting in law one entire deed; and therefore the effect of the two deeds taken together, is to

except out of the grant in each the land covered by the decree as fully as if the exception had been in both deeds.
Anderson *v.* Harvey's heirs, 386

6. The purchasers from the ex'ors of R had no possession either actual or constructive of the land covered by the decree; and their deed conveying the lands, could convey no right to the land covered by the decree as against the heirs of H.
Idem, 386

7. A deed of trust and power of attorney *are made at the same time by and to the same parties. Under the circumstances they are to be considered as one instrument, and construed so as to stand together.
787
French *v.* Townes & als., 513

8. In such a case the attorney and trustee may by his admissions in his answer to a bill filed by the cestuis que trust in the deed, vary the construction of the instruments to his own prejudice.
Idem, 513

9. Land is forfeited to the commonwealth under distinct titles: Upon a proceeding to have the land sold under either title, the sale and conveyance passes all the title vested in the commonwealth under both titles.
Smith & al. *v.* Chapman, 445

10. Land is forfeited under one title in one county, and under another title in another county; the land in one patent extending into both counties. The court in which the proceeding is first commenced for the sale of the land, has jurisdiction of the subject; and the sale and conveyance under its decree passes all the title of the commonwealth, though the conveyance under the decree of the court of the other county, was first executed. Idem, 445

CONVEYANCE—Fraudulent.

A creditor at large may maintain a suit in equity to set aside a fraudulent deed conveying real estate, made by his debtor, both the debtor and his grantee living and being out of the commonwealth.
Peay *v.* Morrison's ex'ors, 149

CORONERS.

Quære: If a coroner has authority to commit to jail for trial a person charged by the inquest taken before him, with a felony. Wormeley's Case, 658

COSTS.

1. A plaintiff in equity whose house where his family resides, is fifteen feet on the Virginia side of the state line, and who so far as known, lives with his family, is prima facie a resident of Virginia; and this prima facie case is not removed by proof that a sheriff had twice gone to the house with process against him, without finding him, and was told by the neighbors that the plaintiff would not be seen by him: and he cannot therefore be held to give security for costs.
Evans *v.* Bradshaw & als., 207

2. A pardon of a person convicted of felony does not release him from the costs of the prosecution for which an execution had been issued before the pardon was granted.
Anglea *v.* The Commonwealth, 696

3. The statute only subjects the prisoner for such costs as the commonwealth is bound to pay; and therefore does not embrace the fees of the clerks, sheriff, or attorneys for the commonwealth.
Idem, 696

CREDITORS.

See Conveyances, Fraudulent, No. 1, and
Peay *v.* Morrison's ex'ors, 149

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. What is not a good defence for bail taken in a criminal prosecution. See Bail, No. 1, 2, 3, 4, and
Archer *v.* Commonwealth, 627

2. Where by law separate terms of a Circuit court are appointed for the trial of civil and criminal causes, a recognizance in a criminal case is properly made returnable to a term for the trial of criminal causes; and a scire facias thereon is properly made returnable to the rules, or to the term for the trial of civil causes: The first being a criminal and the last a civil proceeding. Idem, 627

3. What unnecessary to state in declaring upon a recognizance taken in a criminal prosecution. See Scire Facias, No. 2, and
Idem, 627

4. Quære: If a coroner has authority to commit to jail for trial a person charged by the inquest taken before him, with a felony.
Wormeley's Case, 658

5. If a coroner has not authority to commit to jail, it is too late to object to it after the prisoner has been regularly examined and sent on for trial, and has been indicted for the felony in the Circuit court.
Idem, 658

6. A justice of the peace acting as coroner, and having as coroner committed a person to jail for a felony, may certify the fact of such committal as a justice of the peace. Idem, 658

7. Upon an application of a prisoner charged with murder, for a change of venue, his affidavit alone of his fears or belief that he cannot have a fair trial in the county, is not sufficient to sustain the motion; but he should be required to show by independent testimony, such facts as make it appear probable at least, that his fears and belief are well founded. *But when such facts are shown by the prisoner, and are not successfully repelled or explained by the commonwealth, no argument of inconvenience or delay should be permitted to stand in the way of the great end to be attained, a fair trial.
788
Idem, 658

8. What proof is sufficient to sustain a

motion by a prisoner for a change of venue in a prosecution for murder.
Idem, 658

9. The court being satisfied from the evidence that a witness is absent with the connivance of the prisoner, her absence is not a ground for a continuance of the trial upon his motion. Idem, 658

10. If two distinct felonies are charged in one indictment, it may be quashed, or the prosecutor will be compelled to elect for which offence he will proceed.
Lazier's Case, 708

11. The court being satisfied that jurors cannot be gotten in the county to try a prisoner, when about to adjourn from a regular to a special term may make an order directing the sheriff to summon a certain number of persons from each of two corporations or counties, to attend as jurors for the trial of the prisoner at the special term, without having another venire facias for summoning jurors from the county.
Wormeley's Case, 658

12. After the original venire is exhausted without completing the panel, the court may order any number of persons to be summoned it may think necessary; and if the sheriff for want of time or other cause, fails to summon the whole number the return is valid for as many as are summoned.
Idem, 658

13. On a trial for a felonious offence, the court of its own motion, without the suggestion of either party, may examine upon oath all who have been summoned to serve upon the jury, touching any disability created by statute, such as infancy, want of freehold or property qualification, or in a capital case, conscientious scruples on the subject of capital punishment: And upon such disability having been thus made to appear, or if it be shown that any one summoned has been convicted of perjury, the court may and should set aside any such juror of its own action, without objection made by either party.
Montague's Case, 767

14. On a trial for a felony the court of its own motion, without the suggestion or consent of either party, may excuse or set aside a juror who, though in all other respects competent, is disabled physically or mentally, by disease, domestic affliction, ignorance of the vernacular tongue, loss of hearing or other like causes, from properly performing the duties of a juror. But the erroneous exercise of this power is a matter of exception by the prisoner, for which the judgment of the court may be reversed.
Idem, 767

15. As no challenge to a juror is allowed to the commonwealth except for cause, where such challenge is made the cause should be shown, and should be a good and legal cause for the exclusion of the juror; otherwise it should be overruled.
Idem, 767

16. The court cannot of its own motion, where no challenge is made, without good cause set aside a juror, except where he is disabled physically or mentally from properly performing the duties of a juror, or is disqualified by statute. Idem, 767

17. A juror summoned for the trial of a prisoner fails to appear on the day to which he is summoned, but appears at another day under a rule to show cause why he shall not be fined for failing to appear: If in other respects qualified he may be put upon the panel; that not having been completed when he appears.
Wormeley's Case, 658

18. The prisoner objects to a juror, and his objection is overruled, and he excepts. After the panel is made up, but before the prisoner has exercised his right of challenge, the court, on the motion of the commonwealth, out of abundant caution, sets aside the juror. This is not error.
Idem, 658

19. What is not such an opinion as will disqualify a juror for serving on a trial for felony. Idem, 658
Montague's Case, 767

20. On a trial for arson the nephew of the deceased wife of the person whose house was burned, if she left children, is an incompetent juror. Jaques' Case, 690

21. Such relationship to a party upon the record is a cause of principal challenge. If it be not a cause of principal challenge because the person whose house was burned is not a party on the record, it is a case in which the favor being apparent, he should be set aside. Idem, 690

22. In such case if the deceased wife left no issue, it is for the prosecution to show the fact; and that fact not being shown, the objection is valid. Idem, 690

23. Though in all cases great weight is justly due to the opinion of the court before whom the jurors are questioned and examined, yet upon exception taken the 789 *appellate court must judge from the facts therein stated, whether the reason for setting aside a juror is good and sufficient or the contrary.
Montague's Case, 767

24. If the court sets aside a competent juror, this is an error for which the prisoner may except, and have the judgment reversed. Idem, 767

25. The appellate court will not enquire whether injury has been sustained by the prisoner, by improperly setting aside a competent juror; but the law will intend prejudice to the prisoner. Idem, 767

26. On a prosecution for uttering and attempting to employ as true a forged note purporting to be a note of the bank of D in Pennsylvania, a banking company authorized by the laws of Pennsylvania, the existence of such company may be proved by parol evidence. The averment that it was authorized by the law of Pennsylvania is surplusage, and need not be proved.
Cady's Case, 776

27. In a prosecution for a misdemeanor,

an issue is made up on the plea of not guilty at the May term of the County court for 1851. At the August term 1852, when the case is called for trial, the defendant tenders another plea. The plea is tendered too late and properly rejected.
Scott's Case, 749

28. A presentment for selling ardent spirits without an ordinary license, states the defendant to be a free negro. This is surplusage, and need not be proved.
Idem, 749

29. In such a case a plea that the defendant is not a free negro, but an Indian, is an immaterial plea; and properly rejected.
Idem, 749

30. In such a case the commonwealth may have a writ of error to a judgment in favor of the defendant. Idem, 749

DAMAGES.

1. The damages on the dissolution of an injunction to a judgment, becomes, as to the party obtaining it, a part of the judgment, and are as such, a lien upon the land of that party.
Michaux's adm'r *v.* Brown & als., 612

2. See Public Landings, No. 8, and
Muire *v.* Falconer & al., 12

3. When an injunction should be dissolved without damages. See Vendor and Purchaser, No. 3, and
Reeves *v.* Dickey, 138
Jaynes & al. *v.* Brock, 211

DECREES.

1. When joint decree against two will be reversed upon appeal by one of them. See Appellate Court, No. 9, and
Purcell *v.* McCleary & al., 246

2. In detinue for slaves by a trustee in a deed of trust against a defendant claiming the slaves by purchase from the same grantor, the defendant offers a witness to prove that the debt secured by the deed was paid by a sale of slaves by the debtor to the creditor. To this evidence the plaintiff objects, and introduces a record in a chancery cause between the debtor and creditor, in which it has been decided that the price of the slaves had been by agreement between the debtor and creditor, applied in part discharge of another debt. The decree is conclusive, and the defendant's evidence is inadmissible.
Nichols *v.* Campbell, 560

3. In said chancery cause it was decided that there was no usury in the debt secured by the deed. The decree concludes the defendant; and he cannot set it up in the action by the trustee against him.
Idem, 560

4. In a proceeding for the sale of infants' lands under the value of $300, the order or decree is conclusive upon the infant; and he has no day in court to show cause against it upon his coming of age.
Parker & als. *v.* McCoy & als., 594

5. Though the decree gives the infant a day in court, this will not entitle him as against the bona fide purchaser under the decree, to disturb the sale. Idem, 594

6. To what errors in a decree consent extends.
Buchanan *v.* Clark & als., 164

DEEDS.

1. See Conveyances.

2. A father in consideration of affection for his daughter and one dollar paid him by herself and husband, conveys to the daughter for the use of herself and husband and their joint heirs, slaves. To have and to hold the slaves to the daughter and her husband and their heirs, &c.; and he warrants the title to them. The deed conveys to the daughter and her husband a joint estate.
Cleland *v.* Watson, 159

3. When two deeds will be construed as constituting one deed. See Conveyances, No. 5 and No. 7, and
Anderson *v.* Harvey's heirs, 386
French *v.* Townes & als., 513

4. A deed executed in Boston in December 1798, by parties living there, conveying land in Virginia, is properly admitted
790 *to record upon a certificate of the proof of its execution by the subscribing witnesses before the court of Suffolk county, signed by a party describing himself as clerk of the court, though no seal is attached to it.
Smith & al. *v.* Chapman, 445

5. What will not avoid a deed by sheriff conveying land sold for taxes. See Delinquent and Forfeited Lands, No. 23, 24, 25, and
Flanagan *v.* Grimmet & als., 421

6. Though deed by sheriff is defective, it may be competent evidence in ejectment, coupled with other evidence, to show an entry under claim of title, and thus to have the protection of the statute of limitations.
Idem, 421

DELINQUENT AND FORFEITED LANDS.

1. The statutes of Virginia forfeiting lands to the commonwealth for the failure of the owners to enter them upon the commissioners' books and pay the taxes due thereon, are constitutional.
Wild's lessee *v.* Serpell, 405

2. The forfeiture under these statutes is perfected without a judgment, decree, or other matter of record, or an inquest of office; but by the operation of the statutes the title is divested out of the owner and is vested in the commonwealth.
Idem, 405
Staats *v.* Board, 400

3. In such cases where the title is vested in the commonwealth, and the forfeiture enures to the benefit of a third person claiming under the commonwealth by virtue of another and distinct right, the transfer of the title to such person is, in like man-

ner, perfect and complete without any new grant from the commonwealth, or any proceeding to manifest the transfer, by matter of record or otherwise.
Wild's lessee *v.* Serpell, 405

4. Land omitted to be entered on the commissioners' books were forfeited under § 2 of the act of February 27th, 1835, Sess. Acts, p. 12; and the forfeiture became perfect and consummate on the 1st of November 1836, the period limited in which the forfeiture might be saved by complying with the provisions of the act of March 23d, 1836. Sess. Acts, p. 7. Idem, 405
Staats *v.* Board, 400
Hale *v.* Branscum, 418

5. The act of March 30th, 1837, Sess. Acts, p. 9, giving time for redemption until the 15th of January 1838, did not release the forfeiture which had accrued, except in cases where the owner or proprietor availed himself of the privilege of redemption.
Staats *v.* Board, 400

6. From the time that land is forfeited to the commonwealth under the act of 1835, Sess. Acts, p. 11, time will not run in favor of a party in possession, against the commonwealth or those claiming under her by patent.
Staats *v.* Board, 400
Hale *v.* Branscum, 418

7. Quære: Whether after the lien of the commonwealth for taxes attaches to lands, any possession adverse to the proprietor can operate so as to impede the right of the commonwealth to subject said lands to sale or forfeiture for such taxes; and as a consequence to transfer to a purchaser or vest in an actual occupant, or subject to re-entry and grant, such forfeited lands.
Staats *v.* Board, 400

8. A party claiming under a grant from the commonwealth issued in August 1836, cannot claim the benefit of an older title forfeited to the commonwealth under the act of February 27th, 1835, because by that act a forfeiture only enured to the benefit of those who claimed title under a grant from the commonwealth bearing date before April 1st, 1831.
Wild's lessee *v.* Serpell, 405

9. Nor can such a party sustain such claim under the provisions of the act of March 30th, 1837, unless he is a bona fide occupant of the land. Idem, 405

10. To sustain such a claim under § 16 of the act of March 16th, 1838, Sess. Acts, p. 21, the party must have been at the date of the act, in the actual possession and occupancy of the land forfeited or a part thereof, with the title bona fide claimed or derived under a grant from the commonwealth, which issued subsequent to the 31st of March 1831 and prior to the 1st of January 1838. Idem, 405

11. By the act of March 18th, 1841, Sess. Acts, p. 31, the forfeiture of title to the commonwealth only enures to the benefit of those then in actual possession of the forfeited land under claim of title through a grant from the commonwealth. Though at that time a party held a patent for the land, yet if he was in actual possession under a lease from another person claiming the elder title, that is not the actual possession contemplated. Idem, 405

12. By the act of March 22d, 1842, Sess. Acts, § 3, p. 13, the title to forfeited lands is transferred to and vested in such persons, other than those for whose
791 default *the same may have been forfeited, as had title or claim legal or equitable, derived under grant from the commonwealth, bearing date prior to the 1st of January 1843, without making either actual occupancy or possession of the land, or a bona fide claim of title, any part of the condition on which the transfer of the title takes effect. Idem, 405

13. The act of March 22d, 1842, Sess. Acts, p. 13, is retrospective in its operation. Idem, 405

14. Though the land had been reported to the court as forfeited land, and an order had been made for the sale thereof, yet if not actually sold before the passage of the act, the title is transferred under the statute. Idem, 405

15. By the operation of the act of March 5th, 1836, Sess. Acts, p. 7, the title acquired by the commonwealth by the forfeiture of land for failure to enter it upon the commissioners' books and pay the taxes, vested in the party obtaining a patent for the land in June 1846.
Hale *v.* Branscum, 418

16. In a sale by a commissioner of delinquent lands, under an order or decree of the court, no action of the court or the commissioner can alter the point of the beginning corner of the survey of the land sold; but that must be fixed by the deed.
Smith & al. *v.* Chapman, 445

17. In ascertaining the boundaries of the land claimed by a plaintiff in ejectment who claims as a purchaser of part of a large tract sold by a commissioner of delinquent lands, no regard is to be had to any private arrangements or divisions by the plaintiff and other purchasers of parts of the same tract of land at the same sale.
Idem, 445

18. An actual possession of land claiming the same adversely, does not prevent the operation of the deed made by a commissioner of delinquent lands, conveying to a purchaser the commonwealth's right to the land. Idem, 445

19. A purchaser at a sale of lands made by a commissioner of delinquent lands, is not bound to prove that all the previous proceedings of the commissioner and the court were regular. The proceeding is in the nature of a judicial proceeding, and the orders and decree of the court made in it are conclusive at least upon all strangers.
Idem, 445

20. Land is forfeited to the commonwealth under distinct titles. Upon a proceeding to have the land sold under either title, the

sale and conveyance passes all the title vested in the commonwealth.
Idem, 445

21. Land is forfeited under one title in one county, and under another title in another county; the land in one patent extending into both counties. The court in which the proceeding is first commenced for the sale of the land, has jurisdiction of the subject; and the sale and conveyance under its decree passes all the title of the commonwealth, though the conveyance under the decree of the court of the other county was first executed. Idem, 445

22. In a sale of land for taxes under the act of February 9th, 1814, 2 Rev. Code 542, by the circumstances of the sale which are to be recited in the deed, is not meant all the steps taken by the various officers, which precede the sale; but the circumstances attending the sale itself, viz: That the sale was made at the time and place prescribed for the sale of lands returned delinquent for nonpayment of taxes; if less than the whole lot or tract was sold, how much; who was the purchaser and the amount of the purchase money.
Flanagan *v.* Grimmet & als., 421

23. It is not necessary that the deed shall state that the land had been advertised.
Idem, 421

24. If the deed recites that the land was advertised in a mode that did not conform to the statute, yet as it was not necessary to recite in the deed that the land had been advertised, the recital in the deed of an insufficient advertisement is not an irregularity on the face of the proceedings, which will avoid the deed. Idem, 421

25. The deed cannot be questioned by parol proof of the failure to advertise the sale as the law prescribes. Idem, 421

DEMURRER.

See Pleadings, No. 2, 7, and
Cunningham *v.* Smith & al., 255
Lazier's Case, 708

DEPOSITIONS.

1. The affidavit of a witness that from his age and infirmities he is unable to attend the court without endangering his life, made eight days before the cause is called for trial, is sufficient to authorize his deposition which had been taken de bene esse, to be read in evidence.
Tayloe *v.* Smith, 557

2. On a trial for murder, to contradict a witness for the prisoner, it is competent to introduce in evidence a deposition
792 *given by him before the inquest, taken down at the time by the coroner, and read to the witness and signed by him.
Wormeley's Case, 658

ELEGIT.

An elegit issued upon a judgment rendered against a bankrupt before his bankruptcy, may be in the usual form; and in executing it the sheriff must take notice of the bankruptcy of the debtor, and disregarding all his property not subject to the lien of the judgment, levy the elegit upon that which is so subject.
McCance *v.* Taylor, 580

EMANCIPATION.

The owner of slaves in Virginia took them with him to New York in November 1831, with the intention to emancipate them; and whilst there he executed a deed of emancipation attested by one witness. After remaining in New York a few days, he returned to Virginia, bringing the negroes with him; and ever after during his life he treated them as free persons: *held*:

1st. The owner of the slaves having taken them to New York for the purpose of emancipating them, they were by the laws of New York, free; and so continued after their return to Virginia.
Foster's adm'r *v.* Fosters, 485

2d. The acts of the owner of the slaves were not such a fraud upon the laws of Virginia as rendered his acts null and of no effect. Idem, 485

ENDORSEMENTS.

1. An endorsement on a bond being equivocal in its character, all the circumstances attending the transaction, the cotemporaneous conduct and declarations of the parties, evidence of their purposes and motives, may be looked to to ascertain what kind of instrument was within their contemplation and design.
Smith's ex'or *v.* Spiller, 318

2. An endorsement held to be a part of the bond, and irrevocable without destroying the bond. Idem, 318

EQUITABLE JURISDICTION AND RELIEF.

1. A creditor at large may maintain a suit in equity to set aside a fraudulent deed conveying real estate, made by his debtor, both the debtor and his grantee living and being out of the commonwealth.
Peay *v.* Morrison's ex'ors, 149

2. Process in a foreign attachment is served upon a garnishee having property of the absent debtor in his hands; and afterwards other creditors sue out attachments at law against the same party, as an absconding debtor, which are served upon the same garnishee; and before the foreign attachment is ready for a hearing, they obtain judgments, and an order for the sale of the property in the hands of the garnishee. The plaintiff in the foreign attachment may amend his bill and enjoin the sale.
Moore & als. *v.* Holt, 284

3. The next of kin of an intestate being his mother and widow, and the husband of the mother being in possession of slaves which he had many years before conveyed to the intestate, claiming to hold them for the life of himself and wife; and the administrator having paid all the debts of his

intestate, and declining to sue for the slaves, the widow may sue in equity for distribution of the slaves.
Roberts *v.* King, 184

4. B for himself and others sells part of a tract of land to J, who executes to B his bonds for the purchase money. The other parties refuse to confirm the contract, but sell their interest in the whole tract to J. B having recovered judgments upon the bonds J is entitled to have the judgments enjoined, and to be relieved to the extent of the injury he has sustained by the failure of B to procure the other parties to execute the contract.
Jaynes & al. *v.* Brock, 211

5. Where there are several purchasers of land subject to a judgment lien, some of them may file a bill to question the lien, or if it be valid, asking that the different purchasers may be subjected to pay it: And though they ask for a ratable contribution, this will not prevent the court's subjecting the land last sold to satisfy the creditor.
Michaux's adm'r *v.* Brown & als., 612

6. Though the owner of lands has the legal title, and might maintain trespass for an injury done to it by raising iron ore upon it, yet equity has jurisdiction to enjoin another party who claims the land from taking the ore from it.
Anderson *v.* Harvey's heirs, 386

7. A deed from a husband to his wife, conveying to her all his property real and personal under circumstances showing a strong meritorious consideration, set up in equity against a nephew the heir at law of the grantor.
Jones & wife *v.* Obenchain & als., 259

8. A party claiming that he has not
793 *been credited for all money paid by him to the sheriff on an execution, may have any injustice done to him in that respect corrected by the court from whence the execution issued: And it is not a case for an injunction and relief in equity.
Morrison *v.* Speer, 228

9. In a controversy between parties claiming a judgment lien and others claiming under a deed of trust, it being uncertain what part of the lands of the debtor are included in the deed, it is error to decree a sale of the land until the priorities of the parties are adjusted, and it is ascertained what portion of the lands are included in the deed.
Buchanan *v.* Clark & als., 164

10. The judgment having priority, the land not included in the deed of trust should be first sold and applied to the judgment; and if insufficient to discharge it, then the land included in the deed of trust should be sold, and so much of the proceeds thereof as with the proceeds of the land not conveyed, amount to a moiety of the proceeds of all the lands, should be applied to discharge the judgment. Idem, 164

11. There being two judgments having preference to the deed, the proceeds of the other moiety of the land should be applied to satisfy the second judgment.
Idem, 164

12. Though lands are conveyed in trust to secure debts, a judgment creditor having priority to the deed, is entitled to subject but a moiety of the debtor's lands to the satisfaction of his judgment, except in the case of a mere equity of redemption.
Idem, 164

13. The court having decreed the sale of the whole land, and it having been purchased by a party claiming under the deed of trust; and the final decree being in his favor, and a conveyance to him being directed; upon appeal by the party claiming under the judgment the decree is reversed. The claim of the purchaser must fall with the reversal of the decree; the purchaser not being a stranger to the controversy, purchasing at a judicial sale, but the party chiefly benefited by the decree complained of. Idem, 164

14. See Trusts and Trustees, No. 3, and
Nickell & Miller *v.* Handly & als., 336

EQUITY OF REDEMPTION.

A judgment is a lien upon an equity of redemption in land, and will be preferred to a subsequent purchaser of the equity of redemption not having the legal title: And the lien extends to the whole of the equity of redemption.
Michaux's adm'r *v.* Brown & als., 612

ESCAPES.

See Sheriffs, No. 7, 8, 9, 10, 11, 12, 13, and
Stone *v.* Wilson, 529

ESTATES.

See Conveyances.

ESTOPPELS.

1. N living in Virginia, brought two suits in South Carolina; and B living there, became his security for costs. N executed to B a bond with sureties diving in Virginia, to indemnify him. In an action by B against N and his sureties the records of the suits brought by N in South Carolina were offered in evidence by B, and were objected to on the ground that they showed that B had not become the surety of N at the date of the bond of N and his sureties to him: *held*: That the defendants not showing that B was surety of N for cost in any other cases, their bond must be held to refer to these suits; and they were estopped by their bond from denying that B was the surety of N at the time of its execution.
Cordle *v.* Burch, 480

2. The sureties of a deputy in his bond to the high sheriff for the faithful discharge of his duties, are estopped from denying that the principal was deputy, unless the bond is invalid.
Cecil *v.* Early & others, 198

3. Upon a motion by a high sheriff

against a deputy and his sureties, they file a special plea; and the plaintiff replies specially, and relies on the facts therein stated, and especially on the bond of the deputy and his sureties, as an estoppel. Though the replication has not the peculiar commencement and conclusion of a pleading by way of estoppel, a demurrer to the replication should not be sustained.
Idem, 198

EVIDENCE.

1. A record of another suit between the same parties, in which the same causes of action were in controversy, and the finding of the jury was against them, is competent evidence.
Johnson's ex'x *v.* Jennings' adm'r, 1

2. In ejectment plaintiff claims under a deed from the commissioner of delinquent lands; the record of the proceedings 794 *including the exhibits, in which the sale and conveyance of the land was directed, is competent evidence, though there be irregularities in the proceedings apparent on the face of the record.
Smith & al. *v.* Chapman, 445

3. In detinue for slaves by a trustee in a deed of trust against a defendant who claims the slaves by purchase from the same grantor, the defendant offers a witness to prove the debt secured by the deed was paid by a sale of slaves to the creditor by the debtor. To this evidence the plaintiff objects, and introduces a record in a chancery cause between the debtor and creditor, in which it has been decided that the price of these slaves has been by agreement between the debtor and creditor, applied in part discharge of another debt: *held*: The decree is conclusive, and the defendant's evidence is inadmissible.
Nichols *v.* Campbell, 560

4. In said chancery cause it was decided there was no usury in the debt secured by the deed of trust. The decree concludes the defendant; and he cannot set up usury in the present action. Idem, 560

5. In a writ of right in the pleadings and verdict the plaintiffs are described as the heirs of B under whom they claim. This is not evidence that they are the heirs of B, in an appellate court.
Bell's heirs *v.* Snyder & als., 350

6. The report of the surveyor made in the cause speaks of one of the plaintiffs as the heir of B. This is not evidence that he is such heir. Idem, 350

7. An endorsement on a bond being equivocal in its character, all the circumstances attending the transaction, the cotemporaneous conduct and declarations of the parties, evidence of their purposes and motives, may be looked to, to ascertain what kind of instrument was within their contemplation and design.
Smith's ex'or *v.* Spiller, 318

8. In an action for a devastavit by a creditor against an executor and his sureties, the settled account of the executor was introduced, which showed a credit to the executor of money paid to a legatee. The executor proposed to show by parol proof that the legatee paid was not a legatee of his testator, but of a person of whom his testator was the executor, and had received sufficient assets to pay the legacy, but had not done it: *held*: The fact of such a legacy and that the executor's testator was the executor, should be proved by the will and the record of his qualification; and parol evidence is inadmissible for that purpose.
Millers *v.* Catlett, 477

9. On a survey directed in a cause, some of the lines are run when one of the parties acts as chainman. Upon a second order of survey another chainman is employed, and all but one of the lines are again run. The line not run the surveyor says he ascertains to be correct by other lines run; and the line is submitted to the jury not as a line run, but as a protracted line. This is not error.
Smith & al. *v.* Chapman, 445

10. Statements of a chainman who is dead, as to the corner and line trees of a survey, are admitted in evidence; but statements as to the locality of the land and the streams the lines would cross, are not admissible evidence to fix the locality of the survey. Idem, 445

11. The question being whether a survey was actually run, so as to entitle the party claiming under the patent issued upon it, to reverse the courses called for in the patent, it is competent for the other party to introduce the entry and survey, in which the courses are the same as in the patent, and five other large surveys bearing the same date and made by the same surveyor, to disprove the actual running of the survey. Idem, 445

12. If the deed of a sheriff conveying land sold for taxes is defective, it is still competent evidence to show, with other evidence, an actual entry under a claim of title, and continued holding thereunder, so as to make out a title or right of entry by actual possession.
Flanagan *v.* Grimmet & als., 421

13. On a trial for murder, to contradict a witness for the prisoner, it is competent to introduce in evidence a deposition given by him before the inquest, taken down at the time by the coroner, and read to the witness and signed by him.
Wormeley's Case, 658

14. Though in a prosecution for a rape it is competent to prove the fact of a recent complaint by the female, for the purpose of sustaining her credit, it is not competent to prove any particulars of the description of the person committing the offence, which may have been given by her.
Brogy's Case, 722

15. A fortiori: If the female when examined as a witness declines to give a description of the person committing the offence, it is not competent to prove the

description given by her when not upon oath. Idem, 722

16. A witness for the prisoner on a 795 *trial for felony who had given evidence at a former trial, is absent from the commonwealth at the second trial. It is not competent for the prisoner to prove what the witness swore to on the first trial. Idem, 722

17. On a trial for felony a confession of the prisoner may be given in evidence unless it appears that the confession was obtained from him by some inducement of a worldly or temporal character in the nature of a threat or promise of benefit, held out to him in respect of his escape from the consequences of his offence or the mitigation of his punishment, by a person in authority, or with the apparent sanction of such person. Smith's Case, 734

18. A person to whom a free negro is bound as apprentice, though a justice of the peace, if not acting as such, and no way affected by the offence, is not a person in authority, in the sense of the rule which excludes confessions made to a person in authority. Idem, 734

19. On a prosecution for uttering or attempting to employ as true, a forged note purporting to be the note of the Bank of D, in Pennsylvania, a banking company authorized by the laws of Pennsylvania, the existence of such bank may be proved by parol evidence. The averment that it was authorized by the laws of Pennsylvania is surplusage, and need not be proved. Cady's Case, 776

EXCEPTIONS—Bill of.

1. A party complaining of the admission of improper evidence, must state the facts in his bill of exceptions, from which it will appear affirmatively, to the appellate court, that the evidence was improper.

Johnson's ex'or v. Jennings' adm'r, 1

2. A question is propounded to a witness, which is objected to, but the objection is overruled, and an exception is taken. The bill of exceptions does not state the answer of the witness, or that he answered the question. The appellate court will not reverse the judgment. Idem, 1

3. If an exception is taken to an opinion of the court excluding evidence, the exception must show the relevancy of the evidence, or it is no ground for reversing the judgment. Idem, 1

EXECUTIONS.

1. The issue of an execution after a year and day from the date of the judgment, renders the execution not void but voidable; and this irregularity cannot be taken advantage of in an action founded upon the return on the execution.

Beale's adm'r v. Botetourt justices, 278

2. A mere error of form in an execution issued against an executor, where it has been treated throughout as an execution de bonis testatoris, cannot be set up as a defence to an action of devastavit against the executor and his sureties, founded upon the return upon it. Idem, 278

3. An elegit issued upon a judgment rendered against a bankrupt before his bankruptcy, may be in the usual form; and in executing it the sheriff must take notice of the bankruptcy of the debtor, and disregarding all his property not subject to the lien of a judgment, levy the elegit upon that which is so subject.

McCance v. Taylor, 580

4. A sheriff may have leave to amend his return upon an execution, after notice of a motion against him founded on the original return: And the amended return may be made by a deputy who did not make the first return.

Stone v. Wilson, 529

5. A party claiming that he has not been credited with all the money paid by him to a sheriff upon an execution, may have any injustice done to him in that respect corrected by the court from whence the execution issued: And it is not a case for an injunction and relief in equity.

Morrison v. Speer, 228

EXECUTORS AND ADMINISTRATORS.

1. A mere error of form in an execution issued against an executor, where it has been treated throughout as an execution de bonis testatoris, cannot be set up as a defence to an action of devastavit against the executor and his sureties, founded upon the return upon it.

Beale's adm'r v. Botetourt justices, 278

2. A suit for an account of an administration is brought twenty-six years after the death of the intestate, twenty-one years after the death of the administrator, long after his estate is settled by his administrator showing that there were no personal assets, and in the absence of the first administrator's books and papers, against his heir who at his death was an infant two years old. The staleness of the claim is conclusive against it.

Hillis v. Hamilton, adm'r & als., 300

3. When the condition of the estate 796 *does not require a sale of the slaves, and they are divided among the legatees or distributees, the executor is not entitled to a commission on their appraised value.

Claycomb's legatees v. Claycomb's ex'or, 589

4. But where grain or other perishable property, which by the law the executor is directed to sell, is divided in kind among the legatees, the executor is entitled to a commission upon the appraised value. Idem, 589

5. Where one of two executors performs all the labor of the administration, he may be allowed all the compensation; and it is not for the legatees to object to this. Idem, 589

6. See Evidence, No. 8, and
Miller *v.* Catlett, 477

FORFEITED LANDS.

See Delinquent and Forfeited Lands.

FRAUD.

1. To constitute fraud in the sale of goods it is not enough to represent them as sound and marketable, when they were unsound and damaged, unless the vendor knew that the representations were untrue, or used some fraud or art to disguise or conceal their true condition or quality.

Cunningham *v.* Smith & al., 255

2. But if the representations were untrue, and the vendor at the time of making them knew them to be untrue, and knowingly made them with intent to deceive the purchaser, that is a fraud. Idem, 255

GUARANTOR AND GUARANTEE.

1. A guarantor of a debt may maintain a foreign attachment against the principal before he has paid the debt.

Moore & als. *v.* Holt, 284

2. A letter written by a party to merchants with whom he had been in the habit of dealing, introducing to them his brother who was a stranger to them; stating that he was going to their city to purchase goods, and requesting them to introduce him to some of the houses at which the writer dealt, "with assurance that any contract of his will and shall be promptly paid," is a guarantee. Idem, 284

HUSBAND AND WIFE.

1. A father in consideration of affection for his daughter and of one dollar paid him by herself and husband, conveys to the daughter for the use of herself and husband and their joint heirs, slaves. To have and to hold the slaves to the daughter and her husband and their heirs, &c.: And he warrants the title to them. The deed conveys to the daughter and her husband a joint estate; and the husband may dispose of the slaves.

Cleland *v.* Watson, 159

2. A deed from a husband to his wife conveying to her all his property real and personal, under circumstances showing a strong meritorious consideration, set up in equity against a nephew the heir at law of the grantor.

Jones & wife *v.* Obenchain & als., 259

INDICTMENTS AND PRESENTMENTS.

1. In criminal causes the same defects or imperfections of form may be taken advantage of on a general as on a special demurrer. Lazier's Case, 708

2. In an indictment for murder there are two counts, in the second of which the offence is not set out as another offence. This is not error. See Code, p. 770, § 11. Idem, 708

3. An indictment for murder charges the wound to have been inflicted on the 9th of December, of which wound she on the said 14th of December died. The word "said" is surplusage, and its insertion is not a fatal defect. Idem, 708

4. In an indictment for murder it is not necessary to set out the length or breadth of the wound. See Code, p. 770, § 10. Idem, 708

5. It is not error in an indictment that dates are set out in figures instead of words. Idem, 708
Cady's Case, 776

6. On a prosecution for uttering and attempting to employ as true a forged note purporting to be the note of a bank in another state, it is surplusage to state that the bank was authorized by the laws of that state; and need not be proved. Cady's Case, 776

7. A presentment for selling ardent spirits to be drunk at the place where sold, without having first obtained a license to keep an ordinary, describes the defendant as a free negro. This description is surplusage. Scott's Case, 749

797 *INFANTS.

1. The act 1 Rev. Code of 1819, ch. 96, § 20, Supp. Rev. Code, ch. 149, § 2, authorizing the sale of lands where the interest of each joint owner is less than $300, refers to the estimated value of each interest if the land is divided, and not the value of each interest in the estimated value of the whole.

Parker & als. *v.* McCoy & als., 594

2. If the value of each interest in the land divided in kind is less than $300, the court has authority, under the statute, to sell the land, though the estimated value of the whole land will give to each owner more than $300. Idem, 594

3. The land in possession of a widow for life as her dower, need not be estimated in ascertaining the value of infants' interest in land; but the land in possession of the infants may be valued, and if of less value than $300, may be sold without selling the land in possession of the widow. Idem, 594

4. It is not necessary to summon the infant owners in a proceeding to sell their land under this statute; but the court may appoint a guardian ad litem to defend them. Idem, 594

5. In the proceeding under this statute the order or decree of the court is conclusive upon the infant; and he has no day in court to show cause against it upon his coming of age. Idem, 594

6. Though the final decree gives the infant a day in court, this will not entitle him, as against a bona fide purchaser of the land under the decree of the court, to disturb the sale. Idem, 594

7. Though the proceeding under this statute may be, and usually is, by bill, it

is not necessarily so, but may be by petition or motion; and the parties being summoned the evidence may be heard in court, and the necessary orders and proceedings may be made and had therein.
Idem, 594

INJUNCTIONS.

1. An injunction refused by a judge of the Circuit court, is presented to a judge of the Court of appeals who also refuses it. It may be granted by another judge of the Court of appeals.
Jaynes & al. *v.* Brock, 211

2. A purchaser of land coming into equity to enjoin a judgment for the purchase money on the ground of defect in the title, though the title is afterwards perfected, is entitled to his costs, and the injunction is to be dissolved without damages.
Idem, 211
Reeves *v.* Dickey, 138

3. Though the owner of lands has the legal title and may maintain trespass, yet equity has jurisdiction to enjoin another party who claims the lands from taking iron ore from it.
Anderson *v.* Harvey's heirs, 386

4. An injunction to a judgment at law will not be sustained to allow the defendant at law to set up payments or setoffs which he might have pleaded at law; and if a discovery was necessary to enable him to prove them he should have filed his bill of discovery in aid of his defence at law; or he should have filed interrogatories to the plaintiff under the statute.
George *v.* Strange's ex'or, 499

5. An injunction to a judgment at law will not be sustained where the defendant at law has failed to make his defence at law from ignorance of the nature of the proceeding against him, and a misapprehension of the steps necessary to be taken in order to subject him.
Meem *v.* Rucker, 506

6. The mere averment by a plaintiff in his bill asking for an injunction to a judgment at law, of the facts constituting his excuse for not defending himself at law, is not sufficient; he must prove them.
Idem, 506

7. The damages upon the dissolution of an injunction to a judgment, becomes as to the party obtaining the injunction, a part of the judgment, and embraced in the lien of the judgment.
Michaux's adm'r *v.* Brown & als., 612

8. An injunction to inhibit the sale of property by trustees, is not a bar to their bringing an action at law to recover the trust property; and even if they are guilty of a contempt, that is to be redressed by the Court of chancery acting upon the parties, and will not prevent the maintenance of the action at law.
Nichols *v.* Campbell, 560

9. Plaintiff in a foreign attachment may enjoin the sale of the attached effects under an order of a court of law at the suit of creditors proceeding by attachment at law.
Moore & als. *v.* Holt, 284

10. When purchaser of land not entitled to enjoin collection of purchase money. See Vendor and Purchaser, No. 7, and
Price's ex'ors *v.* Ayres, 575

11. When defendant in an execution not entitled to enjoin it. See Equitable Jurisdiction and Relief, No. 8, and
Morrison *v.* Speer, 228

798 *INQUISITION.

* See Public Landings, No. 4, 5, and
Muire *v.* Falconer & al., 12

INSTRUCTIONS.

1. An instruction which is not relevant to the evidence in the cause, or which is only relevant to written evidence which does not authorize it, properly refused; the court being the proper tribunal to construe written evidence.
Johnson's ex'x *v.* Jennings' adm'r, 1

2. In ejectment the Court of appeals having decided that certain evidence is insufficient to establish an adversary possession, upon a second trial, the evidence being substantially the same, the party in whose favor this decision is, is entitled to have an instruction to the jury to disregard all the parol evidence introduced for the purpose of proving the adversary possession.
Pasley *v.* English, 236

3. The evidence of adversary possession being to be disregarded, it is error to instruct the jury, that if such evidence proves an adversary possession of twenty years under claim of title, the party is entitled to recover. Idem, 236

4. If an instruction is given on an abstract question which may mislead the jury, it is an error for which the judgment will be reversed. Idem, 236

INTERROGATORIES.

See Bail, No. 7, and
Levy *v.* Arnsthall, 641

JEOFAILS.

In a writ of right the failure to file a plea is error not cured by a verdict in favor of the tenant.
Rowans *v.* Givens, 250

JUDGMENTS.

1. An injunction to a judgment at law will not be sustained to allow the defendant at law to set up payments or offsets which he might have pleaded at law; and if a discovery was necessary to enable him to prove them, he should have filed his bill of discovery in aid of his defence at law; or he should have filed interrogatories under the statute.
George *v.* Strange's ex'or, 499

2. An injunction to a judgment at law will not be sustained when the defendant at law has failed to make his defence at

law from ignorance of the nature of the proceeding against him, and a misapprehension of the steps necessary to be taken in order to subject him.
Meem *v.* Rucker, 506

3. The mere averment by a plaintiff in his bill asking for an injunction to a judgment at law, of the facts constituting his excuse or not defending himself at law, is not sufficient; he must prove them.
Idem, 506

4. The lien of a judgment is not defeated by the discharge of the debtor as a bankrupt; and it may be enforced in the state courts.
McCance *v.* Taylor, 580

5. How an elegit upon such judgment is to be levied. See Elegit, No. 1, and
Idem, 580

6. The act of March 3d, 1843, Sess. Acts 1842-3, p. 51, § 3, does not apply to purchasers before the passage of the act. As to such the lien of a judgment is valid though not recorded. Idem, 580

7. A prior deed of trust unrecorded is null and void as to a subsequent judgment; and the judgment is a lien upon the land embraced in the deed. Idem, 580

8. Though lands are conveyed in trust to secure debts, a judgment having priority to the deed is a lien upon but a moiety of the land, except an equity of redemption.
Buchanan *v.* Clark & als., 164

9. A judgment is a lien upon an equity of redemption in land, and will be preferred to a subsequent purchaser of the equity of redemption not having the legal title: And the lien extends to the whole equity of redemption.
Michaux's adm'r *v.* Brown & als., 612

10. Though the judgment was enjoined at the time of the purchase, yet upon the dissolution of the injunction the lien relates back to the date of the judgment; and so has priority over the equity of a purchaser since the date of the judgment.
Idem, 612

11. The damages on the dissolution of an injunction to a judgment becomes, as to the party obtaining the injunction, a part of the judgment, and are embraced in the lien of the judgment upon an equity of redemption. Idem, 612

12. A judgment being rendered for the penalty of a bond to be discharged by the payment of the principal and interest, and the payment having been delayed by an injunction until the principal sum due and the interest exceed the penalty, the lien of the judgment only extends to the penalty, the damages upon the dissolution
799 *of the injunction and the costs at law, without continuing interest.
Idem, 612

13. The land of the debtor or the equity of redemption therein, last sold, is first liable to satisfy a judgment lien.
Idem, 612

14. If some of the land covered by a judgment lien is embraced in a deed of trust subsequent to the judgment and other of it is not, the latter should be first sold, and only so much of that embraced in the deed as will make a moiety of the whole.
Buchanan *v.* Clark & als., 164

15. If there are two judgments having preference to the deed, the remaining moiety should be sold and applied to pay the second judgment. Idem, 164

16. Where there are several purchasers of land subject to a judgment lien, some may file a bill to question the lien, and if it is valid, asking that the different purchasers may be subjected to pay it. And though they ask for a ratable contribution, this will not prevent the court's subjecting the land last sold to satisfy the creditor.
Michaux's adm'r *v.* Brown & als., 612

JUDICIAL SALES.

1. In a controversy between a judgment creditor and creditors claiming under a deed of trust, the court having decreed a sale of all the land, and it having been purchased by a party claiming under the deed of trust; and the final decree being in his favor, and a conveyance to him being directed, upon appeal by the party claiming under the judgment the decree is reversed. The claim of the purchaser must fall with the reversal of the decree; the purchaser not being a stranger to the controversy purchasing at a judicial sale, but the party chiefly benefited by the proceedings complained of.
Buchanan *v.* Clark & als., 164

2. A purchaser at a sale of land made by a commissioner of delinquent lands, is not bound to prove that all the previous proceedings of the commissioner and the court were regular. The proceeding is in the nature of a judicial proceeding, and the orders and decree of the court made in it are conclusive, at least upon all strangers.
Smith & al. *v.* Chapman, 445

JURORS.

1. On a trial for arson the nephew of the deceased wife of the person whose house had been burned, if she left children, is an incompetent juror.
Jaques' Case, 690

2. Such relationship to a party on the record would be a cause of principal challenge. If it be not a cause of principal challenge because the person whose house was burned is not a party on the record, it is a case in which the favor being apparent he should be set aside. Idem, 690

3. In such case if the deceased wife left no issue it is for the prosecution to show the fact; and that fact not being shown the objection is valid. Idem, 690

4. A juror summoned for the trial of a prisoner fails to appear on the day to which he is summoned, but appears at another day under a rule to show cause why he should not be fined for failing to appear. If in other respects qualified he may be put

upon the panel; that not having been completed when he appears.
Wormeley's Case, 658

5. What is not such an opinion as will disqualify a juror for serving on a trial for felony. Idem, 658

6. When the court may on its own motion set aside a juror in a criminal trial. See Criminal Jurisdiction and Proceedings, No. 13, 14, and Montague's Case, 767

7. As no challenge to a juror is allowed to the commonwealth except for cause, when such challenge is made the cause should be shown, and should be a good and legal cause for the exclusion of the juror; otherwise it should be overruled.
Idem, 767

8. The court cannot of its own motion set aside a juror without good cause, except where he is physically or mentally disabled from properly performing the duties of a juror, or is disqualified by a statute.
Idem, 767

9. If the court sets aside a competent juror, it is error for which the prisoner may except, and have the judgment reversed.
Idem, 767

10. What does not render a juror incompetent. Idem, 767

11. How the court may direct additional jurors to be summoned when the original venire is exhausted. See Criminal Jurisdiction and Proceedings, No. 12, and
Wormeley's Case, 658

JUSTICES OF THE PEACE.

1. Upon an application to establish a public landing, the viewers report that a list of one hundred and twenty persons was shown them who would be benefited 800 *by establishing the landing. Two of these persons were justices of the peace of the county, and when the order awarding the writ of ad quod damnum was made, they were on the bench; and one of them was on the bench when the landing was established. This was no legal objection.
Muire v. Falconer & al., 12

2. A justice of the peace acting as coroner, and having as coroner committed a person to jail for a felony, may certify the fact of such committal as a justice of the peace. Wormeley's Case, 658

LACHES.

1. A step father conveyed to his step son, when a minor living with him, a slave, purporting to be for value, and he retained possession of the slave and her increase for many years, and until the death of the step son. After the death of the step son, who left no children, his widow filed a bill against the step father and his wife for distribution of the slaves. This suit was a little less than twenty years from the time when the step son ceased to live with the step father. The latter having stood in the place of a parent and guardian to the son until the son ceased to live with him, the claim is not barred by lapse of time.
Roberts v. King, 184

2. A suit for an account of an administration was brought twenty-six years after the death of the intestate, twenty-one years after the death of the administrator, long after his administrator had settled up his estate, showing that there were no personal assets, and in the absence of the first administrator's books and papers, against his heir, who at his death was an infant two years old. The staleness of the claim is conclusive against it.
Hillis v. Hamilton, adm'r & als., 300

LANDLORD AND TENANT.

1. Quære: If a tenant can disclaim holding under his landlord, and set up an adverse title, without first surrendering possession of the premises. If he can, he cannot deny the title under which he entered, or augment the burden of proof on the other side by denying his tenancy.
Creigh's heirs v. Henson, 231

2. A tenant who surrenders possession at the end of his term, or from whom possession has been recovered, is not concluded by the existence of such tenancy at one time, or by the deed of lease which he executed, from contesting the title of his former landlord.
Wild's lessee v. Serpell, 45

LARCENY.

1. The obligor in a bond may commit larceny in taking it.
Vaughn's Case, 758

2. What constitutes a taking with intent to commit larceny. Idem, 758

LEGACIES.

D and A have each five children, and R is the child of A. Testator regards R with great favor, and gives him a farm and a legacy of $2000. Testator then says, I bequeath to the children of A and D and to R all the funds remaining after every just claim against my estate has been satisfied, to be equally divided between them. The fund is to be divided into ten parts, one of which is to be given to each of the children of A and D, thus giving to R but one tenth of the fund.
McMaster v. McMaster's ex'ors, 275

LIENS.

1. See Sureties, No. 1, 2, and
Buchanan v. Clark & als., 164

2. See Judgments, passim.

LIMITATIONS—Statute of.

1. In an action of assumpsit against an administrator, he pleads the statute of limitations. It is no answer to the plea that the defendant's intestate sold to plaintiff slaves in payment of the debt declared on; and that the defendant since the death of

his intestate, had as administrator sued for, and, upon the title alone, without regard to the intestate's indebtedness to the plaintiff, recovered the said slaves from the plaintiff within five years before the action brought.
Johnson's ex'x *v.* Jennings' adm'r, 1

2. A party having conveyed slaves to his step son, stating a valuable consideration in the deed, and remaining in possession for many years, his possession is subordinate to the deed, and therefore the step son's title to the slaves is not barred by the statute of limitations.
Roberts *v.* King, 184

3. The saving in the act of 1819, 1 Rev. Code, ch. 104, § 13, p. 378, in relation to wills, in favor of persons out of the state, is not repealed by the act of
801 *March 8th, 1826, Sup. Rev. Code p. 260, in relation to the limitation of actions.
Schultz *v.* Schultz & als., 358

4. See Adversary Possession, passim.

5. See Delinquent and Forfeited Lands, No. 6, and
Staats *v.* Board, 400
Hale *v.* Branscum, 418

6. See Trover, No. 2, and
Philips *v.* Marteney's ex'or, 333

MANDAMUS.

The Supreme court of appeals has no jurisdiction either under the constitution or the statute, to issue a mandamus to a judge of the Circuit court to compel him to try a cause depending in his court.
Barnett *v.* Meredith, judge, 650

MISDEMEANORS.

In a prosecution for selling ardent spirits by retail to be drunk at the place where sold, without having obtained a license to keep an ordinary, a writ of error lies for the commonwealth from the judgment of an inferior court. Scott's Case, 749

NOTICE.

1. There is no time fixed by the statute, for which notice shall be given to a party upon whose land a public landing is sought to be established. If therefore the notice is served upon him at any time before the end of the return day of the notice it is sufficient in law; and he must show that it was insufficient or not reasonable notice.
Muire *v.* Falconer & al., 12

2. When the sufficiency or want of notice cannot be objected to in an appellate court.
See Appellate Court, No. 7, 10, and
Idem, 12
Tayloe *v.* Smith, 557

NUNCUPATIVE WILL.

1. The word "habitation" in the act 1 Rev. Code, ch. 104, § 7, p. 377, in relation to nuncupative wills, means "dwelling-house."
Nowlin's adm'r & als. *v.* Scott, 64

2. A testamentary paper signed and acknowledged in the presence of witnesses who are requested to attest it, and attested by them out of the presence of the testatrix, so that it is not good as a written will, cannot be set up as a nuncupative will.
Reese *v.* Hawthorn, 548

3. A nuncupative will to be valid must be made in the last sickness of the testator, when he is in such extremity that he has not the ability and opportunity to make a written will. Idem, 548

PARTITION.

1. Upon a bill for the partition of land, if the title of the plaintiffs is doubtful, the court, prior to the act, Code, ch. 124, § 1, p. 526, should have sent the parties to law to try their title.
Currin & als. *v.* Spraull & als., 145

2. By the act, Code, ch. 124, § 1, p. 526, a court of equity may decide upon the title in suits for partition; and this though the suit was commenced before the statute was enacted. And after allowing a reasonable time to the parties for trial, should proceed to decide the question, observing the general rules of practice in courts of equity, for the purpose of ascertaining facts either by a jury or otherwise, as may be most proper. Idem, 145

PAYMENTS.

1. Bond given for loan of money which is to be paid in a few days by a debtor of the obligor: The debtor pays the debt and takes up the bond. It is thereby extinguished; and if in a future settlement between the borrower and his debtor this claim is omitted by mistake, the remedy of the debtor is not on the bond, but for money paid to the use of the borrower.
Young for &c. *v.* Johnston, 269

2. See Setoffs, No. 1, and
Johnson's ex'x *v.* Jennings' adm'r, 1

PLEADINGS.

1. To recover back money paid upon a contract which has been rescinded, or the consideration of which has wholly failed, the usual and better mode of declaring is the common count for money had and received. But if the plaintiff declares specially it must appear with sufficient certainty, from the facts so set out, or from apt averments made in the count, that the consideration has wholly failed, and that such failure did not proceed from any fraud or illegal conduct on the part of the plaintiff.
Johnson's ex'x *v.* Jennings' adm'r, 1

2. Duplicity in a plea can only be objected to by special demurrer.
Cunningham *v.* Smith & al., 255

3. Upon a motion by a high sheriff
802 *against a deputy and his sureties, they file a special plea denying that the principal was deputy; and the high sheriff replies specially relying on their bond as an estoppel. The replication is

good though it has not the commencement and conclusion peculiar to a pleading of an estoppel.
Cecil *v.* Early & others, 198

4. The statute, Sess. Acts 1844, ch. 70, p. 54, in relation to pleading usury, though in terms only applicable to a plea, yet it is properly applicable to a replication to a plea of setoff.
Hope *v.* Smith, sheriff, 221

5. In debt on a bond a plea that it was given for goods bought of the plaintiff who represented that they were sound and marketable when in fact they were unsound and damaged; and that the plaintiff at the time of making them knew that the representations were untrue, and knowingly made them with the intent to defraud the defendant; and proceeds to set out the unsoundness of numerous articles purchased, and to detail particulars in which the representations had turned out to be untrue. This is a good plea.
Cunningham *v.* Smith & als., 255

6. What pleas present immaterial issues. See Bail, passim, and Executors and Administrators, No. 1, and
Archer *v.* The Commonwealth, 627
Beale's adm'r *v.* Botetourt justices, 278

7. In criminal causes the same defect or imperfections of form may be taken advantage of on a general as on a special demurrer. Lazier's Case, 708

8. On an indictment for murder there are two counts, in the second of which the offence is not set out as another offence. This is not error. Idem, 708

9. It is not error in an indictment that dates are set out in figures instead of words.
Idem, 708
Cady's Case, 776

10. An indictment for murder charges the wound to have been inflicted on the 9th of December, of which wound she on the said 14th of December died. The word "said" is surplusage, and its insertion is not a fatal defect. Lazier's Case, 708

11. In an indictment for murder it is not necessary to set out the length, breadth or depth of the wound. Idem, 708

12. What is surplusage in an indictment or presentment. See Indictments and Presentments, No. 6, 7, and
Cady's Case, 776
Scott's Case, 749

POWER OF ATTORNEY.

A power of attorney and a deed of trust to secure debts are made at the same time, by and to the same party, having reference to nearly the same property, and the same debts. The power of attorney is not revoked by the deed; but they will be considered as one instrument, and construed together.
French *v.* Townes & als., 513

PRACTICE AT COMMON LAW.

1. A party complaining of the admission of improper evidence must state the facts in his bill of exceptions, from which it will appear affirmatively, to the appellate court, that the evidence was improper.
Johnson's ex'x *v.* Jennings' adm'r, 1

2. An instruction which is not relevant to the evidence in the cause, or which is only relevant to written evidence which does not authorize it, properly refused; the court being the proper tribunal to construe the written evidence. Idem, 1

3. In ejectment the court of appeals having decided that certain evidence is insufficient to establish an adversary possession, upon a second trial the evidence being substantially the same, the party in whose favor this decision is, is entitled to have an instruction to the jury to disregard all the parol evidence introduced for the purpose of proving the adversary possession.
Pasley *v.* English, 236

4. The evidence of adversary possession being to be disregarded, it is error to instruct the jury that if such evidence proves an adversary possession of twenty years under claim of title, the party is entitled to recover. Idem, 236

5. The affidavit of a witness that from his age and infirmities he is unable to attend the court without endangering his life, made eight days before the cause is called for trial, is sufficient to authorize his deposition which had been taken de bene esse, to be read as evidence.
Tayloe *v.* Smith, 557

6. Upon a motion by a creditor against a high sheriff for the default of his deputy in permitting a debtor in execution to escape, the court occupies the place of a jury as to the facts, and is bound upon a return of "executed," and upon proof of escape, to presume that it was with the consent of the sheriff, unless he proves that it was without his consent or negligence, and that he had used due means to retake the prisoner.
Stone *v.* Wilson, 529

803 *7. A court having granted a new trial of a cause, there is a motion to reconsider the opinion, and the court takes time till the next term to consider the motion, and at the next term sets aside the order granting the new trial, and enters a judgment on the verdict. There is no error in continuing the motion.
Rhea *v.* Gibson's ex'or, 215

PRACTICE IN CHANCERY.

1. By the act, Code ch. 124, § 1, p. 526, a court of equity may decide upon the title in suits for partition; and this though the suit was commenced before the act was passed: And after allowing a reasonable time to the parties for trial, should proceed to decide the question, observing the general rules of practice in courts of equity for the purpose of ascertaining facts, either by a jury or otherwise, as may be most proper.
Currin & als. *v.* Spraull & als., 145

2. To what errors in a decree consent extends.
Buchanan *v.* Clark & als., 164

3. In a controversy between parties claiming a judgment lien and others claiming under a deed of trust, it being uncertain what part of the lands are embraced in the deed of trust, it is error to decree a sale of the land until the priorities of the parties are adjusted, and it is ascertained what part of the lands are embraced in the deed.
Idem, 164

4. The judgment having priority, the land not included in the deed of trust should be first sold, and applied to the judgment, and if insufficient to discharge it, then the land included in the deed of trust should be sold, and so much of the proceeds thereof as with the proceeds of the land not conveyed, amount to a moiety of the proceeds of all the lands, should be applied to the judgment. Idem, 164

5. When court will not presume a conveyance of property.
Roberts *v.* King, 184

6. Upon a motion against a plaintiff in equity for security for costs, a bill of exceptions is taken to the opinion of the court, which states the evidence introduced on the motion. There is no objection to this mode of putting the evidence upon the record.
Evans *v.* Bradshaw & als., 207

7. In a bill by purchaser of land for a rescission of the contract for failure by vendor to convey the land, there being a latent ambiguity in the contract of sale which can only be cleared up by a survey, it is error to decree a rescission of the contract until a survey is made, and it is thus ascertained whether the vendor can comply with his contract.
Purcell *v.* McCleary & al., 246

8. When questions are raised by the pleadings and proofs an exception to a commissioner's report is unnecessary to raise them for adjudication.
French *v.* Townes & als. 513

9. What proceedings may be had for the sale of small inheritances. See Infants, No. 4, 5, 6, 7, and
Parker & als. *v.* McCoy & als., 594

PRACTICE IN CRIMINAL CAUSES.

See Criminal Jurisdiction and Proceedings.

PRESUMPTIONS.

When the defence set up in the answer of a defendant in chancery, is inconsistent with the fact of a conveyance to him of the property claimed in the bill, the conveyance will not be presumed.
Roberts *v.* King, 184

PROBAT OF WILLS.

See Wills, No. 2, 3, 5, 6, 7, 8, 9, 10, 11, and
Nock *v.* Nock's ex'ors, 106
Schultz *v.* Schultz & als., 358

PUBLICATION.

A decree in a chancery cause says, that the order of publication against an absent defendant had been duly published. It is to be taken in an appellate court that everything required by the statute was done.
Moore & als. *v.* Holt, 284

PUBLIC LANDINGS.

1. The viewers' report that a public landing at the place viewed would be of very great convenience to the public, as a list of persons all heads of families, to the number of one hundred and twenty, had been shown to them, all of whom, as well as many others, would be benefited by the proposed landing: *held*: It was no error in the report that this list of persons was not returned with the report.
Muire *v.* Falconer & al., 12

2. Two of the persons on the list were justices of the peace of the county; and when the order awarding the writ of ad quod damnum was made they were on the bench; and one of them was on the bench when the landing was established. This was no legal objection. Idem, 12

804 *3. There is no time fixed by the statute for which notice shall be given to a party upon whose land a public landing is sought to be established. If, therefore, the notice is served upon him at any time before the end of the return day of the notice, it is sufficient in law; and he must show that it was insufficient and not reasonable notice. Idem, 12

4. The statute does not require the writ of ad quod damnum to be returned to the next court after it is awarded: And if the order awarding it so directs, the direction is merely directory to the officer; and his failure to make the return within the time prescribed will not affect the validity of the inquest properly taken. Idem, 12

5. A jury of inquest upon a writ of ad quod damnum to establish a public landing, is charged according to the act, 2 Rev. Code, p. 238, § 15, but is not charged according to the act of January 30th, 1834, Sess. Acts 97. This is not error, the provisions of this last act having no application to public landings. Idem, 12

6. The application is to establish a landing at a certain place, which is in fact on the lands of two adjoining proprietors; and the precise locality of the dividing line between them is a matter of controversy, though the line had been previously fixed by processioners. The land being open and uncultivated, it was proper for the jury in assessing the damages to each, to take the line fixed by the processioners as the true line. Idem, 12

7. With the consent of the party to whom the damages were assessed, the county court directed that the damages so assessed to him, should be withheld until the dispute about the dividing line should be determined; and that the damages should then be paid to the party to whom it appeared the land belonged. This is no error.
Idem, 12

8. In the absence of evidence clearly showing that the damages assessed are insufficient, the inquest taken on the ground must be deemed conclusive on the question.
Idem, 12

9. What objections to the proceedings cannot be taken in the appellate court. See Appellate Court, No. 6, 7, and
Idem, 12

RAPE.

1. Though in a prosecution for a rape it is competent to prove the fact of a recent complaint by the female, for the purpose of sustaining her credit, it is not competent to prove any particulars of the description of the person committing the offence which may have been given by her.
Brogy's Case, 722

2. A fortiori: If the female when examined as a witness declines to give a description of the person committing the offence, it is not competent to prove the description given by her when not upon oath. Idem, 722

RECOGNIZANCE.

1. Where a recognizance has a condition to do some act for the doing of which an obligation may be properly taken, and the court or officer taking it had authority of law to act in cases of that general description, the recognizance is valid though it does not recite the special circumstances under which it is taken: And in declaring upon such a recognizance it is not necessary to aver the existence of the particular facts which show that the court or officer had authority to take it.
Archer *v.* The Commonwealth, 627

2. See Scire Façias, No. 1, and
Idem, 627

RECORDS.

When the record of a suit is evidence. See Evidence, No. 1, 2, 3, and
Johnson's ex'x *v.* Jennings' adm'r, 1
Smith & al. *v.* Chapman, 445
Nichols *v.* Campbell, 560

REGISTRY OF DEEDS.

A deed executed in Boston in December 1798, by parties living there, conveying land in Virginia, is properly admitted to record upon a certificate of the proof of its execution by the subscribing witnesses before the court of Suffolk county, signed by a party describing himself as clerk of the court; though no seal is attached to the certificate.
Smith & al. *v.* Chapman, 445

RENTS AND PROFITS.

See Trusts and Trustees, No. 1, 2, and
Bank of Washington *v.* Hupp, 23

SCIRE FACIAS.

1. Where by law separate terms of a Circuit court are appointed for the trial of civil and criminal causes, a recognizance in a criminal case is properly made
805 *returnable to a term for the trial of criminal causes; and a scire facias thereon is properly made returnable to the term for the trial of civil causes or to the rules; the first being a criminal and the other a civil proceeding.
Archer *v.* The Commonwealth, 627

2. In declaring on a recognizance it is not necessary to aver the existence of the particular facts which show that the court or officer taking had authority to take it.
Idem, 627

3. See Bail, No. 1, 2, 3, 4, and
Idem, 627

SETOFFS.

1. In an action of assumpsit for various sums of money lent to or paid for the defendant's intestate, though payments and setoffs cannot be proved without an account of such payments and setoffs filed, yet defendant may prove that the money sued for or any part of it, was not lent or advanced for the intestate; but was paid out of the money of the intestate in the hands of the plaintiff.
Johnson's ex'x *v.* Jennings' adm'r, 1

2. When an injunction to a judgment will not be allowed to enable the defendant at law to set up payments and setoffs. See Injunctions, No. 4, and
George *v.* Strange's ex'or, 499

SHERIFFS.

1. The sureties of a deputy in his bond to the high sheriff for the faithful discharge of his duties, are estopped thereby from denying that their principal was deputy, unless the bond is invalid.
Cecil *v.* Early & others, 198

2. The bond of the deputy is not avoided by the fact that the County court did not enter upon the record that he was a man of honesty, probity and good demeanor, and that he did not take the several oaths of office required by law to be taken by a deputy sheriff. Idem, 198

3. Upon a motion by a high sheriff against a deputy and his sureties, they file a special plea; and the plaintiff replies specially, and relies on the facts therein stated and especially on the bond, as an estoppel; though the replication has not the peculiar commencement and conclusion of a pleading by way of estoppel. A demurrer to the replication should not be sustained. Idem, 198

4. A sheriff may have leave to amend his return upon an execution after notice of a motion against him founded on the original return: And the amended return may be made by a deputy who did not make the first return.
Stone *v.* Wilson, 529

5. A second notice to the sheriff is not necessary after the amended return; but the plaintiff may proceed upon the original notice. Idem, 529

6. Under the act, 1 Rev. Code of 1819, ch. 136, § 3, an action of debt may be maintained against a sheriff for either a willful or negligent escape. Idem, 529

7. In order to maintain the action it is only necessary for the plaintiff to show the escape, which may be done by evidence aliunde the return on the execution. And to defeat the action the sheriff must show that the escape was tortious, and that fresh pursuit was made. Idem, 529

8. Upon proof of the escape the jury are bound to presume all that is necessary under the statute to be found in the verdict, unless the sheriff negatives by his proofs all consent or negligence on his part; and also shows that he has used due means to retake the prisoner. Idem, 529

9. Under the act, 1 Rev. Code of 1819, ch. 134, § 48, p. 542, a motion may be maintained against a sheriff for an escape —1st. Where the return on the execution states that the officer has taken the body of the debtor and has it ready to satisfy the execution, and the plaintiff can show the escape aliunde. 2d. Where the return shows such a state of facts as would entitle the plaintiff to a verdict in an action of debt for an escape. Idem, 529

10. Upon such a motion the court occupies the place of a jury as to the facts, and is bound, upon a return of "executed," and proof of an escape, to presume that it was with the consent of the sheriff, unless he proves that it was without his consent or negligence, and that he had used due means to retake the prisoner. Idem, 529

11. The fact that the County court has not provided a jail in which a debtor taken in execution may be confined, does not authorize the sheriff who has taken a debtor in execution to permit him to go at large. If no jail is provided by the County court, it is the sheriff's duty to provide one to keep the debtor who he has taken in execution, in custody. Idem, 529

12. A return by the sheriff that the County court had not provided a jail, and that he had therefore permitted a debtor taken in execution to go at large, 806 *itself shows an escape, and will sustain a motion against the sheriff. Idem, 529

13. A return by the sheriff that the County court had not provided a jail, and that a debtor taken in execution had escaped without his consent or negligence; without adding that he had used due means to retake him, is not sufficient to protect the sheriff; but a motion may be maintained against him upon the return. Idem, 529

SLAVES AND FREE NEGROES.

1. See Emancipation, No. 1, 2, and Foster's adm'r *v.* Fosters, 485

2. A presentment for selling ardent spirits to be drunk at the place where sold, without having first obtained an ordinary license, describes the defendant as a free negro. A plea that the defendant is an Indian, and not a free negro, is an immaterial plea, and properly rejected. Scott's Case, 749

STATUTES.

1. The act of January 30th, 1834, Sess. Acts, p. 97, held not to apply to inquests in cases of public landings.
Muire *v.* Falconer & al., 12

2. The act, 1 Rev. Code, ch. 104, § 7, p. 377, in relation to nuncupative wills, construed in
Nowlin's adm'r & als. *v.* Scott, 64

3. The act, Code, ch. 124, § 1, p. 526, in relation to partition, construed in
Currin & als. *v.* Spraull & als., 145

4. The act, Code, ch. 216, § 2, p. 800, repealing previous laws, construed in Idem, 145

5. The act, Sup. Rev. Code, p. 152, § 44, in relation to granting injunctions, construed in
Jaynes & al. *v.* Brock, 211

6. The act, Sess. Acts 1844, ch. 70, p. 54, in relation to pleading usury, construed in
Hope *v.* Smith, sheriff, 221

7. The act of March 8th, 1826, Sup. Rev. Code, p. 260, in relation to the limitation of actions, construed in
Schultz *v.* Schultz & als., 358

8. The act of March 23d, 1836, in relation to the forfeiture of land to the commonwealth, construed in
Staats *v.* Board, 400
Wild's lessee *v.* Serpell, 405

9. The act of March 30th, 1837, Sess. Acts, p. 9, in relation to forfeited lands, construed in
Wild's lessee *v.* Serpell, 405

10. The act of February 27th, 1835, Sess. Acts, p. 7, in relation to forfeiture of lands, construed in Idem, 405

11. The act of March 18th, 1841, Sess. Acts, p. 31, in relation to forfeitures of lands, construed in Idem, 405

12. The act of March 22d, 1842, Sess. Acts, p. 13, in relation to forfeiture of lands, construed in Idem, 405

13. The act of March 5th, 1836, Sess. Acts, p. 7, in relation to forfeited lands, construed in
Hale *v.* Branscum, 418

14. The act of December 12th, 1792, as amended by the act of December 26th, 1794, 1 Rev. Code, Pleasants' edi. 1814, p. 218, in relation to the registry of deeds, construed in
Smith & al. *v.* Chapman, 445

15. The act of March 30th, 1837, Sess. Acts, p. 11, concerning western land titles, construed in Idem, 445

16. The act of February 27th, 1837, in relation to the sale of forfeited lands, construed in Idem, 445

17. The act of March 15th, 1838, Sess. Acts, p. 19, in relation to forfeited lands, construed in Idem, 445

18. The act, 1 Rev. Code of 1819, ch. 136, § 3, in relation to remedies against sheriffs, construed in
Stone *v.* Wilson, 529

19. The act, 1 Rev. Code of 1819, ch. 134, § 48, in relation to remedies against sheriffs, construed in Idem, 529

20. The act of March 3d, 1843, Sess. Acts 1842-3, p. 51, in relation to docketing judgments, construed in
McCance *v.* Taylor, 580

21. The act, 1 Rev. Code of 1819, ch. 96, § 20, Sup. Rev. Code, ch. 149, § 2, in relation to sales of lands under $300, construed in
Parker & als. *v.* McCoy & als., 594

22. The act, 1 Rev. Code of 1819, p. 209, § 61, in relation to damages upon dissolution of an injunction, construed in
Michaux's adm'r *v.* Brown & als., 612

23. The act of March 31st, 1851, Sess. Acts, p. 36, authorizing a plaintiff to require security in certain cases, construed in
Levy *v.* Arnsthall, 641

24. The act of April 16th, 1852, Sess. Acts, ch. 92, § 4, p. 77, authorizing plaintiff to file interrogatories to defendant, construed in Idem, 641

25. The act of June 5th, 1853, Sess. Acts, p. 53, § 2, in relation to the jurisdiction of the Supreme and District courts of appeal, construed in
Barnett *v.* Meredith, judge, 650

26. The constitution of Virginia in relation to the jurisdiction of the Court of appeals, construed in Idem, 650

27. The act, Code, p. 783, § 11, in relation to costs in criminal cases, construed in
Anglea *v.* Commonwealth, 696

807 *28. The act, Code, p. 770, § 10 and 11, in relation to criminal pleadings, construed in Lazier's Case, 708

29. The act, Code, p. 752, § 21, in relation to persons jointly indicted, construed in Idem, 708

30. The constitution of Virginia, article 6, § 7, in relation to the Circuit courts, construed in Scott's Case, 749

SUBSTITUTION.

See Sureties, No. 2, 3, and
Buchanan *v.* Clark & als., 164

SUPREME COURT OF APPEALS.

1. A writ of error in a criminal cause may be awarded during term returnable to a day in the same term; and the cause may be heard at the same term.
Lazier's Case, 708

2. The Supreme court of appeals has no jurisdiction either under the constitution or the statute, to issue a mandamus to a judge of a circuit court to compel him to try a cause pending in his court.
Barnett *v.* Meredith, judge, 650

SURETIES.

1. There are three principal obligors in a bond; and two of them put money in the hands of the third to pay it, and he undertakes to pay it. As between the three the third is the principal obligor and the other two are his sureties.
Buchanan *v.* Clark & als., 164

2. As between themselves the two are entitled to be substituted to the lien of a judgment upon the land of the third, recovered against the three; and so against purchasers from the third who do not show a better equity. Idem, 164

3. Before the judgment one-half of the land has been purchased, and payments made upon it; and after the judgment the purchaser gave up the land and took a deed of trust upon it for the amount of his payments. The taking the deed of trust merged any prior equity he might have had, and the judgment has preference to his deed of trust. Idem, 164

4. A paper intended to be a bond, is signed in blank as to the sum by a person as surety; and the blank is afterwards filled up in his absence and without his knowledge, and without authority from him. It is not his bond.
Rhea *v.* Gibson's ex'or, 215

5. A covenant by the holder of a bond with the principal obligor, to give a specific time for payment, does not release the surety at law: His only remedy is in equity.
Devers *v.* Ross, 252

6. When bond of sureties operates as an estoppel. See Estoppels, No. 1, 2, and
Cecil *v.* Early & others, 198
Cordle *v.* Burch, 480

7. The sureties of a public officer are not excluded from the benefit of the bankrupt act of 1841.
Saunders *v.* The Commonwealth, 494

SURVEYS.

See Evidence, No. 9, and
Smith & al. *v.* Chapman, 445

TAX SALES.

1. See Delinquent and Forfeited Lands, No. 22, 23, 24, 25, and
Flanagan *v.* Grimmet & als., 421

2. If the deed of the sheriff is defective it is still competent evidence in ejectment to show with other evidence, an actual entry under a claim of title, and continued holding thereunder, so as to make out a title or right of entry by actual possession.
Idem, 421

TROVER.

K the owner of a slave for life, in 1836 sells him to M, who in the same year sells him to J, who gives him to a daughter, by whom he is taken out of the state. K dies in 1846; and then the owners of the remainder in the slave bring trover against M to recover the value thereof: *held*:

1st. The plaintiffs not having had the right to the possession of the slave at the time M sold him, cannot maintain trover against M.
Philips & als. *v.* Martiney's ex'or, 333

2d. If the sale by M gave the plaintiffs the right to bring trover against M, the action is barred by the statute of limitations.

Idem, 333

TRUSTS AND TRUSTEES.

1. A mortgagee in possession and the mortgagor enjoin a sale of the land advertised to be made under a prior deed of trust, upon the ground that the debt is usurious. The court holds that the debt is partly usurious, but partly bona fide, and that the deed is a valid security for the part that is bona fide; and directs a sale of the property for the payment of what is bona fide 808 due. The proceeds of *the sale not being enough to pay this amount, and what was due on a prior deed, the mortgagee is not to account to the prior creditor for the rents and profits of the property; there having been no application for a receiver, or that he should be held to account as such.

Bank of Washington v. Hupp, 23

2. Though by the terms of the mortgage the mortgagee had a discretion to apply the profits to pay his own debt or those for which he was surety, or to the debt of the party secured by the prior deed of trust, he was not bound to apply any part of the profits to this prior debt: And this especially as the holders of that debt claimed not under the mortgage but against it.

Idem, 23

3. Testatrix devises and bequeaths a small farm, slaves and other property upon the land, to a trustee for the life of her daughter H, remainder to the children of H living at her death. And the trustee is directed so to use and conduct the farm, &c., as to be most advantageous to the interest and support of H and her children during her life. There are five children, and the husband of H is dead. H becomes indebted, judgments are recovered against her, and she is discharged as an insolvent debtor; and then her creditors file a bill to subject her interest in the property to the payment of their debts: *held*:

1st. H and her children are not entitled to have set apart for each of them an equal share of the trust property or of its annual products; but it is to be held by the trustee, and the annual products are to be applied to their support according to the necessities of each.

Nickell & Miller v. Handly & als., 336

2d. The creditors could only be entitled to the ratable portion of H of any surplus of the annual products of the trust subject after providing for the support of H and her family; and as any such surplus is not alleged or shown to exist, the bill was properly dismissed. Idem, 336

3d. If any surplus product exists now or shall hereafter exist, the plaintiffs may file a bill to subject it notwithstanding the dismissal of this bill.

Idem, 336

4. A deed of trust and power of attorney made at the same time by and to the same party, and having reference mainly to the same property, and to some of the same debts, considered as one instrument, and construed so as to stand together.

French v. Townes & als., 513

5. Though upon the face of the instruments the trustee in the deed and the attorney in the power would have been a preferred creditor, yet he in his answer to a bill filed by the cestuis que trust admitting that as to one class of his securities he was upon the same footing with the plaintiffs, the instrument will be so construed.

Idem, 513

6. All the parties claiming under the instrument, there can be no question between them, as to whether it was properly admitted to record. Idem, 513

7. Trustee having sold property to one of the cestuis que trust, where both were acting under a mistake of facts, and under this mistake the cestui que trust giving more for the property than he would have given because it was to be credited on his debt; and it proving to be more than his share of the fund, the sale will be set aside, and both will be charged with the true value of the property; and the whole debt of the cestui que trust will be estimated in the apportionment of the fund.

Idem, 513

8. In the absence of any proof to the contrary, a commissioner who is directed to take an account of the trust fund and the trust debts, in stating the account of the debts, should take the amount of the debts as stated in the deed. Idem, 513

9. Quere: If in an action by a trustee in a deed of trust to recover property against a purchaser from the grantor, proof of payment of the debt is admissible to defeat the action under the general issue.

Nichols v. Campbell, 560

10. If defendant may prove payment of the debt before the institution of the suit, and after the day of payment prescribed in the deed, he cannot, under the general issue, prove payment after the commencement of the action. If such payment could be a good defence, it could only be under a plea to the further maintenance of the action, or puis darrein continuance, according as the payment was made before or after plea pleaded. Idem, 560

11. One of three administrators of the creditor in a trust deed, being present when the sale was made to the defendant and not making any claim to the slaves, or objecting to the sale, even if his conduct was fraudulent, would afford no defence to the action at law; the title to the property not being in the administrators, but in the trustees in the deed; and the act of the administrator could not divest the title of the trustees. Idem, 560

12. An injunction to inhibit the sale of property by trustees, is not a bar to their bringing an action for the recovery 809 of the *trust property. And even if they are guilty of a contempt, that is

to be redressed by the court of chancery acting upon the parties; and will not prevent the maintenance of the action.
Idem, 560

13. In such case the pendency of the injunction will not mitigate the damages which the plaintiffs are entitled to recover. If entitled to recover the property they are entitled to recover the hires and profits from the time it or they were held adversely.
Idem, 560

14. The trustees having brought an action of detinue to recover the trust property, and one of them dying, the right of action survived to the other; and he may carry on the suit. Idem, 560

15. In such case pending the suit the beneficiary dies, and the surviving trustee becomes his administrator. A decree is made in a chancery cause in which the grantor in the deed, the administrator and others are parties, directing the sheriff to execute the trust. This decree does not divest the trustee of the legal title, nor destroy the right of action; but the sheriff has a right to control and manage the cause in its further prosecution; and to use the name of the trustee in any other suit which may be necessary to recover possession of any part of the trust property.
Idem, 560

16. A prior deed of trust unrecorded is null and void as to a subsequent judgment; and the judgment is a lien upon the property embraced in the deed.
McCance *v.* Taylor, 580

17. Before a judgment is recovered one-half of defendant's land had been purchased and payments made upon it; and after the judgment the purchaser gave up the land to his vendor, and took a deed of trust upon it for the amount of his payments. The taking the deed of trust merged any prior equity he might have had, and the judgment is to be preferred to the deed.
Buchanan *v.* Clark & als., 164

USURY.

1. The statute, Sess. Acts of 1844, ch. 70, p. 54, in relation to pleading usury, though in terms applicable only to a plea, yet it is properly applicable to a replication to a plea of setoff.
Hope *v.* Smith, sheriff, 221

2. Sheriff sues upon a bond surrendered by an insolvent debtor, and defendant pleads as offsets two judgments recovered against the insolvent after he took the oath, in actions commenced before. The sheriff cannot set up usury in the bonds upon which the judgments were obtained.
Idem, 221

VENDOR AND PURCHASER.

1. A party having made a purchase of three-sixteenths of a tract of land, upon condition that a certain ore upon it proved to be good silver ore, afterwards sold one-sixteenth of the land absolutely, the purchaser knowing the terms of his purchase. The sale is a valid sale.
Reeves *v.* Dickey, 138

2. The state of the vendor's title being known to the purchaser, and the legal title being in fact outstanding, the vendor is entitled to a reasonable time in which to perfect the title. Idem, 138

3. A purchaser coming into equity to enjoin a judgment for the purchase money of land, though the title is afterwards perfected, is entitled to his costs; and the injunction is to be dissolved without damages.
Idem, 138
Jaynes & al. *v.* Brock, 211

4. B for himself and others sells part of a tract of land to J, who executes to B his bonds for the purchase money. The other parties refuse to confirm the contract, but sell their interest in the whole tract to J. B having recovered judgments upon the bonds, J is entitled to have the judgments enjoined, and to be relieved to the extent of the injury he has sustained by the failure of B to procure the others to execute the contract.
Jaynes & al. *v.* Brock, 211

5. Land sold is to be laid off in one, two or three tracts as the purchaser may choose. The vendor is not in default for failing to convey until the purchaser has made his selection, and has caused the land to be surveyed.
Purcell *v.* McCleary & al., 246

6. There being a latent ambiguity in the contract of sale which can only be removed by a survey, it is error to decree a rescission of the contract until a survey is made, and it is thus ascertained whether the vendor can comply with his contract.
Idem, 246

7. W being the owner of a lot in Danville, made a verbal agreement with S for the sale of it to him. S sold to A who received a conveyance for the lot from W with general warranty, and executed his bonds to S for a balance of the purchase money. At the time of the sale the lot was made more valuable by a change in a
810 *street, which street was afterwards returned to its original location by the town authorities. S having made no representations on the subject to A, having been guilty of no fraud, and having made no warranty of title, is not liable to A for the damage he has sustained; and A cannot enjoin the collection of the purchase money.
Price's ex'ors *v.* Ayres, 575

WILLS.

1. *Held*: That under the circumstances the recognition by witnesses to a will, of their attestation, to the testator, was a substantial subscribing of their names as witnesses in his presence.
Sturdivant & als. *v.* Birchett, 67

2. From what circumstances it may be inferred that the name of a testator was written in his presence, and before the acknowledgment of the paper as his will.
Nock *v.* Nock's ex'ors, 106

3. The witnesses to a will subscribe their names in another room, from the testator, who though lying on a bed, is able to walk about; but the witnesses are directly within the range of his vision, so that he can see

all their persons except the forearm and writing hand; these being hid from him by the body of the witness whilst he is subscribing his name, *held*: The witnesses subscribed their names in the presence of the testator, within the meaning of the statute. Idem, 106

4. The saving in the act of 1819, 1 Rev. Code, ch. 104, § 13, p. 378, in relation to wills, in favor of persons out of the state, is not repealed by the act of March 8th, 1826, Sup. Rev. Code, p. 260, in relation to the limitation of actions.
Schultz *v.* Schultz & als., 358

5. A devisee of a will may propound it for probat; and he then represents the will and all persons interested in it, though such persons may not be sui juris; and they are bound by the judgment of the court in the case. And the same is the case if the executor propounds the will.
Idem, 358

6. When a paper is propounded for probat in the proper court, by a devisee therein, and there is a sentence of the court fairly obtained and pronounced on the merits, excluding the paper from probat, such sentence is conclusively binding upon all claiming under the paper. Idem, 358

7. What is a sentence on the merits of the application. Idem, 358

8. The jurisdiction of a court of probat is not exhausted by the admission to probat of the testamentary papers passed upon at one time. If a codicil to the will admitted to probat, be afterwards found, or a will supplemental to the first, or one which may consist with the first and has no clause of revocation, or a will without a clause of revocation which though it conflicts in part may consist in part; in all these cases the two papers constitute the testator's will; and the second may be admitted to probat upon a second motion after the first has been admitted. Idem, 358

9. So if the second paper has a clause of revocation, or conflicts wholly with the first; or from the scheme of the second will it is apparent that it is intended as a complete disposition of the testator's property, the court of probat has jurisdiction to admit such second paper, though the probat of the first paper is not annulled, but remains in full force. Idem, 358

10. The County court having rejected a paper offered for probat on the merits; and the Circuit court having affirmed the sentence, that sentence is still a judgment on the merits against the paper, though the Circuit court may have proceeded on the ground that the County court had no jurisdiction of the case. Idem, 358

11. If the Circuit court intended to decide on the ground of a want of jurisdiction in the County court, it should have reversed the sentence of that court, and entered a judgment overruling the motion to admit the paper on the ground of the want of jurisdiction. Idem, 358

12. See Nuncupative Wills, passim.
13. See Legacies, and
McMaster *v.* McMaster's ex'ors, 275

WITNESS.

1. Two persons being jointly indicted for the same offence, and being tried separately, one is not an incompetent witness for the other, by reason of the joint indictment.
Lazier's Case, 708

2. A witness for the prisoner on a trial for felony, who had given evidence at a former trial, is absent from the commonwealth at the second trial. It is not competent for the prisoner to prove what the witness swore to on the first trial.
Brogy's Case, 722

WRIT OF ERROR.

1. On a prosecution for selling ardent spirits by retail, to be drunk where sold, without having obtained a license to 811 keep *an ordinary, a writ of error lies for the commonwealth to the judgment of an inferior court.
Scott's Case, 749

2. A writ of error in a criminal cause may be awarded by the Court of appeals during the term, returnable to a day in the same term; and the cause may be heard at the same term. Lazier's Case, 708

WRIT OF RIGHT.

1. In a writ of right there is a special verdict which finds that the parties claim in fee from A, the demandants by deed of trust, and the tenant by subsequent equitable title and possession: This is a substantial finding of the seizin of the demandants, or at least estops the tenant from denying it.
Creigh's heirs *v.* Henson, 231

2. In a writ of right the failure to file a plea is error not cured by a verdict for the tenant.
Rowans *v.* Givens, 250

3. In a writ of right the writ and count are against four persons by name. The plea states the surname of one of the four differently, but it speaks of them as the aforesaid, &c., referring to the persons mentioned in the count. The replication to the plea gives the name as in the count. After verdict for the tenant it is too late to object to this error, if it be such.
Bell's heirs *v.* Snyder & als., 350

4. In a writ of right the demandants claim as heirs of B the patentee of the land; and they claim upon the seizin of their ancestors: They must prove that they are the heirs of B. Idem, 350

5. In the pleadings and verdict the demandants are spoken of as the heirs of B: This does not prove that they are the heirs.
Idem, 350

6. The report of the surveyor who made the survey under an order in the cause, speaks of one of the demandants as heir of B: This is not evidence that he is such heir. Idem, 350